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**Assembly
California Legislature**



**ASSEMBLY COMMITTEE ON
PUBLIC SAFETY**
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ASSEMBLYMEMBER, FIFTY-NINTH DISTRICT

CHIEF COUNSEL
GREGORY PAGAN

COUNSEL
DAVID BILLINGSLEY
GABRIEL CASWELL
STELLA Y. CHOE
SANDY URIBE

AGENDA

9:00 a.m. – June 21, 2016
State Capitol, Room 126

REGULAR ORDER OF BUSINESS

<u>Item</u>	<u>Bill No. & Author</u>	<u>Counsel/ Consultant</u>	<u>Summary</u>
1.	SB 6 (Galgiani)	Ms. Choe	Parole: medical parole: compassionate release.
2.	SB 266 (Block)	Ms. Uribe	Probation and mandatory supervision: flash incarceration.
3.	SB 448 (Hueso)	Ms. Choe	Sex offenders: Internet identifiers.
4.	SB 759 (Anderson)	Ms. Choe	Prisoners: Secured Housing Units.
5.	SB 813 (Leyva)	Ms. Uribe	Sex offenses: statute of limitations.
6.	SB 823 (Block)	Mr. Billingsley	Criminal procedure: human trafficking.
7.	SB 966 (Mitchell)	Mr. Pagan	Controlled substances: sentence enhancements: prior convictions
8.	SB 1004 (Hill)	Ms. Choe	Transitional youth diversion program.



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| 9. | SB 1054 (Pavley) | Ms. Uribe | Restitution orders:
collection |
| 10. | SB 1075 (Runner) | Mr. Pagan | Department of Justice: crime
statistics reporting. |
| 11. | SB 1084 (Hancock) | Ms. Choe | Sentencing. |
| 12. | SB 1137 (Hertzberg) | Mr. Billingsley | Computer crimes:
ransomware. |
| 13. | SB 1157 (Mitchell) | Ms. Choe | Incarcerated persons:
visitation. |
| 14. | SB 1295 (Nielsen) | Mr. Billingsley | Mentally ill prisoners. |
| 15. | SB 1323 (Bates) | Mr. Caswell | Controlled substances:
fentanyl. |
| 16. | SB 1404 (Leno) | Mr. Caswell | Victims of violent crime:
trauma recovery centers. |
| 17. | SJR 20 (Hall) | Mr. Caswell | Gun violence: research. |

FOR CONCURRENCE VOTE PER A.R. 77.2

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| 18. | AB 1511 (Santiago) | Mr. Billingsley | Firearms: lending. |
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Individuals who, because of a disability, need special assistance to attend or participate in an Assembly committee hearing or in connection with other Assembly services, may request assistance at the Assembly Rules Committee, Room 3016, or by calling 319-2800. Requests should be made 48 hours in advance whenever possible.

Date of Hearing: June 14, 2016
Counsel: Stella Choe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

SB 6 (Galgiani) – As Introduced December 1, 2014
As Proposed to be Amended in Committee

SUMMARY: Exempts from medical parole and compassionate release eligibility a prisoner who was convicted of the murder of a peace officer, as provided, and applies the provisions of this bill retroactively.

EXISTING LAW:

- 1) Provides if the Secretary of the Department of Corrections and Rehabilitation (CDCR), Board of Parole Hearings (BPH), or both determine that a prisoner has six months or less to live; that the conditions under which the prisoner would be released do not pose a threat to public safety and that the prisoner is permanently medically incapacitated, the Secretary of CDCR or BPH may recommend to the court that the prisoner's sentence be recalled (compassionate release). (Pen. Code, § 1170, subd. (e)(1) & (2).)
- 2) Exempts from compassionate release a prisoner sentenced to death or a term of life without the possibility of parole (LWOP). (Pen. Code, § 1170, subd. (e)(2)(C).)
- 3) Requires any recommendation for recall submitted to the court by the CDCR Secretary or BPH to include one or more medical evaluations, a postrelease plan, and findings of the prisoner's eligibility. (Pen. Code, § 1170, subd. (e)(7).)
- 4) Requires the court to hold a hearing within 10 days of receipt of a positive recommendation by BPH or the secretary of CDCR for a prisoner's sentence to be recalled. (Pen. Code, § 1170, subd. (e)(3).)
- 5) States if the court grants the recall and resentencing application, the prisoner shall be released within 48 hours of receipt of the court order, unless a longer time period is agreed to by the inmate. (Pen. Code, § 1170, subd. (e)(9).)
- 6) Establishes the medical parole program whereby any prisoner who the head physician of the institution where the prisoner is located determines is permanently medically incapacitated with a medical condition that renders him or her permanently unable to perform activities of basic daily living, and results in the prisoner requiring 24-hour care, and that incapacitation did not exist at the time of sentencing, shall be granted medical parole if BPH determines that the conditions under which the prisoner would be released would not reasonably pose a threat to public safety. (Pen. Code, § 3550, subd. (a).)
- 7) States that medical parole shall not apply to any prisoner sentenced to death or LWOP or to any inmate who is serving a sentence for which medical parole is prohibited by any initiative

statute. (Pen. Code, § 3550, subd. (b).)

- 8) States that when a physician employed by CDCR who is the primary care provider for an inmate identifies an inmate that he or she believes meets the medical criteria for medical parole, the primary care physician shall recommend to the head physician of the institution where the prisoner is located that the prisoner be referred to the BPH for consideration for medical parole. Within 30 days of receiving that recommendation, if the head physician of the institution concurs in the recommendation of the primary care physician, he or she shall refer the matter to BPH using a standardized form and format developed by the department, and if the head physician of the institution does not concur in the recommendation, he or she shall provide the primary care physician with a written explanation of the reasons for denying the referral. (Pen. Code, § 3550, subd. (c).)
- 9) Allows the prisoner or his or her family member or designee to independently request consideration for medical parole by contacting the head physician at the prison or CDCR. Within 30 days of receiving the request, the head physician of the institution shall, in consultation with the prisoner's primary care physician, make a determination regarding whether the prisoner meets the criteria for medical parole as specified and, if the head physician of the institution determines that the prisoner satisfies the criteria, he or she shall refer the matter to BPH using a standardized form and format developed by CDCR. If the head physician of the institution does not concur in the recommendation, he or she shall provide the prisoner or his or her family member or designee with a written explanation of the reasons for denying the application. (Pen. Code, § 3550, subd. (d).)
- 10) Requires CDCR to complete parole plans for inmates referred to BPH for medical parole consideration. The parole plans shall include, but not be limited to, the inmate's plan for residency and medical care. (Pen. Code, § 3550, subd. (e).)
- 11) Provides, notwithstanding any other law, that medical parole hearings shall be conducted by two-person panels consisting of at least one commissioner. In the event of a tie vote, the matter shall be referred to the full board for a decision. Medical parole hearings may be heard in absentia. (Pen. Code, § 3550, subd. (f).)
- 12) Requires BPH, upon receiving a recommendation from the head physician of the institution where a prisoner is located for the prisoner to be granted medical parole, to make an independent judgment regarding whether the conditions under which the inmate would be released pose a reasonable threat to public safety, and make written findings related thereto. (Pen. Code, § 3550, subd. (g).)
- 13) Authorizes the board or the Division of Adult Parole Operations to impose any reasonable conditions on prisoners subject to medical parole supervision, including, but not limited to, the requirement that the parolee submit to electronic monitoring. As a further condition of medical parole, the parolee may be required to submit to an examination by a physician selected by the board for the purpose of diagnosing the parolee's current medical condition. In the event such an examination takes place, a report of the examination and diagnosis shall be submitted to the board by the examining physician. If the board determines, based on that medical examination, that the person's medical condition has improved to the extent that the person no longer qualifies for medical parole, the board shall return the person to the custody

of the department. (Pen. Code, § 3550, subd. (h).)

- 14) Requires CDCR, at the time a prisoner is placed on medical parole supervision, to ensure that the prisoner has applied for any federal entitlement programs for which the prisoner is eligible, and has in his or her possession a discharge medical summary, full medical records, parole medications, and all property belonging to the prisoner that was under the control of the department. Any additional records shall be sent to the prisoner's forwarding address after release to health care-related parole supervision. (Pen. Code, § 3550, subd. (i).)
- 15) Requires CDCR to give notice at least 30 days' notice, or as soon as feasible, to the county of commitment, and the proposed county of release if applicable, of any medical parole hearing or any medical parole release. (Pen. Code, § 3550, subd. (k).)
- 16) Provides that the penalty for a defendant found guilty of murder in the first degree, with a finding of one of the enumerated special circumstances, is death or LWOP. Includes first degree murder of a peace officer, as specified, as one of the enumerated special circumstances. (Pen. Code, § 190.2, subd. (a)(7).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "The original compassionate release legislation (SB 1399 from 2010) was intended to prohibit compassionate release for anyone convicted of murder against an officer – as it prohibited compassionate release for anyone serving a death sentence, or sentence of life without the possibility of parole.

"However, there was a multi-year period in the 1970s where California had neither a death penalty nor a sentence of life without the possibility of parole available. For that period of time, persons convicted of first degree murder of a police officer were sentenced to life with parole.

"The honorable work that our men and women in law enforcement perform on a daily basis is crucial to ensuring that our neighbors and families live in safe communities. Senate Bill 6 is necessary to guarantee that individuals convicted of these heinous crimes serve their entire sentences given to them by a jury of their peers."

