

March 2, 2000

Assembly Bill 250 (Musser/Moen)

Throwing or Expelling Bodily Substances by Prisoners at or Towards Others

Summary of Bill -

This bill creates a new offense making it a Class E felony for a prisoner to intentionally throw or expel certain bodily substances at or toward an officer, employee or visitor of the prison or facility or another prisoner with intent to harm. It also provides for testing to detect the presence of communicable diseases. Cost of the tests would be the responsibility of the county in which the tests were ordered.

As introduced, the bill applies to blood, semen, urine or feces. AA1 to AB 250, as amended by Assembly Amendment 1 to AA1, expands the bill to also include vomit, saliva or other bodily substances.

Staff Comments -

This gives prosecutors a new tool to crack down on prisoners expelling bodily substances to abuse, harass, offend, intimidate or frighten the correctional officer, employee, visitor or prisoner. The significant new penalties should act as a deterrent to prisoners using these tactics.

The bill does not appropriate any funds. Most agencies could not provide a precise, reliable fiscal estimate due to the difficulty in estimating the number of offenses. Counties may view this as an unfunded mandate.

Standing Committee Action

AB 250, as amended by AA1 and AA1 to AA1, was approved 11-0 by the Assembly Committee on Corrections and the Court on April 21, 1999.

Recommended JFC Action -

Adoption of AA 1
Adoption of AA 2
Passage of AB 250 as amended

Prepared by Deb



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March 2, 2000

TO: Members
Joint Committee on Finance

FROM: Bob Lang, Director

SUBJECT: Assembly Bill 250: Throwing or Expelling Bodily Substances by Prisoners at or Towards Others

On March 25, 1999, Assembly Bill 250 was introduced and referred to the Assembly Committee on Corrections and the Courts. On April 21, 1999, that Committee recommended AB 250 for passage, as amended by AA 1 and AA 1 to AA 1, on a 11 to 0 vote. On May 6, 1999, the bill was referred to the Joint Committee on Finance.

BACKGROUND

Under current law, there are two assault or battery offenses that apply specifically to prisoners:

a. *Battery by a Prisoner.* Any prisoner confined to a state prison or other state, county or municipal detention facility who intentionally causes bodily harm to an officer, employe, visitor or another inmate in the prison or institution, without his or her consent, is guilty of a Class D felony. A Class D felony is punishable by a fine of not more than \$10,000 or a total sentence of not more than ten years or both.

b. *Assault by a Prisoner.* Any prisoner confined to a state prison or other state, county or municipal detention facility who intentionally places an officer, employe, visitor or another inmate in the prison or institution in apprehension of an immediate battery likely to cause death or great bodily harm, or confines or restrains an officer, employe, visitor or another inmate in the prison or institution without the person's consent is guilty of a Class C felony. A Class C felony is punishable by a fine of not more than \$10,000 or a total sentence of not more than 15 years or both.

Current law also requires that a person may be compelled to undergo testing to detect the presence of human immunodeficiency virus (HIV) and sexually transmitted diseases if the person is: (a) an adult charged with or convicted of sexual assault of an adult, sexual assault of a child, repeated acts of sexual assault of the same child, sexual exploitation of a child, incest with a child or sexual assault of a student by a school instructional staff person; or (b) a juvenile alleged to be delinquent or in need of protection or services because he or she is alleged to have committed sexual assault of an adult, sexual assault of a child, repeated acts of sexual assault of the same child, sexual exploitation of a child or incest with a child. Current law further requires that before a person may be required to undergo testing to detect the presence of HIV or a sexually transmitted disease, the district attorney must apply for an order to have the person tested. A prosecutor must apply for an order if: (a) the victim or, if the victim is a minor, the victim's parent or guardian, requests the district attorney to apply to a court for an order requiring the testing; and (b) the district attorney has probable cause to believe that the person has significantly exposed the victim to the transmission of HIV or a sexually transmitted disease, except that such probable cause is not required if the person has been convicted, adjudicated delinquent, found to be a juvenile in need of protection or services or found not guilty by reason of mental disease or defect. The court must then hold a hearing to determine whether there is probable cause to believe that the person has significantly exposed the victim to the transmission of HIV or a sexually transmitted disease. The results of any required tests must be disclosed to the following: (a) the person tested; (b) the parent, guardian or legal custodian of the person tested, if the person tested is a minor; (c) the victim or, if the victim is a minor, to the victim's parent or guardian; (d) the health care professional who provides care to the victim, if requested by the victim or the victim's parent or guardian; and (e) the health care provider of the person tested, if the person tested is a minor and disclosure is requested by the minor's parent or guardian.

