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# SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

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**Bill No:** SB 813                      **Hearing Date:** April 12, 2016  
**Author:** Leyva  
**Version:** March 31, 2016  
**Urgency:** No                                      **Fiscal:** No  
**Consultant:** AA

**Subject:** *Sex Offenses: Statute of Limitations*

## HISTORY

**Source:** California Women's Law Center

**Prior Legislation:** SB 46 (Alquist) – 2009, failed passage, Senate Public Safety  
SB 256 (Alquist) – 2008, failed passage, Senate Public Safety  
SB 1128 (Alquist) – Ch. 337, Stats. 2006  
SB 111 (Alquist) – Ch. 479, Stats. 2005  
SB 261 (Speier) – 2005, held in Senate Appropriations Committee.  
AB 1667 (Kehoe) – Ch. 368, Stats. 2004  
SBx4 2 (Speier) – Ch. 2, Stats. 2003-04 Fourth Extraordinary  
Session  
AB 78 (Alquist) – Ch. 235, Stats. 2001  
AB 1742 (Correa) – Ch. 235, Stats. 2000  
ABx1 25 (Andal) – Ch. 46 Ex., Stats. 1994  
AB 290 (Boland) – Ch. 390, Stats. 1993  
AB 782 (N. Waters) – Ch. 1312, Stats. 89

**Support:** Alameda County District Attorney; San Bernardino County District  
Attorney; California Police Chiefs Association; Crime Victims United of  
California; National Council of Jewish Women/Los Angeles; Peace  
Officers Research Association of California; several individuals

**Opposition:** California Attorneys for Criminal Justice; California Public Defenders  
Association; American Civil Liberties Union; Legal Services for prisoners  
with Children; Taxpayers for Improving Public Safety; one individual

## PURPOSE

*The purpose of this bill is to eliminate any statute of limitations for specified sex crimes.*

### **Criminal Statute of Limitations Generally**

*Under current law, statutes of limitations for the commencement of criminal actions generally are based on the term of the sentence, the type of offense, or the nature of the victim, as specified below.*

- Prosecution for a crime punishable by death, life imprisonment, life imprisonment without the possibility of parole, or the embezzlement of public funds may be commenced at any time.<sup>1</sup> (Penal Code § 799.)
- Prosecution for crimes punishable by imprisonment for eight years or more, as specified, and not otherwise covered must be commenced within six years after commission of the offense. (Penal Code § 800.)
- Prosecution for crimes punishable by imprisonment in the state prison or as a jail felony, as specified, must be commenced within three years after commission of the offense. (Penal Code § 801.)
- Prosecution for crimes involving fraud, breach of a fiduciary duty, embezzlement of funds from an elder or dependent adult, or misconduct by a public official must be commenced within four years after discovery of the crime or within four years after completion, whichever is later. (Penal Code § 801.5.)
- Prosecution for crimes involving elder or dependent abuse must be commenced within five years after commission of the offense. (Penal Code § 801.6.)
- Prosecution for misdemeanor crimes involving molesting a child under the age of 14 years or sexual misconduct with a patient must be commenced within three years after commission of the offense. For most other misdemeanors, prosecution generally must be commenced within one year after commission of the offense. (Penal Code § 802.)

### **Criminal Statute of Limitations for Felony Sex Crimes**

*Current law* provides that the prosecution for a felony sex offense subject to mandatory sex offender registration, as specified, must be commenced within 10 years after commission of the offense. (Penal Code § 801.1.)

*Current law* provides that the prosecution for inducing a minor to pose in connection with the production of a representation of sexual activity involving a minor, must be commenced within 10 years of the date of production of the pornographic material. (Penal Code § 801.2.)

*Current law* further provides that in addition to the 10-year statute of limitations applicable above, a criminal complaint to be filed in specified child sex crime cases as follows:

1. If the crime is alleged to have been committed against a person when that person was under the age of 18, prosecution may commence any time up to the victim's 40th birthday (Penal Code § 801.1); or

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<sup>1</sup> Punishment for murder, attempted premeditated and deliberate murder, kidnapping for purposes of robbery, extortion, or certain sex offenses are punishable by life in prison. (Penal Code §§ 190 and 209.)

2. Within one year of the date a person of any age reports to a California law enforcement agency that he or she, while under the age of 18 years, was a victim of a sex crime, as specified, if all of the following occur:
  - a. The limitation period specified in Section 800, 801, or 801.1, whichever is later, has expired;
  - b. The crime involved substantial sexual conduct, as specified, excluding masturbation that is not mutual; and,
  - c. There is independent evidence that corroborates the victim's allegation. If the victim was 21 years of age or older at the time of the report, the independent evidence shall clearly and convincingly corroborate the victim's allegation. (Penal Code § 803 (f).).