- 2) **Compassionate Release:** To be eligible for compassionate release, a prisoner must be "terminally ill with an incurable condition caused by an illness or disease that would produce death within six months, as determined by a physician employed by [CDCR]." (Pen. Code, § 1170, subd. (e)(2)(A).) The court must also make a finding that the conditions under which the prisoner would be released or receive treatment do not pose a threat to public safety. (Pen. Code, § 1170, subd. (e)(2)(B).) Compassionate release may also be available to a prisoner who is permanently incapacitated by a medical condition and unable to perform activities of daily living, requiring 24-hour care. (Pen. Code, § 1170, subd. (e)(2)(C).) The prisoner is ineligible if he or she is sentenced to death or a term of LWOP. (*Ibid.*)

If the secretary of CDCR determines that the prisoner satisfies the criteria for recall of his or her sentence, the secretary or BPH may recommend to the court that the sentence be recalled.

At its next lawfully noticed meeting, BPH must consider this information and make an independent judgment and related findings before rejecting the request or making a recommendation to the court. (Pen. Code, § 1170, subd. (e)(6).) Any recommendation for recall of the inmate's sentence submitted to the court shall include one or more medical evaluations, a postrelease plan, and findings regarding the prisoner's eligibility for release. (Pen. Code, § 1170, subd. (e)(7).) Within 10 days of receipt of a positive recommendation, the court must hold a hearing to consider whether recall is appropriate. (Pen. Code, § 1170, subd. (e)(3).) If possible, the matter must be heard by the judge who sentenced the prisoner. (Pen. Code, § 1170, subd. (e)(8).) If the court grants recall of the prisoner's sentence, the prisoner must be released within 48 hours of receipt of the court's order, unless the inmate agrees to a longer time period. (Pen. Code, § 1170, subd. (e)(9).)

Due to its stringent criteria and lengthy process, the number of prisoners released on compassionate release is quite low. From 2007 through the first ten months of 2013, CDCR received 488 requests for compassionate release, of which 99 were approved. In 2012, 97 applications for compassionate release were submitted to CDCR for review; 35 were approved and advanced to the sentencing court; 13 sentences were recalled by judges, clearing the way for release. 27 cases were never completed due to withdrawal, death, or not meeting the criteria. (McNichol, *Final Requests* (Jan. 2014) California Lawyer, at pp. 18-21.)

- 3) **Medical Parole:** In 2010, California's medical parole law was signed into law. (SB 1399 (Leno), Chapter 405, Statutes of 2010.) The law applies to those inmates who have been declared by the head physician in the institute where they are housed to be permanently medically incapacitated with a medical condition that renders him or her permanently unable to perform activities of basic daily living, and results in the prisoner requiring 24-hour care. BPH must also make a determination that the conditions under which the prisoner would be released would not reasonably pose a threat to public safety.

The Legislature crafted SB 1399 to address some of the shortcomings of the compassionate release statute (Pen. Code, § 1170, subd. (e)). (Assem. Com. on Public Safety, Analysis of Sen. Bill No. 1399 (2009-10 Reg. Sess.) as amended June 23, 2014.) Unlike compassionate release which requires the court to recall the sentence, medical parole creates an alternative procedure that permits these inmates to be placed on parole supervision under conditions determined by the parole board, and allows parole to be revoked if for any reason the parolee's condition changes and creates a danger to the public.

The purpose of the medical parole law was to alleviate some of the financial burden facing CDCR in caring for inmates suffering from certain medical conditions. According to the background information provided by the author's office for SB 1399:

"SB 1399 will medically parole, the sickest of the sick. And although this would only apply to a handful of inmates, these inmates are by far the most costly in the system. The average cost for an inmate placed in a correctional treatment center bed is \$10,604. When you add the costs of medical guarding and transportation to that (patients in this setting normally average one to three outside medical visits with hospital transportation and two correctional officers at the hourly rate, plus benefits) the figure rises to \$114,395 dollars per inmate. The Federal Receiver has identified 11 inmates as extremely incapacitated and housed within the prison system in correctional treatment center beds with medical bills averaging over

\$114,000 each per year.

"An additional 21 inmates are housed at an even higher rate to the taxpayer in nursing facilities or hospitals outside of the prison facility. These type of beds average a cost of \$3,500 per day. When you add the guarding costs to that (two correctional officers per shift, three shifts per day, straight time plus benefits) the number jumps to \$5,406 a day. So the total cost for a single inmate in this type of treatment setting is nearly \$2 million - \$1,973,252. This means that the state has paid a total of \$41.4 million a year for just 21 individuals who would most likely qualify as medical parole candidates under this legislation due to their severe medical condition as evidenced by the exorbitant costs of their medical care.

"Finally, there is one more type of bed, the hospice bed. For inmates dying in this type of medical setting, the costs of a physician assistant, registered nurse, office assistant, and clinical social worker total nearly \$2 million per hospice bed – \$1,868,232. CDCR has 17 hospice beds currently within the system at a price of \$31,759,944 – nearly \$32 million dollars a year.

"By eliminating the requirement for 24-hour guard care at health facilities, a medical parole program could save the state millions just in custody and transportation costs alone. According to the State Auditor, between 2003 and 2008, medical guard time accounted for 24% of the prison system's total guard overtime. Spending for guard costs has increased by \$66 million since 2003. The price for two correctional officers to guard a single inmate at an outside nursing facility has been reported to be \$2,317 a day. The guard price for the inmate during a six-month period was \$410,000. That's nearly equal to actual cost of medical care provided to the inmate during the same timeframe which totaled an additional \$421,000. We can assume that for every inmate we send out into the community for special treatment, we are nearly doubling the taxpayer burden for the cost of their incarceration.

"Incarcerated inmates, regardless of their medical condition, are not eligible to receive any federally funded medical care. However, these restrictions do not apply to persons on parole, meaning that SB 1399 would allow the State to receive federal reimbursement for a significant portion of the costs associated with inmates eligible to be placed on medical parole.

"Currently, prisoners who are suffering from severe medical incapacitation are treated in correctional treatment center beds, outside hospital patient beds, or hospice beds; the price tag for which starts at nearly \$115,000 a year for the lowest level treatment setting of the three options. Now, taking that into account, imagine the savings that could be realized given that the average annual cost of Medi-Cal fee-for-service skilled nursing care is only about \$60,000. Of course, the cost of skilled nursing varies significantly depending on the acuity level of patients and it's likely that terminally ill patients on average would have greater care needs and thus have a higher average cost; nevertheless, the Medi-Cal cost share is 50-percent state and 50-percent federal meaning the state would only pay half one-the costs of caring for a parolee being treated in the community if he or she qualified for Medi-Cal. Further, it is conceivable that many of these inmates will qualify for Medicare which is entirely funded by the federal government." (Assem. Com. on Public Safety, Analysis of Sen. Bill No. 1399, *supra*, pp. 5-7.)

- 4) **Parole Suitability:** The California Supreme Court has held that parole suitability cannot be based solely on the nature of the crime. (*In re Lawrence* (2008) 44 Cal.4th 1181, 1221.) Parole suitability must be based on an evaluation of several factors to determine the current dangerousness to the public. (*Ibid.*) The nature of the crime is merely a consideration in parole suitability and in the context of medical parole, BPH can consider that factor along with whether the prisoner is eligible due to his or her medical condition; and whether his or her parole would pose a reasonable public safety risk in making its decision.

SB 6 excludes prisoners from medical parole based solely on the nature of the crime. This is contrary to the purpose of the medical parole law and contrary to the law on parole suitability in general. While the rationale to exclude this particular category of inmates is based on parity because an inmate sentenced to first degree murder of a peace officer today would receive a sentence of either LWOP or death, thus making the inmate ineligible for medical parole, it also creates a new precedent of excluding certain prisoners from medical parole based solely on the nature of the offense. This could lead to new categories of exclusion in the future which would further erode the medical parole law.

- 5) **Ex Post Facto Concerns:** Both the United States Constitution and the California Constitution prohibit ex post facto laws. (U.S. Const. art. I, Section 10; Cal. Const. art. I, Section 9.) "[T]wo critical elements must be present for a criminal or penal law to be ex post facto: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." (*Weaver v. Graham* (1981) 450 U.S. 24, 29.) The purpose of the prohibition against ex post facto laws is to ensure due process through fair notice of the conduct that constitutes a crime and the punishment that may be imposed for a crime. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 638.)

Although courts have held that certain changes to parole violate the ex post facto rule (see *In re Thomson* (1980) 104 C.A.3d 950, 954; *In re Bray* (1979) 97 C.A.3d 506, 510 [increase in length of parole term violates ex post facto]), procedural changes in the parole system are generally not ex post facto violations (see *California Dept. of Corrections v. Morales* (1995) 514 U.S. 499 [changes to parole procedures allowing a state parole board to decrease the frequency of parole suitability hearings under certain circumstances does not violate the Ex Post Facto Clause]). Whether a change in parole procedures violates ex post facto principles requires consideration of whether there is a significant risk the change will prolong a prisoner's incarceration. (*In re Vicks* (2013) 56 Cal.4th 274, 300.)

In *Morales, supra*, the United States Supreme Court considered California's 1981 increase in the potential deferral period between parole suitability hearings. Specifically, the amended statute authorized the Board to defer subsequent suitability hearings for up to three years if the prisoner has been convicted of more than one offense which involves the taking of a life and if the Board finds that it is not reasonable to expect that parole would be granted at a hearing during the following years and states the bases for the finding. (*Morales, supra*, 514 U.S. at p. 503.) After evaluating whether the change would violate ex post facto principles, the Supreme Court concluded that the Board's new authority to defer hearings created only a speculative possibility of increasing a prisoner's punishment because: (1) the amendment applied only to a class of prisoners for whom the likelihood of release on parole is remote; and, (2) only after the Board had concluded at the initial parole hearing that the prisoner was not suitable for parole and it was not reasonable to expect that the prisoner would be suitable for parole in a year would the timing of a prisoner's hearings be affected. (*Id.* at pp. 510-

511.)