SUMMARY OF BILL

Under Assembly Bill 250, a new offense would be created which specifies that any prisoner confined to a state prison or other state, county or municipal detention facility who throws or expels blood, semen, urine or feces at or toward an officer, employe or visitor of the prison or facility or another prisoner of the prison or facility under all of the following circumstances is guilty of a Class E felony:

- a. The prisoner throws or expels the blood, semen, urine or feces with the intent that it come into contact with the officer, employe, visitor or other prisoner.
- b. The prisoner throws or expels the blood, semen, urine or feces with the intent either to cause bodily harm to the officer, employe, visitor or other prisoner or to abuse, harass, offend, intimidate or frighten the officer, employe, visitor or other prisoner.
- c. The officer, employe, visitor or other prisoner does not consent to the blood, semen, urine or feces being thrown or expelled at or toward him or her.

A Class E felony is punishable by a fine of not more than \$10,000 or total sentence of not more than five years or both. The bill specifies that the new offense would first be applicable to offenses committed on the effective date of the bill.

In addition to creating the new offense, AB 250 specifies that a court is required to impose a sentence for the new offense that is consecutive to any sentence previously imposed or which may be imposed for any crime or offense for which the person was in custody when he or she committed the assault by a prisoner by throwing or expelling bodily substances.

Under AB 250, a district attorney prosecuting a case of an assault by a prisoner by throwing or expelling bodily substances would be required to apply to the circuit court for his or her county for an order requiring the defendant to submit to a test or a series of tests administered by a health care professional to detect the presence of communicable diseases if all of the following apply:

a. The district attorney has probable cause to believe that the act or alleged act of the defendant that constitutes a violation of the new offense created in AB 250 carried a potential for transmitting a communicable disease to the victim or alleged victim and involved the defendant's blood, semen, urine or feces.

b. The alleged victim or victim who is not a minor or the parent or guardian of the alleged victim or victim who is a minor requests the district attorney to apply for an order.

Assembly Bill 250 would require a court to set a time for a hearing on whether to require a defendant to be tested for the presence of communicable diseases. The bill specifies that the court is required to give the district attorney and the defendant notice of the hearing at least 72 hours prior to the hearing. At the hearing a defendant may have counsel, and counsel may examine and cross-examine witnesses. Under the bill, if a court finds probable cause to believe that the act or alleged act of a defendant that constitutes a violation of the new offense created in the bill carried a potential for transmitting a communicable disease to the victim or alleged victim and involved the defendant's blood, semen, urine or feces, a court would be required to order a defendant to submit to a test or a series of tests administered by a health care professional to detect the presence of any communicable disease that was potentially transmitted by the act or alleged act of the defendant.

The bill would require the court to direct the health care professional who performs the test to disclose the test results to: (a) the defendant; (b) the alleged victim or victim, if the alleged victim or victim is not a minor; (c) the parent or guardian of the alleged victim or victim, if the alleged victim or victim is a minor; and (d) the health care professional who provides care to the alleged victim or victim, upon request by the alleged victim or victim or, if the alleged victim or victim is a minor, by the parent or guardian of the alleged victim or victim. However, a court would also be required to direct the health care professional who performs the test to refrain from making the test results part of the defendant's permanent medical record.

Generally, the bodily substance violation and testing provisions under AB 250 would also apply to juveniles who commit the violation while placed in a secured correctional facility, a secure detention facility, a secured child caring institution, or a secured group home. Under current law, a juvenile in one of these placements who commits battery or assault would be under the original jurisdiction of the adult court. A juvenile alleged to have committed the bodily substance violation under AB 250 would also be under the original jurisdiction of the adult court. Under current law, the adult court may transfer jurisdiction in these cases to the juvenile court.