*Current law* provides that notwithstanding any other time limitation, a criminal complaint may be filed within one year of the date on which the identity of the suspect is conclusively established by DNA testing, if both of the following conditions are met:

1. The crime is one that is subject to mandatory sex offender registration, as specified; and
2. The offense was committed prior to January 1, 2001, and biological evidence collected in connection with the offense is analyzed for DNA type no later than January 1, 2004, or the offense was committed on or after January 1, 2001, and biological evidence collected in connection with the offense is analyzed for DNA type no later than two years from the date of the offense. (Penal Code § 803 (g).)

### **This Bill**

*This bill* would amend Penal Code section 799 to provide that the prosecution for the following felony sex crimes may be commenced at any time:

- rape;<sup>2</sup>
- spousal rape;<sup>3</sup>
- in concert rape, spousal rape or forcible sexual penetration;<sup>4</sup>
- forcible sodomy;<sup>5</sup>
- molestation of a child under the age of 14 involving “substantial sexual conduct;”<sup>6</sup>
- molestation of a child under the age of 14 by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person;<sup>7</sup>

<sup>2</sup> Specifically, paragraph (1), (2), (3), (4), (6) or (7) of subdivision (a) of Penal Code section 261.

<sup>3</sup> Specifically, paragraph (1), (2), (3), (4), or (5) of subdivision (a) of Penal Code section 262.

<sup>4</sup> Penal Code section 264.1.

<sup>5</sup> Specifically, paragraph (2) or (3) of subdivision (c) of, or subdivision (d), (f), (g), (i), or (k) of, Penal Code section 286.

<sup>6</sup> Specifically, subdivision (a) of Penal Code section 288 involving substantial sexual conduct as defined by in subdivision (b) of Penal Code section 1203.066.

<sup>7</sup> Specifically, subdivision (b) of Penal Code section 288.

- continuous sexual abuse of a child under the age of 14;<sup>8</sup>
- forcible oral copulation;<sup>9</sup> and
- forcible sexual penetration.<sup>10</sup>

*This bill* provides that its provisions would apply “to crimes that were committed on or after January 1, 2017, and to crimes for which the statute of limitations that was in effect prior to January 1, 2017, has not run as of January 1, 2017.”

*This bill* makes additional technical conforming amendments to related statutes.

#### RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past several years this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state’s ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its “ROCA” policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In December of 2015 the administration reported that as “of December 9, 2015, 112,510 inmates were housed in the State’s 34 adult institutions, which amounts to 136.0% of design bed capacity, and 5,264 inmates were housed in out-of-state facilities. The current population is 1,212 inmates below the final court-ordered population benchmark of 137.5% of design bed capacity, and has been under that benchmark since February 2015.” (Defendants’ December 2015 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).) One year ago, 115,826 inmates were housed in the State’s 34 adult institutions, which amounted to 140.0% of design bed capacity, and 8,864 inmates were housed in out-of-state facilities. (Defendants’ December 2014 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).)

While significant gains have been made in reducing the prison population, the state must stabilize these advances and demonstrate to the federal court that California has in place the “durable solution” to prison overcrowding “consistently demanded” by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants’ Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge

<sup>8</sup> Penal Code section 288.5.

<sup>9</sup> Specifically, paragraph (2) or (3) of subdivision (c) of, or subdivision (d), (f), (g), (i), or (k) of Penal Code section 288a

<sup>10</sup> Specifically, subdivision (a), (b), (d), (e), or (g) of Penal Code section 289.

Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

## COMMENTS

### 1. Stated Need for This Bill

The author states:

Existing California law generally limits the prosecution of a felony sexual offense to only 10 years after the offense is committed, unless DNA evidence is found which then offers a victim additional time. California allows the prosecution of certain sex offenses against minors any time before the victim's 40th birthday.

In 1984, when the California Law Revision Commission last discussed revisions to the statute of limitations, it acknowledged that the time limits proposed for crimes, including felony sex offenses, were "somewhat arbitrary." Sexual assault is a notoriously under-reported and under-prosecuted form of criminal victimization. This bill seeks to rid California law of the arbitrary time limits imposed on the prosecution of certain serious sexual offenses so that law enforcement and prosecutors will have a better chance of being able to bring sexual offenders to justice, giving more victims the opportunity to have their day in court.

According to the U.S. Department of Justice, only two in 100 rapists in the U.S. will be convicted of a felony and spend any time in prison. The other 98 percent will never be punished for their crimes.