Similarly, in *Vicks, supra*, the California Supreme Court considered whether the increase in the period of time between parole hearings established by Marsy's Law violated the Ex Post Facto Clause by creating a significant risk of prolonged incarceration. Marsy's Law (enacted by Proposition 9, approved by California voters in 2008) increased the time between parole hearings. The default period between hearings became 15 years, absent a finding by BPH that there is a reasonable likelihood the prisoner would be suitable for parole at an earlier hearing. In evaluating Vicks' ex post facto challenge, the Court compared his case to *Weaver, supra*, where the United States Supreme Court found an ex post facto violation where there was a reduction in the rate at which the prisoner accumulated credit for good behavior in prison because the reduction was a lost opportunity for release. (*Weaver, supra*, 450 U.S. 24 at pp. 35-36.) In contrast to the change considered in *Weaver*, Marsy's Law did not alter the criteria for obtaining release. The court found that Vicks had not lost an opportunity for earlier release because there is no reasonable likelihood that he would be suitable for parole earlier than the hearing date he was assigned, which was five years. (*Vicks, supra*, 56 Cal.4th at p. 312.)

Recently, the Ninth Circuit Court of Appeals took up the issue of whether Propositions 9 and 89 violated the Ex Post Facto Clause. (*Gilman v. Brown* (9th Cir. 2016) 814 F.3d 1007.) Proposition 9 is discussed in the *Vicks* case. Proposition 89, approved by California voters in 1988, amended the California Constitution to grant the Governor 30 days to affirm, modify, or reverse decisions of BPH. Prior to the passage of Proposition 89, BPH had the exclusive power to make parole decisions. The Court weighed whether the changes in law effected by these Propositions, which applied retroactively to the defendant who was convicted prior to the passage of the Propositions, created a "significant risk of a higher sentence." (*Id.* at 1015.) As to the defendant's challenge to Proposition 89, the Court held that the change in law as applied to the defendant did not violate the Ex Post Facto Clause because he could not show that he would have received parole before the enactment of Proposition 89. The Court stated that the law did not change the factors used to determine whether a person would receive parole, rather, it changed who would ultimately make the decision. (*Id.* at 1016.)

As to defendant's challenge to Proposition 9, the Court, similar to the rationale used in *Vicks*, pointed out that "in reviewing decisions of state parole authorities for potential Ex Post Facto Clause issues, the question is not whether 'discretion is been changed in its exercise' by changes in parole procedures, but whether discretion 'will not be exercised at all.'" (*Gilman, supra*, 814 F.3d at 1007, quoting *Garner v. Jones* (529 U.S. 244, 254).) The Court found that Proposition 9 did not require BPH to engage in a "categorical exemption" and held that the change in law did not violate the Ex Post Facto Clause as applied to the defendant. (*Id.* at 1020.)

In *Morales* and *Vicks* BPH retained discretion to expedite the parole hearing sooner than the established deferral times if there was a reasonable likelihood that the prisoner would be suitable for parole prior to the date of the established hearing. Also, in *Gilman*, while the Court held that an Ex Post Facto claim cannot be successful if based on a speculative, attenuated risk of affecting a prisoner's actual term of imprisonment, the Court again made note that the Ex Post Facto Clause is violated when BPH retains its discretion, rather than being required to engage in a categorical exemption from parole. (*Gilman, supra*, 814 F.3d at 1007.)

Unlike *Morales*, *Vicks* and *Gilman*, SB 6 removes discretion from BPH by stating that categorically prisoners who have committed first degree murder of a peace officer is ineligible for medical parole or compassionate release. SB 6 will increase a prisoner's incarceration by altering the criteria for release so a prisoner who is currently eligible for medical parole or compassionate release would no longer be eligible if SB 6 becomes law. Thus, similar to *Weaver*, this change can be viewed as a lost opportunity for a prisoner who may be eligible for medical parole or compassionate release prior to passage of this bill.

While it would be speculative to argue that Mr. Youngberg (the inmate referenced in the author's statement) would have been released but for this law, it may be violate the Ex Post Facto Clause as applied to another prisoner. In fact, Mr. Youngberg applied for medical parole in 2012 and BPH denied his application, thus similar to *Gilman*, it cannot be shown that he would have received medical parole but for this law. This Committee has been informed by CDCR that Mr. Youngberg died shortly after he was denied medical parole. When asked how many other inmates would be affected by SB 6's provisions, CDCR could not provide data because the Penal Code section related to first-degree murder covers all first degree murder, not just those involving a peace officer victim. If there are any other inmates who would be affected by this legislation, they may still challenge the SB 6 if it becomes law as violating the Ex Post Facto Clause as applied to them.

- 6) **Proposed Amendments:** This bill is being heard as proposed to be amended. The amendments are technical in nature and intended to clarify that the exclusion applies to those who would be convicted of first degree murder with special circumstances which carries a penalty of either LWOP or death in order to accomplish the bill's stated purpose of covering only those inmates who were sentenced to first degree murder of a peace officer between 1972 and 1977 when the death penalty was not an available sentence because it was declared to be unconstitutional. The sentence of LWOP in these types of cases was also not available until 1977.
- 7) **Argument in Support:** According to *California Narcotic Officers' of California*, the sponsor of this bill, "Senate Bill 6 will close a loophole that currently exists in California's Medical Parole and Compassionate Release laws. When Medical Parole and Compassionate Release were first enacted, that law contained within its provisions language that specifically exempted persons who had been sentenced to death or persons who had been sentenced to life in prison without the possibility of parole.

"The clear intent of this provision was to assure that persons who had committed the most serious of crimes would not be eligible for Medical Parole. The challenge is that, unknown when the law was first enacted, from 1972 through 1977 California had neither a death penalty nor a sentence of life in prison without the possibility of parole. What this meant is that persons who committed first degree murder of peace officers in the line of duty during that period – a crime that would result in a sentence of death or life without possibility of parole at any other time in California history – were eligible for Medical Parole or Compassionate Release."

- 8) **Argument in Opposition:** According to the *American Civil Liberties Union*, "Under existing law, in order to be granted medical parole, an inmate must be deemed 'medically incapacitated, with a medical condition that renders him or her permanently unable to

perform activities of basic daily living, and results in the prison requiring 24-hour care.' (P.C. §3550, subd. (a).) The intent of medical parole is to release inmates who require twenty-four hour care at huge expense to the State. An inmate living in a persistent vegetative state or otherwise medically incapacitated is not likely to pose a threat to public safety, yet the state is responsible for around-the-clock in-custody care at a cost of thousands of dollars per week.

"Moreover, current law simply allows an inmate to petition Board of Parole Hearings for release. The Board is fully capable of screening the petitions to determine who is appropriate to be released in the totality of circumstances, including the offense the person committed. Given that the intent of medical parole is to reduce the financial strain of caring for medically incapacitated inmates, the Legislature should not start excepting out specified offenses for which an inmate is not eligible, despite being medically incapacitated. If an inmate meets the requirements specified in the law, he or she should be eligible for release."

9) **Prior Legislation:**

- a) SB 1284 (Galgiani), of the 2013-2014 Legislative Session, was substantially similar to this bill. SB 1284 died in this Committee.
- b) AB 353 (Brown), of the 2013-2014 Legislative Session, was substantially similar to this bill. AB 353 died in this Committee.
- c) SB 1399 (Leno), Chapter 405, Statutes of 2010, established California's medical parole law.
- d) AB 1539 (Krekorian), Chapter 740, Statutes of 2007, established criteria and procedure for which a state prisoner may have his or her sentence recalled and be re-sentenced if he or she is diagnosed with a disease that would produce death within six months or is permanently medically incapacitated and whose release is deemed not to threaten public safety.
- e) SB 1547 (Romero), of the 2005-06 Legislative Session, would have required CDCR to establish programs that would parole geriatric and medically incapacitated inmates who no longer pose a threat to the public safety. SB 1547 failed passage on the Assembly floor.
- f) AB 1946 (Steinberg), of the 2003-04 Legislative Session, would have provided that terminally ill or medically incapacitated prisoners, as specified, are eligible to apply to have their sentences recalled and to be re-sentenced; and made legislative findings that programs should be available for inmates that are designed to prepare nonviolent felony offenders for successful reentry into the community. AB 1946 was vetoed by the Governor.
- g) AB 29 (Villaraigosa), Chapter 751, Statutes of 1997, established a procedure whereby a court may have the discretion to re-sentence or recall a sentence if a prisoner is terminally ill with an incurable condition caused by an illness or disease that would produce death within six months

REGISTERED SUPPORT / OPPOSITION:

Support

California Narcotic Officers' Association (Sponsor)
California Association of Code Enforcement Officers
California Association of Highway Patrolmen
California College and University Police Chiefs Association
California Correctional Supervisors Organization
California District Attorneys Association
California Peace Officers' Association
California Police Chiefs Association
California State Sheriffs' Association
Fraternal Order of Police
Los Angeles County Professional Peace Officers Association
Los Angeles Deputy Sheriffs
Los Angeles Police Protective League
Peace Officers Research Association of California
Riverside State Sheriffs Association

Opposition

American Civil Liberties Union of California
California Attorneys for Criminal Justice

Analysis Prepared by: Stella Choe / PUB. S. / (916) 319-3744

Amendments Mock-up for 2015-2016 SB-6 (Galgiani (S))

*******Amendments are in BOLD*******

**Mock-up based on Version Number 99 - Introduced 12/1/14
Submitted by: Stella Choe, Public Safety Committee**

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 1170 of the Penal Code, as amended by Section 1 of Chapter 612 of the Statutes of 2014, is amended to read:

1170. (a) (1) The Legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances. The Legislature further finds and declares that the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion.