Under the bill, the corporation counsel would have the same authority as the district attorney to apply to the court for the testing of juveniles alleged to have committed a violation. The hearing on whether to require a juvenile under the jurisdiction of the juvenile court to be tested would not be subject to common law or statutory rules of evidence.

Under current law, the court may order the county to pay for the cost of a test or series of tests relating to the testing of a juvenile for HIV infection and certain diseases. Assembly Bill 250 would provide that the court could also order the county to pay for the cost of a test or series of tests relating to the bodily substance violation, if the test is ordered on the basis of an application under the juvenile code.

The disclosure of the test results under AB 250 would also vary somewhat for juvenile offenders. Under the bill, the court could require the health care professional who performs the test or series of tests on a juvenile to disclose the results of the test to any of the following:

- a. The parent, guardian or legal custodian of the juvenile.
- b. The victim or alleged victim, if the victim or alleged victim is an adult.
- c. The parent, guardian or legal custodian of the victim or alleged victim, if the victim or alleged victim is a child.
- d. The health care professional that provides care for the juvenile, upon request by the parent, guardian or legal custodian of the juvenile.
- e. The health care professional that provides care for the victim or alleged victim, upon request by the victim or alleged victim or, if the victim or alleged victim is a child, upon request by the parent, guardian or legal custodian of the victim or alleged victim.

Finally, under the bill, the victim's bill of rights is amended to specify that victims may request an order for, and be given the results of, testing to determine the presence of a communicable disease. Likewise, the bill specifies that each known victim of a juvenile's act would be required to receive timely notice of the procedure under which the victim, if an adult, or the parent, guardian or legal custodian of the victim, if the victim is a child, may request an order

requiring a juvenile who is alleged to have committed the violation to submit to a test or a series of tests to detect the presence of communicable diseases.

Assembly Amendment 1 to AB 250, as Amended by Assembly Amendment 1 to AA 1 to AB 250

Assembly Amendment 1 to AB 250 and Assembly Amendment 1 to AA 1 to AB 250 modify the bill to specify that the new offense created in the bill applies not only to blood, semen, urine or feces thrown or expelled at or toward an officer, employe or visitor to the prison or facility or another prisoner of the prison or facility, but also to vomit, saliva or other bodily substances which may be thrown or expelled.

FISCAL EFFECT

The bill does not appropriate any funds. Costs of the tests ordered by a court under the bill would be the responsibility of the county in which the test or tests was ordered. If an individual is found guilty of the newly-created offense, a court could order a defendant to pay the cost of testing. For juveniles under the jurisdiction of a juvenile court, counties may recover test costs from the parent or guardian of the juvenile based on the parent or guardian's ability to pay.

Fiscal notes for AB 250 have been submitted by the Department of Justice, District Attorneys, State Public Defender, Department of Health and Family Services, the State Laboratory of Hygiene and the Department of Corrections.

Department of Justice. The DOJ fiscal estimate does not anticipate any local or DOJ fiscal effect as a result of AB 250.

District Attorneys. The District Attorneys fiscal estimate states that there are no data with which to estimate the number of annual instances that would require a district attorney to prosecute prisoners for the newly-created crime of intentionally throwing or expelling certain bodily substances with intent to harm or the number of instances of the need for district attorneys to seek a court order to test prisoners for certain transmittable diseases. According to the DA fiscal estimate, if the bill becomes law and its significant new penalties are understood by prisoners, then the number of violations may be small.