### 2. What This Bill Would Do; Current Limitations "Windows"

As explained above, this bill would change the statute of limitations for the following specified felony sex crimes, allowing them to be commenced at any time:

- rape;
- spousal rape;
- in concert rape, spousal rape or forcible sexual penetration;

- forcible sodomy;
- molestation of a child under the age of 14 involving “substantial sexual conduct;”
- molestation of a child under the age of 14 by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person;
- continuous sexual abuse of a child under the age of 14;
- forcible oral copulation; and
- forcible sexual penetration.<sup>11</sup>

This bill would *not* revive cases where the applicable statute of limitations has expired before the provisions of this bill become effective, which is compliant with applicable constitutional law.<sup>12</sup>

As described above in more detail, California’s statute of limitations law currently provides four statutory “windows” for commencing prosecutions of sex crimes:

- The first window is the general limitations period for prosecuting sex crimes, which is 10 years from when the crime was committed.<sup>13</sup> (Penal Code § 801.1 (b).)
- The second window applies if the crime is alleged to have been committed against a person when that person was under the age of 18, in which case prosecution may commence any time up to the victim's 40<sup>th</sup> birthday.<sup>14</sup> (Penal Code § 801.1.).)
- A third window allows that when the 10-year limitations period has lapsed, a criminal complaint may be filed within one year of the date a person of any age reports to law enforcement that they were a victim of a child sex crime, if a) the crime involved "substantial sexual conduct", as specified;<sup>15</sup> and b) there is independent evidence that corroborates the victim's

<sup>11</sup> See footnotes 2-10, *supra*, for the specific Penal Code citations for these offenses.

<sup>12</sup> In the 1990s, California enacted legislation to *revive* otherwise expired child sexual abuse cases to apply the newly extended limitation periods to these old cases. These revival provisions, however, were struck down in 2003 by the United States Supreme Court in *Stogner v. California* (2003) 123 S.Ct. 2446. In *Stogner*, the Court ruled that a law enacted after expiration of a previously applicable limitations period violates the Ex Post Facto Clause when it is applied to revive a previously time-barred prosecution. The Court concluded that the bill in question threatened the very kind of harm that the Ex Post Facto Clause seeks to avoid. The Court noted that the statute deprived the defendant of the “fair warning that might have led him to preserve exculpatory evidence,” and warned that “a Constitution that permits such an extension, by allowing legislatures to pick and choose when to act retroactively, risks both ‘arbitrary and potentially vindictive legislation. . . .’” *Stogner*, at 2449-2450 (citations omitted).

<sup>13</sup> This limitations period was established by AB 1667 (Kehoe) (Ch. 368, Stats. 2004.)

<sup>14</sup> This limitations period was established originally in 2005 by SB 111 (Alquist) (Ch. 479, Stats. 2005) and changed in 2014 by SB 926 (Beall)(Ch. 921, Stats. 2014.)

<sup>15</sup> “Substantial sexual conduct” for purposes of this section cross-references Penal Code Section 1203.066 (b), excluding “masturbation that is not mutual.” “Substantial sexual conduct” is penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation, or masturbation of either the victim or the offender. (§ 1203.066 (b).) “Masturbation of either the victim or the offender” means “any touching or contact, however slight, of the genitals of either the victim or the offender.” (*People v. Chambliss* (1999) 74 Cal.App.4th 773 [defendant touched girl's vagina and made her touch his penis].) Mutual masturbation shown where defendant rubbed Vaseline on a boy's penis. (*People v. Lamb* (1999) 76 Cal.App.4th 664, 678-679.)

allegation, which must be proved by clear and convincing evidence if the victim is 21 years of age or older at the time of the report.<sup>16</sup> (Penal Code § 803 (f).)

- A fourth window is available at all times: a criminal complaint may be filed within one year of the date on which the identity of a suspect is conclusively established by DNA testing in sex crime cases if the DNA is analyzed in a timely manner, as specified.<sup>17</sup> (Penal Code § 803 (g).)

### **3. Operation of and Public Policy Behind the Statute of Limitations; Policy Questions Raised by This Bill**

The statute of limitations requires commencement of a prosecution within a certain period of time after the commission of a crime. A prosecution is initiated by filing an indictment or information, filing a complaint, certifying a case to superior court, or issuing an arrest or bench warrant. (Penal Code § 804.) The failure of a prosecution to be commenced within the applicable period of limitation is a complete defense to the charge. The statute of limitations is jurisdictional and may be raised as a defense at any time, before or after judgment. (*People v. Morris* (1988) 46 Cal.3d 1, 13.) The defense may only be waived under limited circumstances. (See *Cowan v. Superior Court* (1996) 14 Cal.4th 367.)