(2) Notwithstanding paragraph (1), the Legislature further finds and declares that programs should be available for inmates, including, but not limited to, educational programs, that are designed to prepare nonviolent felony offenders for successful reentry into the community. The Legislature encourages the development of policies and programs designed to educate and rehabilitate nonviolent felony offenders. In implementing this section, the Department of Corrections and Rehabilitation is encouraged to give priority enrollment in programs to promote successful return to the community to an inmate with a short remaining term of commitment and a release date that would allow him or her adequate time to complete the program.

(3) In any case in which the punishment prescribed by statute for a person convicted of a public offense is a term of imprisonment in the state prison of any specification of three time periods, the court shall sentence the defendant to one of the terms of imprisonment specified unless the convicted person is given any other disposition provided by law, including a fine, jail, probation, or the suspension of imposition or execution of sentence or is sentenced pursuant to subdivision (b) of Section 1168 because he or she had committed his or her crime prior to July 1, 1977. In sentencing the convicted person, the court shall apply the sentencing rules of the Judicial Council. The court, unless it determines that there are circumstances in mitigation of the punishment prescribed, shall also impose any other term that it is required by law to impose as an additional term. Nothing in this article shall affect any provision of law that imposes the death

penalty, that authorizes or restricts the granting of probation or suspending the execution or imposition of sentence, or expressly provides for imprisonment in the state prison for life, except as provided in paragraph (2) of subdivision (d). In any case in which the amount of preimprisonment credit under Section 2900.5 or any other provision of law is equal to or exceeds any sentence imposed pursuant to this chapter, the entire sentence shall be deemed to have been served and the defendant shall not be actually delivered to the custody of the secretary. The court shall advise the defendant that he or she shall serve a period of parole and order the defendant to report to the parole office closest to the defendant's last legal residence, unless the in-custody credits equal the total sentence, including both confinement time and the period of parole. The sentence shall be deemed a separate prior prison term under Section 667.5, and a copy of the judgment and other necessary documentation shall be forwarded to the secretary.

(b) When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. At least four days prior to the time set for imposition of judgment, either party or the victim, or the family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation. In determining the appropriate term, the court may consider the record in the case, the probation officer's report, other reports, including reports received pursuant to Section 1203.03, and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected and the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law. A term of imprisonment shall not be specified if imposition of sentence is suspended.

(c) The court shall state the reasons for its sentence choice on the record at the time of sentencing. The court shall also inform the defendant that as part of the sentence after expiration of the term he or she may be on parole for a period as provided in Section 3000.

(d) (1) When a defendant subject to this section or subdivision (b) of Section 1168 has been sentenced to be imprisoned in the state prison and has been committed to the custody of the secretary, the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the secretary or the Board of Parole Hearings, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence. The court resentencing under this subdivision shall apply the sentencing rules of the Judicial Council so as to eliminate disparity of sentences and to promote uniformity of sentencing. Credit shall be given for time served.

(2) (A) (i) When a defendant who was under 18 years of age at the time of the commission of the offense for which the defendant was sentenced to imprisonment for life without the possibility of parole has served at least 15 years of that sentence, the defendant may submit to the sentencing court a petition for recall and resentencing.

(ii) Notwithstanding clause (i), this paragraph shall not apply to defendants sentenced to life without parole for an offense where the defendant tortured, as described in Section 206, his or her victim or the victim was a public safety official, including any law enforcement personnel mentioned in Chapter 4.5 (commencing with Section 830) of Title 3, or any firefighter as described in Section 245.1, as well as any other officer in any segment of law enforcement who is employed by the federal government, the state, or any of its political subdivisions.

(B) The defendant shall file the original petition with the sentencing court. A copy of the petition shall be served on the agency that prosecuted the case. The petition shall include the defendant's statement that he or she was under 18 years of age at the time of the crime and was sentenced to life in prison without the possibility of parole, the defendant's statement describing his or her remorse and work towards rehabilitation, and the defendant's statement that one of the following is true:

(i) The defendant was convicted pursuant to felony murder or aiding and abetting murder provisions of law.

(ii) The defendant does not have juvenile felony adjudications for assault or other felony crimes with a significant potential for personal harm to victims prior to the offense for which the sentence is being considered for recall.

(iii) The defendant committed the offense with at least one adult codefendant.

(iv) The defendant has performed acts that tend to indicate rehabilitation or the potential for rehabilitation, including, but not limited to, availing himself or herself of rehabilitative, educational, or vocational programs, if those programs have been available at his or her classification level and facility, using self-study for self-improvement, or showing evidence of remorse.

(C) If any of the information required in subparagraph (B) is missing from the petition, or if proof of service on the prosecuting agency is not provided, the court shall return the petition to the defendant and advise the defendant that the matter cannot be considered without the missing information.

(D) A reply to the petition, if any, shall be filed with the court within 60 days of the date on which the prosecuting agency was served with the petition, unless a continuance is granted for good cause.

(E) If the court finds by a preponderance of the evidence that the statements in the petition are true, the court shall hold a hearing to consider whether to recall the sentence and commitment previously ordered and to resentence the defendant in the same manner as if the defendant had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence. Victims, or victim family members if the victim is deceased, shall retain the rights to participate in the hearing.

(F) The factors that the court may consider when determining whether to recall and resentence include, but are not limited to, the following:

(i) The defendant was convicted pursuant to felony murder or aiding and abetting murder provisions of law.

(ii) The defendant does not have juvenile felony adjudications for assault or other felony crimes with a significant potential for personal harm to victims prior to the offense for which the sentence is being considered for recall.

(iii) The defendant committed the offense with at least one adult codefendant.

(iv) Prior to the offense for which the sentence is being considered for recall, the defendant had insufficient adult support or supervision and had suffered from psychological or physical trauma, or significant stress.

(v) The defendant suffers from cognitive limitations due to mental illness, developmental disabilities, or other factors that did not constitute a defense, but influenced the defendant's involvement in the offense.

(vi) The defendant has performed acts that tend to indicate rehabilitation or the potential for rehabilitation, including, but not limited to, availing himself or herself of rehabilitative, educational, or vocational programs, if those programs have been available at his or her classification level and facility, using self-study for self-improvement, or showing evidence of remorse.

(vii) The defendant has maintained family ties or connections with others through letter writing, calls, or visits, or has eliminated contact with individuals outside of prison who are currently involved with crime.

(viii) The defendant has had no disciplinary actions for violent activities in the last five years in which the defendant was determined to be the aggressor.

(G) The court shall have the discretion to recall the sentence and commitment previously ordered and to resentence the defendant in the same manner as if the defendant had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence. The discretion of the court shall be exercised in consideration of the criteria in subparagraph (B). Victims, or victim family members if the victim is deceased, shall be notified of the resentencing hearing and shall retain their rights to participate in the hearing.

(H) If the sentence is not recalled, the defendant may submit another petition for recall and resentencing to the sentencing court when the defendant has been committed to the custody of the department for at least 20 years. If recall and resentencing is not granted under that petition, the defendant may file another petition after having served 24 years. The final petition may be

submitted, and the response to that petition shall be determined, during the 25th year of the defendant's sentence.

(I) In addition to the criteria in subparagraph (F), the court may consider any other criteria that the court deems relevant to its decision, so long as the court identifies them on the record, provides a statement of reasons for adopting them, and states why the defendant does or does not satisfy the criteria.

(J) This subdivision shall have retroactive application.

(e) (1) Notwithstanding any other law and consistent with paragraph (1) of subdivision (a), if the secretary or the Board of Parole Hearings or both determine that a prisoner satisfies the criteria set forth in paragraph (2), the secretary or the board may recommend to the court that the prisoner's sentence be recalled.

(2) (A) The court shall have the discretion to resentence or recall if the court finds that the facts described in ~~subparagraphs (A) and (B) or subparagraphs (B) and (C) clauses (i) and (ii) or clauses (ii) and (iii)~~ exist:

~~(A)~~

~~(i) The prisoner is terminally ill with an incurable condition caused by an illness or disease that would produce death within six months, as determined by a physician employed by the department.~~

~~(B)~~

~~(ii) The conditions under which the prisoner would be released or receive treatment do not pose a threat to public safety.~~

~~(C)~~

~~(iii) The prisoner is permanently medically incapacitated with a medical condition that renders him or her permanently unable to perform activities of basic daily living, and results in the prisoner requiring 24-hour total care, including, but not limited to, coma, persistent vegetative state, brain death, ventilator-dependency, loss of control of muscular or neurological function, and that incapacitation did not exist at the time of the original sentencing.~~

~~(B) This subdivision does not apply to the following:~~

~~(i) A prisoner sentenced to death or a term of life without the possibility of parole.~~

~~(ii) ~~(A)~~ A prisoner who was convicted of first degree murder if the victim was a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3, as defined in Section 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.4, 830.5, 830.6,~~

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830.10, 830.11, or 830.12, who was killed while engaged in the performance of his or her duties, and the individual knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties; or the victim was a peace officer, as defined in the above-enumerated sections, or a former peace officer under any of those sections, and was intentionally killed in retaliation for the performance of his or her official duties.

