

## **INITIAL STATEMENT OF REASONS:**

Cell phones and other wireless communication devices in correctional facilities nationwide present an increasing and documented risk to staff, other inmates and the public. Corrections agencies including the California Department of Corrections and Rehabilitation (CDCR) routinely monitor inmate telephone calls made through the traditional inmate telephone system. This prevents or reduces communications relative to criminal activity. Inmates who are in possession of cell phones circumvent monitoring safeguards. Such devices in the hands of inmates enable felons to access information while in prison about other inmates and/or parolees, department staff or their families' addresses via public network sites, or coordinate criminal activities with collaborators who are not incarcerated and jeopardize institutional security by providing inmates with the ability to take and disseminate photographs and video.

CDCR proposes to adopt revisions to affected Sections of 3000 Definitions; 3006 Contraband; 3170.1 General Visiting Guidelines; 3172.1 Approval/Disapproval of Prospective Visitors; 3173.2 Searches and Inspections; 3315 Serious Rule Violations; and 3323 Disciplinary Credit Forfeiture Schedule of the California Code of Regulations (CCR), Title 15, Division 3, governing unauthorized possession of a cell phone(s) or wireless communication devices within the secure perimeter of a CDCR prison and/or introducing an unauthorized device into a state prison.

On October 5, 2011, Governor Edmond G. Brown Jr., signed into law emergency legislation (Senate Bill 26), which created a new crime as defined in Penal Code Section 4576. The Governor also issued Executive Order No. B-11-11 through which he ordered that CDCR, among other directives, conduct more thorough searches for contraband communication devices and increase penalties for inmates in possession of contraband devices.

Existing statute provides for the accumulation, denial, or loss of time credits for inmates of the department based on each inmate's behavior while under the jurisdiction of the department. The statute provides that an inmate who is found to be in possession of a wireless communication device is subject to a greater denial of time credits than is currently allowed. This new statute also provides, with exceptions, that a person who possesses with the intent to deliver, or delivers, to an inmate in the custody of the department any cellular telephone or other wireless communication device, or component thereof, including, but not limited to a subscriber identity module or memory storage device, is guilty of a misdemeanor, punishable by imprisonment in the county jail not exceeding 6 months, a fine not to exceed \$5000 for each device, or both.

The new statute contains the following elements:

### **Inmate Possession**

An inmate in possession of a cell phone or wireless communication device shall be subject to credit forfeiture up to 90 days.

### **Smuggling**

Any person, employee or nonemployee, who possesses a cell phone with the intent to deliver, or delivers, to an inmate is guilty of a misdemeanor, punishable by six months in jail and a fine of up to \$5,000 per device.

### **Visitor Protection**

Visitors who bring a cell phone or any of its components into a prison without intent to deliver to an inmate shall have the device(s) or component(s) temporarily confiscated but will not be prosecuted.

In compliance with statute, these regulations provide that if a person who is visiting an inmate under the jurisdiction of the CDCR is found to be in possession of a cellular telephone, wireless communication device or any component thereof, upon being searched or subjected to a metal detector prior to visiting, that device is subject to confiscation and may be returned the same day if the case is not reviewed for criminal prosecution. At the conclusion of an investigation if it is determined that no criminal prosecution will occur, the device or any component thereof shall be returned to the owner at their expense. Additionally, the statute requires that a notice to that effect be posted in each area where visitors are searched prior to visiting with an inmate. The statute also provides that any person who brings, without authorization, a wireless communication device within the secure perimeter of a prison or institution housing offenders under the jurisdiction of the department is deemed to have consented to the department using available technology to prevent the device from sending or receiving calls or other electronic communication, and would require notice of this provision to be posted in all areas where visitors are searched.

### **HISTORY:**

Contraband cell phone usage has become a growing problem in CDCR's facilities across the state. In 2006, prison officials confiscated 261 contraband cell phones. In 2007, the department confiscated approximately 1,400 cell phones, in 2008, approximately 2,800 cell phones, in 2009 approximately 6,995 cell phones. In 2010 approximately 10,761 cell phones were discovered by correctional staff. In 2010, there were 200 incidents directly traced back by CDCR's Investigative Services Unit (ISU) to inmates using cell phones to conduct criminal activities from inside CDCR institutions. In 2010, CDCR's Office of Victim and Survivor Rights and Services recorded 119 contacts made by CDCR inmates with their crime victims using cell phones. Charles Manson, a former cult leader serving a life sentence for murder has been caught twice in possession of a cell phone. And these are only the incidents that CDCR can confirm.