In 1984, the California Law Revision Commission published a series of recommendations to revise the statute of limitations. The impetus for reform derived from numerous changes made to the statute by the Legislature – there were 11 legislative enactments amending the felony statute of limitations in 14 years. The Commission commented, "[t]his simple scheme has been made complex by numerous modifications . . . the result of this development is that the California law is complex and filled with inconsistencies." The Commission described the rationale of the statute:

The statute of limitations is simply a societal declaration that it will no longer pursue a criminal after a certain period of time. The period selected may be somewhat arbitrary but still achieves society's purpose of imposing an outside limit that recognizes the staleness problem, that requires that crime must come to light and be investigated within a reasonable time, and that represents the point after which society declares it no longer has an interest in prosecution and seeks repose.

The three principal policy reasons for felony limitations statutes include:

- *Staleness*: The statute of limitations protects persons accused of crime: (i) from having to face charges based on evidence that may be unreliable, and (ii) from losing access to the evidentiary means to defend against the accusation. With the passage of time, memory fades, witnesses die or otherwise

<sup>16</sup> This limitations period was established by AB 78 (Alquist)(Ch. 235, Stats. 2001) and amended by AB 1667 (Kehoe)(Ch. 368, Stats. 2004).

<sup>17</sup> This limitations period was enacted by AB 1742 (Correa) (Ch. 235, Stats. 2000).

become unavailable, and physical evidence becomes unobtainable or contaminated.

- *Prompt Investigation*: The statute of limitations imposes a priority among crimes for investigation and prosecution. The deadline serves to motivate the police and to ensure against bureaucratic delays in investigating crimes.
- *Repose*: The statute of limitations reflect society's lack of desire to prosecute for crimes committed in the distant past. The interest in repose represents a societal evaluation of the time after which it is neither profitable nor desirable to commence a prosecution.

These principals are reflected in court decisions. The United States Supreme Court has stated that statutes of limitations are the primary guarantee against bringing overly stale criminal charges. (*United States v. Ewell* (1966) 383 U.S. 116, 122.) There is a measure of predictability provided by specifying a limit beyond which there is an irrebutable presumption that a defendant's right to a fair trial would be prejudiced. Such laws reflect legislative assessments of relative interests of the state and the defendant in administering and receiving justice. More recently, in *Stogner v. California* (2003) 123 S.Ct. 2446, the Court underscored the basis for statutes of limitations:

Significantly, a statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict. And that judgment typically rests, in large part, upon evidentiary concerns – for example, concern that the passage of time has eroded memories or made witnesses or other evidence unavailable.<sup>18</sup>

Members and the author may wish to discuss this bill in the context of these broader policy considerations, including:

WOULD THIS BILL AFFECT THE AVAILABILITY AND RELIABILITY OF EVIDENCE IN SEX CRIME CASES AND, IF SO, HOW?

WOULD THIS BILL AFFECT THE REPORTING AND INVESTIGATION OF SEX CRIME CASES AND, IF SO, HOW?

WOULD THIS BILL AFFECT THE SUCCESSFUL PROSECUTION OF SEX CRIME CASES AND, IF SO, HOW?

#### 4. Considerations in Support of This Bill

In an opinion piece published earlier this year, supporters of this bill submitted in part:

Victims of sexual assault contend with a wide range of often overwhelming after-effects. They wrestle with emotions of shock, fear,

<sup>18</sup> *Stogner, supra*, 123 S.Ct. at 2452 (citations omitted).



anxiety, grief, rage, shame, helplessness and self-blame. Psychological disorders such as posttraumatic stress disorder or dissociation may also trouble these victims, as may physical problems including eating and sleep disorders. Victims may be reticent to burden others with their problems and they may suffer with a loss of a sense of order or fairness in the world. Substance abuse, self-harm or attempted suicide are not uncommon expressions of a victim's inchoate rage and despair.

Given the variety of mental, physical and emotional issues that a rape or sexual assault victim grapples with, it is no surprise that not all are ready to report their attack at the same time. . . .

Victims must deal with the police and the prosecutor, both of whom have an extraordinary amount of power over whether and how their cases will proceed. Once a victim reports his or her attack, the case is taken out of their hands. The police decide whether they believe a crime has occurred and how to investigate it, whether to arrest an identified suspect and whether to refer the case to the prosecutor. . . .