~~(H) The victim was a peace officer or had been a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3, and was intentionally murdered in retaliation for the performance of his or her official duties, and the defendant was sentenced on or after January 1, 2016.~~

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~~(C) The Board of Parole Hearings shall make findings pursuant to this subdivision before making a recommendation for resentencing or recall to the court. This subdivision does not apply to a prisoner sentenced to death or a term of life without the possibility of parole.~~

(3) Within 10 days of receipt of a positive recommendation by the secretary or the board, the court shall hold a hearing to consider whether the prisoner's sentence should be recalled.

(4) Any physician employed by the department who determines that a prisoner has six months or less to live shall notify the chief medical officer of the prognosis. If the chief medical officer concurs with the prognosis, he or she shall notify the warden. Within 48 hours of receiving notification, the warden or the warden's representative shall notify the prisoner of the recall and resentencing procedures, and shall arrange for the prisoner to designate a family member or other outside agent to be notified as to the prisoner's medical condition and prognosis, and as to the recall and resentencing procedures. If the inmate is deemed mentally unfit, the warden or the warden's representative shall contact the inmate's emergency contact and provide the information described in paragraph (2).

(5) The warden or the warden's representative shall provide the prisoner and his or her family member, agent, or emergency contact, as described in paragraph (4), updated information throughout the recall and resentencing process with regard to the prisoner's medical condition and the status of the prisoner's recall and resentencing proceedings.

(6) Notwithstanding any other provisions of this section, the prisoner or his or her family member or designee may independently request consideration for recall and resentencing by contacting the chief medical officer at the prison or the secretary. Upon receipt of the request, the chief medical officer and the warden or the warden's representative shall follow the procedures described in paragraph (4). If the secretary determines that the prisoner satisfies the criteria set forth in paragraph (2), the secretary or board may recommend to the court that the prisoner's sentence be recalled. The secretary shall submit a recommendation for release within 30 days in the case of inmates sentenced to determinate terms and, in the case of inmates sentenced to indeterminate terms, the secretary shall make a recommendation to the Board of Parole Hearings with respect to the inmates who have applied under this section. The board shall consider this

information and make an independent judgment pursuant to paragraph (2) and make findings related thereto before rejecting the request or making a recommendation to the court. This action shall be taken at the next lawfully noticed board meeting.

(7) Any recommendation for recall submitted to the court by the secretary or the Board of Parole Hearings shall include one or more medical evaluations, a postrelease plan, and findings pursuant to paragraph (2).

(8) If possible, the matter shall be heard before the same judge of the court who sentenced the prisoner.

(9) If the court grants the recall and resentencing application, the prisoner shall be released by the department within 48 hours of receipt of the court's order, unless a longer time period is agreed to by the inmate. At the time of release, the warden or the warden's representative shall ensure that the prisoner has each of the following in his or her possession: a discharge medical summary, full medical records, state identification, parole medications, and all property belonging to the prisoner. After discharge, any additional records shall be sent to the prisoner's forwarding address.

(10) The secretary shall issue a directive to medical and correctional staff employed by the department that details the guidelines and procedures for initiating a recall and resentencing procedure. The directive shall clearly state that any prisoner who is given a prognosis of six months or less to live is eligible for recall and resentencing consideration, and that recall and resentencing procedures shall be initiated upon that prognosis.

(f) Notwithstanding any other provision of this section, for purposes of paragraph (3) of subdivision (h), any allegation that a defendant is eligible for state prison due to a prior or current conviction, sentence enhancement, or because he or she is required to register as a sex offender shall not be subject to dismissal pursuant to Section 1385.

(g) A sentence to state prison for a determinate term for which only one term is specified, is a sentence to state prison under this section.

(h) (1) Except as provided in paragraph (3), a felony punishable pursuant to this subdivision where the term is not specified in the underlying offense shall be punishable by a term of imprisonment in a county jail for 16 months, or two or three years.

(2) Except as provided in paragraph (3), a felony punishable pursuant to this subdivision shall be punishable by imprisonment in a county jail for the term described in the underlying offense.

(3) Notwithstanding paragraphs (1) and (2), where the defendant (A) has a prior or current felony conviction for a serious felony described in subdivision (c) of Section 1192.7 or a prior or current conviction for a violent felony described in subdivision (c) of Section 667.5, (B) has a prior felony conviction in another jurisdiction for an offense that has all the elements of a serious felony described in subdivision (c) of Section 1192.7 or a violent felony described in subdivision

(c) of Section 667.5, (C) is required to register as a sex offender pursuant to Chapter 5.5 (commencing with Section 290) of Title 9 of Part 1, or (D) is convicted of a crime and as part of the sentence an enhancement pursuant to Section 186.11 is imposed, an executed sentence for a felony punishable pursuant to this subdivision shall be served in state prison.

(4) Nothing in this subdivision shall be construed to prevent other dispositions authorized by law, including pretrial diversion, deferred entry of judgment, or an order granting probation pursuant to Section 1203.1.

(5) (A) Unless the court finds that, in the interests of justice, it is not appropriate in a particular case, the court, when imposing a sentence pursuant to paragraph (1) or (2), shall suspend execution of a concluding portion of the term for a period selected at the court's discretion.

(B) The portion of a defendant's sentenced term that is suspended pursuant to this paragraph shall be known as mandatory supervision, and, unless otherwise ordered by the court, shall commence upon release from physical custody or an alternative custody program, whichever is later. During the period of mandatory supervision, the defendant shall be supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation, for the remaining unserved portion of the sentence imposed by the court. The period of supervision shall be mandatory, and may not be earlier terminated except by court order. Any proceeding to revoke or modify mandatory supervision under this subparagraph shall be conducted pursuant to either subdivisions (a) and (b) of Section 1203.2 or Section 1203.3. During the period when the defendant is under such supervision, unless in actual custody related to the sentence imposed by the court, the defendant shall be entitled to only actual time credit against the term of imprisonment imposed by the court. Any time period which is suspended because a person has absconded shall not be credited toward the period of supervision.

(6) The sentencing changes made by the act that added this subdivision shall be applied prospectively to any person sentenced on or after October 1, 2011.

(7) The sentencing changes made to paragraph (5) by the act that added this paragraph shall become effective and operative on January 1, 2015, and shall be applied prospectively to any person sentenced on or after January 1, 2015.

(i) This section shall remain in effect only until January 1, 2017, and as of that date is repealed, unless a later enacted statute, that is enacted before that date, deletes or extends that date.

SEC. 2. Section 1170 of the Penal Code, as amended by Section 2 of Chapter 612 of the Statutes of 2014, is amended to read:

1170. (a) (1) The Legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under

similar circumstances. The Legislature further finds and declares that the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion.

(2) Notwithstanding paragraph (1), the Legislature further finds and declares that programs should be available for inmates, including, but not limited to, educational programs, that are designed to prepare nonviolent felony offenders for successful reentry into the community. The Legislature encourages the development of policies and programs designed to educate and rehabilitate nonviolent felony offenders. In implementing this section, the Department of Corrections and Rehabilitation is encouraged to give priority enrollment in programs to promote successful return to the community to an inmate with a short remaining term of commitment and a release date that would allow him or her adequate time to complete the program.

(3) In any case in which the punishment prescribed by statute for a person convicted of a public offense is a term of imprisonment in the state prison of any specification of three time periods, the court shall sentence the defendant to one of the terms of imprisonment specified unless the convicted person is given any other disposition provided by law, including a fine, jail, probation, or the suspension of imposition or execution of sentence or is sentenced pursuant to subdivision (b) of Section 1168 because he or she had committed his or her crime prior to July 1, 1977. In sentencing the convicted person, the court shall apply the sentencing rules of the Judicial Council. The court, unless it determines that there are circumstances in mitigation of the punishment prescribed, shall also impose any other term that it is required by law to impose as an additional term. Nothing in this article shall affect any provision of law that imposes the death penalty, that authorizes or restricts the granting of probation or suspending the execution or imposition of sentence, or expressly provides for imprisonment in the state prison for life, except as provided in paragraph (2) of subdivision (d). In any case in which the amount of preimprisonment credit under Section 2900.5 or any other provision of law is equal to or exceeds any sentence imposed pursuant to this chapter, the entire sentence shall be deemed to have been served and the defendant shall not be actually delivered to the custody of the secretary. The court shall advise the defendant that he or she shall serve a period of parole and order the defendant to report to the parole office closest to the defendant's last legal residence, unless the in-custody credits equal the total sentence, including both confinement time and the period of parole. The sentence shall be deemed a separate prior prison term under Section 667.5, and a copy of the judgment and other necessary documentation shall be forwarded to the secretary.

(b) When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime. At least four days prior to the time set for imposition of judgment, either party or the victim, or the family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation to dispute facts in the record or the probation officer's report, or to present additional facts. In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer's report, other reports, including reports received pursuant to Section 1203.03, and statements in aggravation or mitigation submitted by the prosecution, the

defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall set forth on the record the facts and reasons for imposing the upper or lower term. The court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law. A term of imprisonment shall not be specified if imposition of sentence is suspended.

(c) The court shall state the reasons for its sentence choice on the record at the time of sentencing. The court shall also inform the defendant that as part of the sentence after expiration of the term he or she may be on parole for a period as provided in Section 3000.

(d) (1) When a defendant subject to this section or subdivision (b) of Section 1168 has been sentenced to be imprisoned in the state prison and has been committed to the custody of the secretary, the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the secretary or the Board of Parole Hearings, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence. The court resentencing under this subdivision shall apply the sentencing rules of the Judicial Council so as to eliminate disparity of sentences and to promote uniformity of sentencing. Credit shall be given for time served.

(2) (A) (i) When a defendant who was under 18 years of age at the time of the commission of the offense for which the defendant was sentenced to imprisonment for life without the possibility of parole has served at least 15 years of that sentence, the defendant may submit to the sentencing court a petition for recall and resentencing.