State Public Defender. According to the SPD fiscal estimate, because the bill makes it a felony for a prisoner to throw or expel certain bodily substances toward another prisoner or an officer, employe, or visitor of the prison or facility, it is estimated that enactment of the bill would increase costs by \$51,800 GPR annually to the SPD. The SPD states that, according to Corrections, approximately 72 incidents involving the behavior prohibited in the bill occurred in 1998 (this number does not include the number of incidents that occurred in county jails or, as indicated by Corrections, juvenile institutions). The SPD estimate assumes that: (a) the same number of

incidents would occur annually; (b) all prisoners would be eligible for SPD representation; and (c) the SPD private bar would handle every case at the current hourly private bar rate of \$40. To the extent that any of the variables assumed by the SPD differ, costs could vary. The SPD states it is unable to estimate the number of such incidents that would occur in other state, county or municipal detention facilities. According to the SPD, if such incidents do occur outside the state correctional system, then the SPD could experience further increased costs.

The SPD states that the provision that would allow a court to order a person to undergo tests for the presence of communicable diseases if the person has been charged with, convicted of or found not guilty by reason of mental disease or defect could also increase SPD costs because of the bill requirement that a hearing be held whenever the prosecutor files a petition requesting such testing. According to the SPD, when such a petition is filed, it is likely that the SPD would simultaneously represent the defendant on the underlying criminal charge and at the hearing on the petition for communicable disease testing. The SPD notes, however, that if the SPD is not representing the defendant at the same time that the prosecutor requests testing for communicable diseases, the SPD would not appoint counsel to represent the defendant for that sole purpose. The SPD's fiscal note does not include a specific cost estimate associated with this provision.

Health and Family Services. The Department of Health and Family Services operates the Wisconsin Resource Center (WRC), which provides mental health services to inmates whose treatment needs cannot be met by the Department of Corrections. It is not possible to provide a reliable estimate of the number of additional tests for communicable diseases that would be conducted on inmates at the WRC if the bill were enacted. However, to the extent that this occurs, medical staff at the WRC may spend more time drawing samples from individuals who are subject to court-ordered tests.

State Laboratory of Hygiene. The State Laboratory of Hygiene indicates that it could incur costs under the bill if a court would order tests for a prisoner for the presence of communicable diseases. The State Lab has identified per test costs ranging from \$7.56 for a test for syphilis to \$85.45 for a herpes simplex culture. However, the State Lab indicates that because it is not possible to gauge the number of assaults and tests that could be ordered under the bill, the cost of the bill is unknown.

Department of Corrections. Under the bill, an offender convicted of throwing or expelling bodily fluids by a prisoner may be sentenced to prison for up to two years and to extended supervision for up to three years. The bill specifies that a sentence for the new offense must be made consecutive to any other sentence. In its fiscal note, Corrections indicates that in "the past year (1998), there were over 100 reported assaults involving bodily fluids in the adult and juvenile institutions." The Department further indicates that to the extent that offenders are convicted and sentenced to additional prison time, costs for the Department will increase. Given that the correctional facilities exceed capacity, Corrections indicates that any growth in the inmate population would be accommodated through additional contract bed purchases.

Since it is unknown how many offenders would be charged and convicted of the new offense, how long a sentence an offender would receive and how much contract beds would cost at the time of a placement, the Department could not provide a precise estimate. However, Corrections indicates that if 25% of the assaults that occur result in a conviction, that each offender is sentenced to serve one year and is placed in a contract bed with a cost of \$45 to \$55 per day, costs to the Department could range from \$412,500 to \$500,000 annually. To the extent that any of the variable identified by Corrections differ, costs could vary. Costs to the Department are dependent on the number of incidents that occur, the number of individuals referred for prosecution, the number of individuals prosecuted, the number of individuals found guilty, whether an individual who is found guilty is placed on probation, fined, sentenced to jail or sentenced to prison, the length of any sentence and the cost of any contract bed at the time it is needed.

With respect to juvenile offenders, the Corrections fiscal note indicates that, if the violation is prosecuted under the original jurisdiction of the adult court, the correctional cost would be the same as for adults. If jurisdiction for the case is transferred to the juvenile court, the increased costs of the disposition, if any, would accrue to the county unless the juvenile's costs are state-paid (serious, violent and extended jurisdiction juvenile offenders). State or county costs relating to juveniles adjudicated for bodily substance violations are not estimated by the Department because the number and nature of such dispositions cannot be anticipated.

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