From January through August of this year (2011), 9,935 phones have been confiscated so far. Smugglers are selling these phones to inmates for \$500 to over a \$1,000 a piece depending on the cell phone's capabilities. So far this year, the total estimated value being made by smugglers is \$4,967,500 to \$9,935,000. One CDCR staff member, who was caught, claimed to profit \$100,000 in a single year smuggling cell phones to inmates.

Controlling the influx of contraband cellular phones and wireless communication devices is challenging due to the miniaturization of electronics and the current limited financial resources of state government. Additionally, the vastness of prison properties and high inmate populations contribute to the multiple ingress points for contraband.

Forty-three other states and the Federal Government have laws forbidding the possession of cell phones in prisons. SB 26 is California's third attempt to criminalize cell phones in prison.

Cell phones in the hands of inmates are a clear and present threat to the safety of correctional staff, inmates, and the public. Senator Alex Padilla, the author of SB 26, affirmed this by stating; “Inmates with access to cell phones are ordering murders, organizing escapes, facilitating drug deals, controlling street gangs, accessing social networks sites and terrorizing rape victims. The importance of deterring inmate use of illegal cell phones is clear”.

The use of cell phones in prisons has been linked to:

- Street gangs controlled by inmates. On August 31<sup>st</sup>, 2010, Attorney General Brown announced the arrest of 34 members of the notorious Nuestra Familia gang. The gang is believed to be controlled by senior members incarcerated in California prisons that use cell phones to direct illegal activity throughout the state.
- Inmates coordinating with drug traffickers from inside prison cells to plan murders, kidnappings, and drug deals.
- Planned escapes, such as one in Texas in March: The new Smart Phone technology allows users to announce their location with pinpoint accuracy. This allows others to be able to locate the user and during an escape attempt would prove invaluable to the conspirators awaiting the arrival of the transport.
- Threats and intimidation of witnesses and victims either directly or through social network sites.
- Attacks on correctional employees.
- An inmate incarcerated in the Baltimore City Detention Center Maryland was able to use a contraband cell phone to successfully orchestrate the murder of the primary witness for his upcoming trial.
- In Texas, a cell phone was smuggled into a condemned inmate, who proceeded to contact and threaten a Texas State Senator and his family.
- The coordination of simultaneous rebellions in 73 prisons in Sao Paulo, Brazil in 2006 and, more ominously, coordinated attacks on law enforcement in the streets. These criminal acts essentially shut down Brazil’s financial capitol for days.

The presence of cell phones is changing the very meaning of “imprisonment.” Incarceration, in part, is supposed to isolate criminals, keeping them away from the general public and their collaborators who are not incarcerated so they can not cause additional harm. Inmate possession of wireless devices inside California’s prisons is providing an unrestricted and unmonitored means for them to continue engaging in criminal activities on the general public. It allows inmates to maintain a digital presence and exert their influence in the outside world despite being incarcerated. Inmates are using voice calls, text messages, social websites, email, and handheld Web browsers to taunt their victims, intimidate witnesses, run gangs, traffic in drugs, organize disturbances and plan escapes. A single wireless communication device can be exchanged multiple times between inmates having their own subscriber

identity module (SIM) cards, which increases the potential number of illegal communications propagated from each device. This problem is not isolated exclusively to California. Inmate access to contraband cellular telephones and wireless communication devices has been documented in all State and Federal prison systems and in numerous prisons throughout the world.

With the advent of faster operating systems, internet connectivity, and still and video recording functions, the capabilities of illicit activities propagated with these devices will continue to escalate. These functions can also serve to breach current and existing security measures incorporated both inside and outside the institutions security perimeter. Some examples are: utilizing global position satellite mapping functions to plan escapes, researching and developing methods to disable and defeat institutional security systems (i.e., lethal electric fences, surveillance cameras), and obtaining personal information for the purpose of extorting staff, staging simultaneous disturbances at a single institution or multiple prisons throughout the State. The capabilities of cellular and wireless devices in the hands of an incarcerated inmate with ill intent are placing the citizens of California in jeopardy.

In 2011, CDCR piloted a Managed Access System in 2 of its 33 prisons lasting eleven days. This pilot program was an effort to test new technology to stop this epidemic in California's prisons. During the pilot program, specialized equipment detected a total of 2,593 unique wireless devices and blocked 24,190 unauthorized communication attempts (calls, text, emails, efforts to log on to the internet), or an average of 2,199 per day. In one day, at one of the testing locations, specialized equipment prevented 546 unauthorized devices with 7,299 unauthorized communication attempts.

The Department, in proposing the adoption of these regulations, has not identified nor has it relied upon any technical, theoretical, or empirical study, report, or similar document.