(ii) Notwithstanding clause (i), this paragraph shall not apply to defendants sentenced to life without parole for an offense where the defendant tortured, as described in Section 206, his or her victim or the victim was a public safety official, including any law enforcement personnel mentioned in Chapter 4.5 (commencing with Section 830) of Title 3, or any firefighter as described in Section 245.1, as well as any other officer in any segment of law enforcement who is employed by the federal government, the state, or any of its political subdivisions.

(B) The defendant shall file the original petition with the sentencing court. A copy of the petition shall be served on the agency that prosecuted the case. The petition shall include the defendant's statement that he or she was under 18 years of age at the time of the crime and was sentenced to life in prison without the possibility of parole, the defendant's statement describing his or her remorse and work towards rehabilitation, and the defendant's statement that one of the following is true:

(i) The defendant was convicted pursuant to felony murder or aiding and abetting murder provisions of law.

(ii) The defendant does not have juvenile felony adjudications for assault or other felony crimes with a significant potential for personal harm to victims prior to the offense for which the sentence is being considered for recall.

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(iii) The defendant committed the offense with at least one adult codefendant.

(iv) The defendant has performed acts that tend to indicate rehabilitation or the potential for rehabilitation, including, but not limited to, availing himself or herself of rehabilitative, educational, or vocational programs, if those programs have been available at his or her classification level and facility, using self-study for self-improvement, or showing evidence of remorse.

(C) If any of the information required in subparagraph (B) is missing from the petition, or if proof of service on the prosecuting agency is not provided, the court shall return the petition to the defendant and advise the defendant that the matter cannot be considered without the missing information.

(D) A reply to the petition, if any, shall be filed with the court within 60 days of the date on which the prosecuting agency was served with the petition, unless a continuance is granted for good cause.

(E) If the court finds by a preponderance of the evidence that the statements in the petition are true, the court shall hold a hearing to consider whether to recall the sentence and commitment previously ordered and to resentence the defendant in the same manner as if the defendant had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence. Victims, or victim family members if the victim is deceased, shall retain the rights to participate in the hearing.

(F) The factors that the court may consider when determining whether to recall and resentence include, but are not limited to, the following:

(i) The defendant was convicted pursuant to felony murder or aiding and abetting murder provisions of law.

(ii) The defendant does not have juvenile felony adjudications for assault or other felony crimes with a significant potential for personal harm to victims prior to the offense for which the sentence is being considered for recall.

(iii) The defendant committed the offense with at least one adult codefendant.

(iv) Prior to the offense for which the sentence is being considered for recall, the defendant had insufficient adult support or supervision and had suffered from psychological or physical trauma, or significant stress.

(v) The defendant suffers from cognitive limitations due to mental illness, developmental disabilities, or other factors that did not constitute a defense, but influenced the defendant's involvement in the offense.

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(vi) The defendant has performed acts that tend to indicate rehabilitation or the potential for rehabilitation, including, but not limited to, availing himself or herself of rehabilitative, educational, or vocational programs, if those programs have been available at his or her classification level and facility, using self-study for self-improvement, or showing evidence of remorse.

(vii) The defendant has maintained family ties or connections with others through letter writing, calls, or visits, or has eliminated contact with individuals outside of prison who are currently involved with crime.

(viii) The defendant has had no disciplinary actions for violent activities in the last five years in which the defendant was determined to be the aggressor.

(G) The court shall have the discretion to recall the sentence and commitment previously ordered and to resentence the defendant in the same manner as if the defendant had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence. The discretion of the court shall be exercised in consideration of the criteria in subparagraph (B). Victims, or victim family members if the victim is deceased, shall be notified of the resentencing hearing and shall retain their rights to participate in the hearing.

(H) If the sentence is not recalled, the defendant may submit another petition for recall and resentencing to the sentencing court when the defendant has been committed to the custody of the department for at least 20 years. If recall and resentencing is not granted under that petition, the defendant may file another petition after having served 24 years. The final petition may be submitted, and the response to that petition shall be determined, during the 25th year of the defendant's sentence.

(I) In addition to the criteria in subparagraph (F), the court may consider any other criteria that the court deems relevant to its decision, so long as the court identifies them on the record, provides a statement of reasons for adopting them, and states why the defendant does or does not satisfy the criteria.

(J) This subdivision shall have retroactive application.

(e) (1) Notwithstanding any other law and consistent with paragraph (1) of subdivision (a), if the secretary or the Board of Parole Hearings or both determine that a prisoner satisfies the criteria set forth in paragraph (2), the secretary or the board may recommend to the court that the prisoner's sentence be recalled.

(2) (A) The court shall have the discretion to resentence or recall if the court finds that the facts described in ~~subparagraphs (A) and (B) or subparagraphs (B) and (C)~~ *clauses (i) and (ii) or clauses (ii) and (iii)* exist:

~~(A)~~

(i) The prisoner is terminally ill with an incurable condition caused by an illness or disease that would produce death within six months, as determined by a physician employed by the department.

~~(B)~~

(ii) The conditions under which the prisoner would be released or receive treatment do not pose a threat to public safety.

~~(C)~~

(iii) The prisoner is permanently medically incapacitated with a medical condition that renders him or her permanently unable to perform activities of basic daily living, and results in the prisoner requiring 24-hour total care, including, but not limited to, coma, persistent vegetative state, brain death, ventilator-dependency, loss of control of muscular or neurological function, and that incapacitation did not exist at the time of the original sentencing.

(B) This subdivision does not apply to the following:

(i) A prisoner sentenced to death or a term of life without the possibility of parole.

(ii) ~~(H)~~ A prisoner who was convicted of first degree murder if the victim was a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3, as defined in Section 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.4, 830.5, 830.6, 830.10, 830.11, or 830.12, who was killed while engaged in the performance of his or her duties, and the individual knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties; or the victim was a peace officer, as defined in the above-enumerated sections, or a former peace officer under any of those sections, and was intentionally killed in retaliation for the performance of his or her official duties.

~~(H) The victim was a peace officer or had been a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3, and was intentionally murdered in retaliation for the performance of his or her official duties, and the defendant was sentenced on or after January 1, 2016.~~

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(C) The Board of Parole Hearings shall make findings pursuant to this subdivision before making a recommendation for resentencing or recall to the court. ~~This subdivision does not apply to a prisoner sentenced to death or a term of life without the possibility of parole.~~

(3) Within 10 days of receipt of a positive recommendation by the secretary or the board, the court shall hold a hearing to consider whether the prisoner's sentence should be recalled.

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(4) Any physician employed by the department who determines that a prisoner has six months or less to live shall notify the chief medical officer of the prognosis. If the chief medical officer concurs with the prognosis, he or she shall notify the warden. Within 48 hours of receiving notification, the warden or the warden's representative shall notify the prisoner of the recall and resentencing procedures, and shall arrange for the prisoner to designate a family member or other outside agent to be notified as to the prisoner's medical condition and prognosis, and as to the recall and resentencing procedures. If the inmate is deemed mentally unfit, the warden or the warden's representative shall contact the inmate's emergency contact and provide the information described in paragraph (2).

(5) The warden or the warden's representative shall provide the prisoner and his or her family member, agent, or emergency contact, as described in paragraph (4), updated information throughout the recall and resentencing process with regard to the prisoner's medical condition and the status of the prisoner's recall and resentencing proceedings.

(6) Notwithstanding any other provisions of this section, the prisoner or his or her family member or designee may independently request consideration for recall and resentencing by contacting the chief medical officer at the prison or the secretary. Upon receipt of the request, the chief medical officer and the warden or the warden's representative shall follow the procedures described in paragraph (4). If the secretary determines that the prisoner satisfies the criteria set forth in paragraph (2), the secretary or board may recommend to the court that the prisoner's sentence be recalled. The secretary shall submit a recommendation for release within 30 days in the case of inmates sentenced to determinate terms and, in the case of inmates sentenced to indeterminate terms, the secretary shall make a recommendation to the Board of Parole Hearings with respect to the inmates who have applied under this section. The board shall consider this information and make an independent judgment pursuant to paragraph (2) and make findings related thereto before rejecting the request or making a recommendation to the court. This action shall be taken at the next lawfully noticed board meeting.

(7) Any recommendation for recall submitted to the court by the secretary or the Board of Parole Hearings shall include one or more medical evaluations, a postrelease plan, and findings pursuant to paragraph (2).

(8) If possible, the matter shall be heard before the same judge of the court who sentenced the prisoner.

(9) If the court grants the recall and resentencing application, the prisoner shall be released by the department within 48 hours of receipt of the court's order, unless a longer time period is agreed to by the inmate. At the time of release, the warden or the warden's representative shall ensure that the prisoner has each of the following in his or her possession: a discharge medical summary, full medical records, state identification, parole medications, and all property belonging to the prisoner. After discharge, any additional records shall be sent to the prisoner's forwarding address.

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(10) The secretary shall issue a directive to medical and correctional staff employed by the department that details the guidelines and procedures for initiating a recall and resentencing procedure. The directive shall clearly state that any prisoner who is given a prognosis of six months or less to live is eligible for recall and resentencing consideration, and that recall and resentencing procedures shall be initiated upon that prognosis.

(f) Notwithstanding any other provision of this section, for purposes of paragraph (3) of subdivision (h), any allegation that a defendant is eligible for state prison due to a prior or current conviction, sentence enhancement, or because he or she is required to register as a sex offender shall not be subject to dismissal pursuant to Section 1385.

(g) A sentence to state prison for a determinate term for which only one term is specified, is a sentence to state prison under this section.