If the case is referred to the prosecutor, the victim is subject to the prosecutor's decision to file charges. While prosecutors decide based on legal factors, the victim's character invariably enters the equation. He or she may be inundated with questions concerning his or her age, occupation, and education or about "risk-taking" behavior such as drinking or drug use. . . . If the prosecutor elects to bring the case to trial, victims fear public exposure and harassment from the defense and the public.

. . . To report a rape or assault takes courage . . . . Given all this, it is of no surprise that some victims may take a good length of time to come forward, if they ever do.

This "good length of time" may be a week, a year, 10 years, 20 years. There is no exact science for predicting when victims may be ready to report. In fact, in 1984 when the California Law Revision Commission last discussed revisions to the statute of limitations, it acknowledged that the time limits proposed for crimes, including felony sex offenses, were "somewhat arbitrary." The 10-year mark that has been held as an effective benchmark is instead an assumption of what an appropriate time limit would be. Time and awareness have proven this assumption incorrect. . . .

SB 813 is not a radical proposal. The district attorney would still maintain prosecutorial discretion and could decline to prosecute if there is insufficient evidence to convict. Further, if the District Attorney decided to prosecute, the case would still have to be proven beyond a reasonable doubt.

What SB 813 would do is leave the door open for victims to report their attacks when they feel ready. Rape and sexual assault are not like other crimes and should not be treated as such. . . .<sup>19</sup>

## 5. Considerations in Opposition to this Bill

The American Civil Liberties Union, which opposes this bill, states in part:

Criminal statutes of limitations in the United States date back to colonial times, with the first such statute appearing as early as 1652. The statutes' fundamental purpose is to protect people accused of crimes from having to face charges based on evidence that may be unreliable, and from losing access to the evidentiary means to defend against the accusation. The United States Supreme Court has stated that statutes of limitations are considered "the primary guarantee against bringing overly stale criminal charges" and that they "protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time..." . . .

With the passage of time, memories fade, witnesses die, records and biological evidence are lost or destroyed. All of this makes it more likely that an innocent person will be wrongly convicted.

In a recent piece in the Daily Journal, psychology Professor Elizabeth Loftus raised concerns about SB 813, specifically with respect to the ways in which criminal statutes of limitations protect against deficits in witness' memories. As Professor Loftus explained, "a growing body of research, including [her] own, has found that, contrary to what some may think, the human memory is not like a recording device. You can't perfectly preserve events, to be played or rewound and replayed at will. Instead, our memories are more like a Wikipedia page: they can be edited by us and other people, and more so with each year that goes by." As she explained, "[s]cientists have long known about the 'forgetting curve,' which revealed that, as time passes, people are unable to retrieve information that they would have earlier be[en] able to remember accurately. The loss of memory can be quite significant, especially after many years go by."

The memory issues raised by Professor Loftus apply equally to all parties involved in a criminal prosecution: defendants, detectives, witnesses, and victims alike. SB 813 is particularly concerning because the bill specifically addresses cases in which there is likely no DNA evidence, and where the primary evidence being used is witness testimony based on memories that are at least 10 years old, if not decades older.

. . . SB 813 . . . would address cases that do not fit within any of (the existing) . . . carefully tailored exceptions: cases with little to no physical

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<sup>19</sup> Butler and Sharp, *Bill Could Help Rape Victims, and Others* (Published in the Daily Journal Feb. 8, 2016).

evidence, which rely almost if not entirely on memory. Cases for which statutes of limitations are specifically designed.

. . . (S)tatutes of limitations also serve the purpose of encouraging swift investigations and prosecutions. Survivors of sexual violence already face significant barriers when attempting to access the criminal justice system following the commission of a crime. Studies have found that, depending on the data source, police officers judge that 1% to 70% of rape reports are false. These types of attitudes result in delayed investigations and deprioritization of forensic resources. A recent state audit found that nearly half of the rape kits at the selected law enforcement agencies were never analyzed. Countless other kits sit on evidence shelves across California. . . .

Problems with law enforcement perceptions bleed into prosecutorial decisions as well. While police deem just a fraction of sexual assault cases worthy of investigation, studies document that prosecutors have approached suspiciously even those cases that police deemed to have the strongest evidence of sexual assault.

SB 813 does not address these core causes of under-prosecution of sex crimes. Moreover, if SB 813 becomes law, these problems may actually grow worse, with survivors coming forward after many years of silence only to be faced with law enforcement officers who may not believe them and prosecutors who say they cannot proceed because there is not enough evidence to ethically do so. Rather than expanding the statute of limitations, the Legislature should be directing its attention towards investigating and resolving the cases already languishing in departments across the state and investing in comprehensive services and tools for survivors and effective prevention strategies.

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