The Department has determined that no reasonable alternatives to the regulations have been identified or brought to the attention of the Department that would lessen any adverse impact on small business.

The Department has made an initial determination that the action will not have a significant adverse economic impact on business. Additionally, there has been no testimony or other evidence provided that would alter the Department's initial determination.

The Department has determined that this action imposes no mandates on local agencies or school districts, or a mandate, which requires reimbursement pursuant to Part 7 (Section 17561) of Division 4.

The Department must determine that no alternative considered would be more effective in carrying out the purpose of this action or would be as effective, and less burdensome to affected private persons than the action proposed.

**Section 3000 is amended** to alphabetically merge with existing definitions and new definition for possession, both "actual" and "constructive" and amend the current definition of dangerous contraband to include wireless communication devices:

"Dangerous Contraband" is being amended to add the new language "or could be used to facilitate a crime or could be used to aid an escape" to the existing definition. This is being added to identify that any object that can be used to aid an escape is considered to be dangerous contraband. Cell phones

and wireless communication devices can and have been used to plan escapes in California and other states. Additional language “or cellular telephones or wireless communication devices or any components thereof, including, but not limited to, a subscriber identity module (SIM card), memory storage device, cellular phone charger” is being added. This is necessary due to the number of cell phones and or wireless communication devices currently in the hands of inmates under CDCR’s jurisdiction. As described earlier, electronic communication devices in the hands of inmates have been linked to criminal activity. Such devices not only endanger institutional security, its staff, inmates and visitors, but allow victims to be re-victimized by incarcerated inmates possessing cell phones. By adding cell phones and wireless communication devices to the definition of dangerous contraband, any credit loss for possession of these devices is non-restorable under existing regulations in Section 3327(a)(4). Senator Alex Padilla, the author of SB 26, affirmed this by stating, “My intent is that the CDCR create regulations that deter possession of illegal cell phones by inmates through a permanent loss of earned, good time credit.”

“Possession” is being added as a definition and to distinguish between “possession” and “constructive possession” for staff, inmates and the public. Possession is defined as “actual physical custody or control of an object.” For example, if an inmate is found to be in possession of an unauthorized object on his or her person, they are in “actual physical custody” of the object. “Constructive Possession” exists where a person has knowledge of an object plus the ability to control the object, even if the person has no physical contact with it. It is well established in California case law that to prove possession as an element of a crime, or in this case at a disciplinary or administrative hearing, it is sufficient to demonstrate either actual physical possession or constructive possession of the object or contraband at issue. Additionally, this clarification will prevent inmates who retain actual physical custody of the contraband from threatening or bribing others to accept constructive possession of the contraband, in an attempt to escape accountability.

At the end of Section 3000 in the authority and reference citations, PC Section 4576 is being added as a reference.

**Subsection 3006(a) is amended** to add cell phones or any wireless communication devices or components thereof as dangerous property under “Contraband”. Cell phones in the hands of inmates present an immediate threat to the safety and security of the correctional setting, public, staff and inmates because of the unmonitored nature of those communications. The use of cell phones in prison or jail has been directly related to harassment of victims, contract murders, street gang activity by inmates, kidnappings, threatening public officials, drug trafficking, contract murders, planned escapes, coordinated attacks on law enforcement personnel and coordinated attacks on other inmates with sex related offenses, etc. The components and accessories of cell phones and wireless communication devices also posed a safety risk. Subscriber identity module (SIM) cards store information, for example, so that inmates do not have to possess their own individual cell phone. One phone can be shared by several inmates, and by using individual SIM cards, the phone can be “customized” for each inmate’s use. Senator Padilla, the bill’s author, understood this safety threat and wrote, “It was also my intent that cell phones, wireless communication devices and ‘components thereof’, should all be subject to the inmate credit forfeiture of up to 90 days in Penal Code 4576(c).”

**Subsection 3006(c)(19) is being deleted** from this section which list examples of “non-dangerous” contraband in California prisons. Cell phones, wireless communication devices and components thereof were added to subsection 3006(a) as dangerous property. This deletion prevents confusion for the inmates, staff and the public, as to the new status of wireless devices as dangerous contraband.

At the end of Section 3006 in the authority and reference citations, PC Section 4576 is being added as a reference.