(h) (1) Except as provided in paragraph (3), a felony punishable pursuant to this subdivision where the term is not specified in the underlying offense shall be punishable by a term of imprisonment in a county jail for 16 months, or two or three years.

(2) Except as provided in paragraph (3), a felony punishable pursuant to this subdivision shall be punishable by imprisonment in a county jail for the term described in the underlying offense.

(3) Notwithstanding paragraphs (1) and (2), where the defendant (A) has a prior or current felony conviction for a serious felony described in subdivision (c) of Section 1192.7 or a prior or current conviction for a violent felony described in subdivision (c) of Section 667.5, (B) has a prior felony conviction in another jurisdiction for an offense that has all the elements of a serious felony described in subdivision (c) of Section 1192.7 or a violent felony described in subdivision (c) of Section 667.5, (C) is required to register as a sex offender pursuant to Chapter 5.5 (commencing with Section 290) of Title 9 of Part 1, or (D) is convicted of a crime and as part of the sentence an enhancement pursuant to Section 186.11 is imposed, an executed sentence for a felony punishable pursuant to this subdivision shall be served in state prison.

(4) Nothing in this subdivision shall be construed to prevent other dispositions authorized by law, including pretrial diversion, deferred entry of judgment, or an order granting probation pursuant to Section 1203.1.

(5) (A) Unless the court finds, in the interest of justice, that it is not appropriate in a particular case, the court, when imposing a sentence pursuant to paragraph (1) or (2), shall suspend execution of a concluding portion of the term for a period selected at the court's discretion.

(B) The portion of a defendant's sentenced term that is suspended pursuant to this paragraph shall be known as mandatory supervision, and, unless otherwise ordered by the court, shall commence upon release from physical custody or an alternative custody program, whichever is later. During the period of mandatory supervision, the defendant shall be supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation, for the remaining unserved portion of the sentence

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imposed by the court. The period of supervision shall be mandatory, and may not be earlier terminated except by court order. Any proceeding to revoke or modify mandatory supervision under this subparagraph shall be conducted pursuant to either subdivisions (a) and (b) of Section 1203.2 or Section 1203.3. During the period when the defendant is under such supervision, unless in actual custody related to the sentence imposed by the court, the defendant shall be entitled to only actual time credit against the term of imprisonment imposed by the court. Any time period which is suspended because a person has absconded shall not be credited toward the period of supervision.

(6) The sentencing changes made by the act that added this subdivision shall be applied prospectively to any person sentenced on or after October 1, 2011.

(7) The sentencing changes made to paragraph (5) by the act that added this paragraph shall become effective and operative on January 1, 2015, and shall be applied prospectively to any person sentenced on or after January 1, 2015.

(i) This section shall become operative on January 1, 2017.

SEC. 3. Section 3550 of the Penal Code is amended to read:

3550. (a) Notwithstanding any other provision of law, except as provided in subdivision (b), ~~any prisoner who~~ *if the head physician of the institution where the an institution in which a prisoner is located incarcerated* determines, as provided in this section, *that the prisoner* is permanently medically incapacitated with a medical condition that renders him or her permanently unable to perform activities of basic daily living, and results in the prisoner requiring 24-hour care, and that incapacitation did not exist at the time of sentencing, *the prisoner* shall be granted medical parole if the Board of Parole Hearings determines that the conditions under which ~~the prisoner~~ *he or she* would be released would not reasonably pose a threat to public safety.

~~(b) Subdivision (a) shall not apply to any prisoner sentenced to death or life in prison without possibility of parole or to any inmate who is serving a sentence for which parole, pursuant to subdivision (a), is prohibited by any initiative statute. The provisions of this section shall not be construed to alter or diminish the rights conferred under the Victim's Bill of Rights Act of 2008: Marsy's Law.~~

(b) This section does not alter or diminish the rights conferred under the Victims' Bill of Rights Act of 2008 (Marsy's Law). Subdivision (a) does not apply to any of the following:

(1) A prisoner sentenced to death or life in prison without possibility of parole.

(2) A prisoner who is serving a sentence for which parole, pursuant to subdivision (a), is prohibited by any initiative statute.

(3) (A) A prisoner who was convicted of first degree murder if the victim was a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3, as defined in Section 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.4, 830.5, 830.6, 830.10, 830.11, or 830.12, who was killed while engaged in the performance of his or her duties, and the individual knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties; or the victim was a peace officer, as defined in the above-enumerated sections, or a former peace officer under any of those sections, and was intentionally killed in retaliation for the performance of his or her official duties.

(B) The victim was a peace officer or had been a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3, and was intentionally murdered in retaliation for the performance of his or her official duties, and the defendant was sentenced on or after January 1, 2016.

(c) When a physician employed by the Department of Corrections and Rehabilitation who is the primary care provider for an inmate identifies an inmate a prisoner identifies a prisoner that he or she believes meets the medical criteria for medical parole specified in subdivision (a), the primary care physician shall recommend to the head physician of the institution where the prisoner is located that the prisoner be referred to the Board of Parole Hearings for consideration for medical parole. Within 30 days of receiving that recommendation, if the head physician of the institution concurs in the recommendation of the primary care physician, he or she shall refer the matter to the Board of Parole Hearings using a standardized form and format developed by the department, and if the head physician of the institution does not concur in the recommendation, he or she shall provide the primary care physician with a written explanation of the reasons for denying the referral.

(d) Notwithstanding any other provisions of this section, the prisoner or his or her family member or designee may independently request consideration for medical parole by contacting the head physician at the prison or the department. Within 30 days of receiving the request, the head physician of the institution shall, in consultation with the prisoner's primary care physician, make a determination regarding whether the prisoner meets the criteria for medical parole as specified in subdivision (a) and, if the head physician of the institution determines that the prisoner satisfies the criteria set forth in subdivision (a), he or she shall refer the matter to the Board of Parole Hearings using a standardized form and format developed by the department. If the head physician of the institution does not concur in the recommendation, he or she shall provide the prisoner or his or her family member or designee with a written explanation of the reasons for denying the application.

(e) The Department of Corrections and Rehabilitation shall complete parole plans for inmates referred to the Board of Parole Hearings for medical parole consideration. The parole plans shall include, but not be limited to, the inmate's plan for residency and medical care.

(f) Notwithstanding any other law, medical parole hearings shall be conducted by two-person panels consisting of at least one commissioner. In the event of a tie vote, the matter shall be referred to the full board for a decision. Medical parole hearings may be heard in absentia.

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(g) Upon receiving a recommendation from the head physician of the institution where a prisoner is located for the prisoner to be granted medical parole pursuant to subdivision (c) or (d), the board, as specified in subdivision (f), shall make an independent judgment regarding whether the conditions under which the inmate would be released pose a reasonable threat to public safety, and make written findings related thereto.

(h) Notwithstanding any other provision of law, the board or the Division of Adult Parole Operations shall have the authority to impose any reasonable conditions on prisoners subject to medical parole supervision pursuant to subdivision (a), including, but not limited to, the requirement that the parolee submit to electronic monitoring. As a further condition of medical parole, pursuant to subdivision (a), the parolee may be required to submit to an examination by a physician selected by the board for the purpose of diagnosing the parolee's current medical condition. In the event such an examination takes place, a report of the examination and diagnosis shall be submitted to the board by the examining physician. If the board determines, based on that medical examination, that the person's medical condition has improved to the extent that the person no longer qualifies for medical parole, the board shall return the person to the custody of the department.

(1) Notwithstanding any other provision of law establishing maximum periods for parole, a prisoner sentenced to a determinate term who is placed on medical parole supervision prior to the earliest possible release date and who remains eligible for medical parole, shall remain on medical parole, pursuant to subdivision (a), until that earliest possible release date, at which time the parolee shall commence serving that period of parole provided by, and under the provisions of, Chapter 8 (commencing with Section 3000) of Title 1.

(2) Notwithstanding any other provisions of law establishing maximum periods for parole, a prisoner sentenced to an indeterminate term who is placed on medical parole supervision prior to the prisoner's minimum eligible parole date, and who remains eligible for medical parole, shall remain on medical parole pursuant to subdivision (a) until that minimum eligible parole date, at which time the parolee shall be eligible for parole consideration under all other provisions of Chapter 8 (commencing with Section 3000) of Title 1.

(i) The Department of Corrections and Rehabilitation shall, at the time a prisoner is placed on medical parole supervision pursuant to subdivision (a), ensure that the prisoner has applied for any federal entitlement programs for which the prisoner is eligible, and has in his or her possession a discharge medical summary, full medical records, parole medications, and all property belonging to the prisoner that was under the control of the department. Any additional records shall be sent to the prisoner's forwarding address after release to health care-related parole supervision.

(j) The provisions for medical parole set forth in this title shall not affect an inmate's eligibility for any other form of parole or release provided by law.

(k) (1) Notwithstanding any other provision of law, the Department of Corrections and Rehabilitation shall give notice to the county of commitment and the proposed county of release, if that county is different than the county of commitment, of any medical parole hearing as described in subdivision (f), and of any medical parole release as described in subdivision (g).

(2) Notice shall be made at least 30 days, or as soon as feasible, prior to the time any medical parole hearing or medical parole release is scheduled for an inmate receiving medical parole consideration, regardless of whether the inmate is sentenced either determinately or indeterminately.