**Subsection 3170.1(h) is being adopted** to inform visitors, inmates, staff or any person who brings an unauthorized cell phone or wireless communication device within the secure perimeter is deemed to have given consent to the Department of Corrections and Rehabilitation to prevent the sending and receiving of calls or other forms of electronic communication from unauthorized cell phones or wireless communication devices using available technology. Senate Bill 26, Penal Code 4576(b)(3) requires such notice and this codifies it in the regulations and documents for department staff the statutory mandate for such notices. This is necessary to deter the introduction of unauthorized cell phones or wireless communication devices into the secure perimeter by informing visitors, inmates and staff that unauthorized communication devices will not function within the secure perimeter.

At the end of Section 3170.1 in the authority and reference citations, PC Section 4576 is being added as a reference.

**Subsection 3172.1(b)(3)(B) is being amended** to add the language, “Cell phones or other wireless communication devices or the components thereof” to the existing text. This is necessary to ensure visitors, inmates and staff are aware that any infractions involving the introduction or attempt to introduce a cell phone or wireless communication device or components thereof into the secure perimeter may result in the disapproval of future applications to visit in CDCR institutions.

At the end of Section 3172.1 in the authority and reference citations, PC Section 4576 is being added as a reference.

**Subsection 3173.2(h) is being adopted** to inform visitors, inmates, staff or any person who brings an unauthorized cell phone or wireless communication device within the secure perimeter is deemed to have given consent to the Department of Corrections and Rehabilitation to prevent the sending and receiving of calls or other forms of electronic communication from cell phones or wireless communication devices using available technology. It is also important to inform all parties involved that cell phones and wireless communication devices discovered through a search are subject to confiscation. Such items shall be returned unless they are held as evidence, in a case where department staff has determined there was intent to deliver the item to an inmate. This is necessary to deter the introduction of unauthorized cell phones or wireless communication devices into the secure perimeter by informing visitors, inmates and staff that unauthorized communication devices will not function within the secure perimeter.

At the end of Section 3173.2 in the authority and reference citations, PC Section 4576 is being added as a reference.

**Subsection 3315(a)(3)(X) is adopted to** establish that if an inmate is found guilty of being in actual possession or constructive possession of a cellular telephone or wireless communication device or any

component thereof, a credit forfeiture of 90 days shall be taken as permitted by new Penal Code 4576. This amount of credit loss is necessary to be consistent with other Division-D offenses as outlined in the Title 15, Section 3323(f). In addition, redefining unauthorized cell phones, wireless communication devices and their components as “dangerous property” under contraband makes the credit loss non-restorable under existing regulations in Section 3327(a)(4). Before Penal Code 4576 (SB 26) current law allowed for inmates who were discovered to be in possession of a cell phone or other electronic communications device to receive a low level Division F violation with a credit forfeiture of up to only 30 days with the possibility of credit restoration for good behavior as outlined in CCR 3327. The practice failed to deter the introduction of and the distribution and possession of a cell phone or wireless communication devices among inmates. This increase in administrative penalties is necessary to deter inmates from being in possession of illegal cell phone or wireless communication devices, in California prisons.

At the end of Section 3315 in the authority and reference citations, PC Section 4576 is being added as a reference.

**Subsection 3323(a) is amended** to make a grammatical change in the sentence from “is” to “in.” This is a non substantive correction without regulatory effect pursuant to California Code of Regulations, Title 1, Section 100.

**3323(f)(15) is adopted to** establish a specific charge if an inmate is found in “actual” or “constructive” possession of a cell phone or wireless communication device or any component thereof. The inclusion of this charge will be a “Division D” offense that shall result in a credit forfeiture of 90 days and a loss of privileges. However, prior to the finding of the inmate’s guilt or innocence, for the violation, the inmate will be provided with all the procedural safeguards (due process) as all other administrative violations as outlined in California Code of Regulations (CCR), Title 15, Division 3. This is necessary to be in compliance with new Penal Code Section 4576. This will also give staff clear direction in holding inmates accountable for this type of behavior.

**3323(h)(7) is amended to** add an exclusion clause to this subsection as possession of a cellular phone or wireless communication device is no longer a Division “F” offense. Per Penal Code 4576, such devices are subject to stronger sanctions, under Division “D.” and considered dangerous contraband.

**3323(j) is amended to** accurately reflect the reference change from the Board of Prison Terms to the current title of Board of Parole Hearings. The 2005 Department reorganization (SB 737), made this change to the Board’s name. This is a non-substantive change made for accuracy.

**3323(k)(4) is amended to** accurately reflect the reference change from the Board of Prison Terms to the current title of Board of Parole Hearings. The 2005 Department reorganization (SB 737), made this change to the Board’s name. This is a non-substantive change made for accuracy.

At the end of Section 3323 in the authority and reference citations, PC Section 4576 is being added as a reference, with regards to stronger disciplinary sanctions for inmates.