Date of Hearing: June 21, 2016

Counsel: Sandy Uribe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY

Reginald Byron Jones-Sawyer, Sr., Chair

SB 266 (Block) – As Amended June 2, 2016

As Proposed to be Amended in Commitee

SUMMARY: Authorizes the use of a sanction known as "flash incarceration" to defendants granted probation or placed on mandatory supervision. Specifically, **this bill:**

- 1) Provides that in any case where the court grants probation or imposes a sentence that includes mandatory supervision, the county probation department is authorized to use flash incarceration for any violation of the conditions of probation or mandatory supervision if, at the time of granting probation or ordering mandatory supervision, the court obtains from the defendant a waiver to a court hearing prior to the imposition of a period of flash incarceration.
- 2) Prohibits the denial of probation for refusal to sign a waiver agreeing to flash incarceration.
- 3) Requires each county probation department to develop a response matrix that establishes protocols for the imposition of graduated sanctions for violations of the conditions of probation to determine appropriate interventions to include the use of flash incarceration.
- 4) Requires a probation department supervisor to approve a term of flash incarceration before its imposition.
- 5) Requires the probation department to notify the court, public defender, district attorney, and sheriff upon a decision to impose a period of flash incarceration.
- 6) States that if the defendant does not agree to accept a recommended period of flash incarceration, then the probation officer may address the alleged violation by filing a declaration or revocation request with the court.
- 7) Defines "flash incarceration" as "a period of detention in a county jail due to a violation of an offender's conditions of probation or mandatory supervision. The length of the detention period may range between one and 10 consecutive days. Shorter, but if necessary more frequent, periods of detention for violations of an offender's conditions of probation or mandatory supervision shall appropriately punish an offender while preventing the disruption in a work or home establishment that typically arises from longer periods of detention."
- 8) States that in cases where there are multiple violations in a single incident, only one flash incarceration booking is authorized and may range between one and 10 consecutive days.

- 9) Excludes application of flash incarceration to any defendant convicted of a nonviolent drug possession offense who receives probation under Proposition 36 of 2000.
- 10) Provides that if the supervised person's probation or mandatory supervision is revoked, credits earned for a period of flash incarceration count towards the term to be served.
- 11) Sunsets these provisions on January 1, 2021.

EXISTING LAW:

- 1) Authorizes intermediate sanctions, including flash incarceration, to be imposed on inmates released from prison after July 1, 2013 and subject to parole. (Pen. Code, § 3000.08, subd. (d).)
- 2) Authorizes intermediate sanctions, including flash incarceration, for violating the terms of post-release community supervision (PRCS). (Pen. Code, § 3454, subd. (b).)
- 3) Defines "flash incarceration" as a period of detention in a city or county jail due to a violation of a person's conditions of parole or PRCS. The length of the detention period can range between one and 10 consecutive days in a county jail. (Pen. Code, §§ 3000.08, subd. (e), and 3454, subd. (c).)
- 4) Requires a person placed on PRCS to agree to specified conditions of release, including the waiver of the right to a court hearing prior to the imposition of a period of flash incarceration for any violation of his or her PRCS conditions. (Pen. Code, § 3453, subd. (q).)
- 5) Authorizes, as a general matter, the court to suspend a felony sentence and order the conditional and revocable release of the defendant in the community to probation supervision. (Pen. Code, § 1203.)
- 6) Provides if any probation officer, parole officer, or peace officer has probable cause to believe that a supervised person is violating any term or condition of his/her supervision, the officer may arrest the person without a warrant at any time and bring the person before the court for further disposition such as modification, revocation or termination of the person's supervision, as specified. (Pen. Code, § 1203.2.)
- 7) Gives the sentencing judge discretion to impose two types of sentences to county jail. The court may commit the defendant for the entire term allowed by law, or the court may impose a "split sentence" in which part of the term is served in custody and the remaining part of the term is comprised of a period of mandatory supervision. However, the presumption is that the defendant shall receive a split sentence, unless the court finds that, in the interests of justice, it is not appropriate in a particular case. (Pen. Code, § 1170, subd. (h)(5).)
- 8) States that the traditional procedures used for violations of probation will now be applicable to violations of mandatory supervision. Also states that procedures used to modify probation are applicable to modify the conditions of mandatory supervision. (Pen. Code, § 1170, subd. (h)(5)(B).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "The passage of Realignment in 2011 overhauled how certain convicted felons would serve their sentences with a strong emphasis on rehabilitation and keeping these offenders in their local communities. As a result, probation departments now have the responsibility to supervise Post-Release Community Supervision (PRCS) offenders, along with persons on mandatory supervision.

"A tool currently afforded to probation departments to supervise Post-Release Community Supervision (PRCS) offenders that has been successful is the use of flash incarceration. This immediate, evidence-based tool, allows departments to address serious violations of a condition of probation while minimally disrupting the offenders' rehabilitation progress.

"Currently however, the use of flash incarceration is not authorized on individuals under mandatory supervision (MS) or those on probation. The result is that when an individual under MS or probation commits a serious violation of a condition of probation, the only existing mechanism to address these violations is to initiate a petition for revocation of probation. The revocation process disrupts offenders' rehabilitation by removing them from their jobs, re-entry programs, school, and/or family for a much longer period of time compared to the use of flash incarceration.

"By authorizing flash incarceration on MS and probationers, SB 266 will provide an additional tool to local probation departments to address serious violations of a condition of probation while not disrupting an individual's progress to re-entry. Flash incarceration requires an individual to serve up to 10 days in county jail after a violation is found.

"The bill has recently been amended to do several important things. First, it will allow a person to decline flash at any time and choose to go the traditional court hearing route via a petition for revocation. Second, it prohibits probation from being denied for refusal to sign the waiver. Third, it sets forth a notification process to stakeholders upon an imposition of flash, requires development of a local response matrix based on evidence based practices, and requires supervisor approval of the imposition of flash. Additionally, the bill clarifies that while credits are not applied during a period of flash incarceration, credits earned during a period of flash would be applied to a custody term if the person on probation or mandatory supervision was revoked. Lastly, the bill includes a sunset date of 2022.

"SB 266 utilizes evidence-based intermediate sanctions which balances holding offenders accountable while focusing on shorter and few disruptions from work, home, and programming"

- 2) **Flash Incarceration:** One of the components of criminal justice realignment was to restructure the State's parole system. Realignment shifted the supervision of some released prison inmates from the California Department of Corrections and Rehabilitation (CDCR) parole agents to local probation departments. Parole under the jurisdiction of CDCR for inmates released from prison on or after October 1, 2011 is limited to those defendants whose term was for a serious or violent felony; were serving a Three-Strikes sentence; are classified as high-risk sex offenders; who are required to undergo treatment as mentally disordered offenders; or who, while on certain paroles, commit new offenses. (Pen. Code, § 3000.08.

subds. (a) & (b).) All other inmates released from prison are subject to up to three years of PRCS under local supervision by probation departments. (Pen. Code, § 3451, subd. (a).)

The changes to the supervision of inmates released from prison included establishing a new sanction for a violation of supervised release known as flash incarceration. Flash incarceration is defined as "a period of detention in county jail due to a violation of a parolee's conditions of parole" that "can range between one and 10 consecutive days." (Pen. Code, §§ 3000.08, subd. (e), & 3455, subd. (c).)

With the creation of PRCS, the supervising agency was authorized to employ "flash incarceration" as an "intermediate sanction" for responding to both parole and PRCS violations. (See Pen. Code, §§ 3454, subd. (c), & 3000.08 (e).) The Legislative Analyst's Office explained the context and reasoning behind "flash incarceration" as part of realignment: "[T]he realignment legislation provided counties with some additional options for how to manage the realigned offenders. . . . [T]he legislation allows county probation officers to return offenders who violate the terms of their community supervision to jail for up to ten days, which is commonly referred to as "flash incarceration." The rationale for using flash incarceration is that short terms of incarceration when applied soon after the offense is identified can be more effective at deterring subsequent violations than the threat of longer terms following what can be lengthy criminal proceedings." (Legislative Analyst's Office, *The 2012–13 Budget: The 2011 Realignment of Adult Offenders—An Update* (Feb. 22, 2012), pp. 8-9.)

Flash incarceration as intermediate sanction for offenders under state supervision who violate a term of their parole became effective July 1, 2013. (Pen. Code, § 3000.08, subd. (d).) Despite the new authority to impose terms of flash incarceration upon state-supervised parolees, the Division of Adult Parole Operations (DAPO) has made a policy decision not to utilize flash incarceration. (See *Valdivia v. Brown*, Response to May 6 Order, filed 05/28/13, p. 17.) CDCR has informed this committee that, as of June 2016, DAPO was still not utilizing flash incarceration.

Flash incarceration is currently being used by probation departments on the PRCS population. The Chief Probation Officers of California (CPOC), the sponsor of this bill, has provided this committee the following data: "Flash incarceration is currently being used by probation departments on the PRCS population of 31,494 people as of June 2015. "Probation departments used their authority to 'flash incarcerate' 20,326 times, on 12,759 PRCS offenders in FY 2014-2015. This ratio of 1.6 Flash Incarceration bookings in jail per person in the year implies the sanction was used multiple times on the same person. On average, 5% of the active PRCS population was booked into jail under flash incarceration per month in 2014-15."

Current law does not authorize the use of flash incarceration as a sanction for probationers and persons released on mandatory supervision. However, the sponsor of the bill has informed this committee that it is the practice of about eight counties, including Marin, Nevada, Butte, Sierra, and Sutter, to use flash incarceration on probationers and individuals on mandatory supervision. In these jurisdictions, the probation departments obtains a waiver from the defendant to use the practice, and also provides the defendant with an opportunity to decline flash, in which case the probation department uses the normal revocation process to

address violation of the conditions of release. This bill seeks to codify that practice.

- 3) **Due Process Considerations:** Liberty, once granted, is a substantial right that cannot be revoked without some level of due process under the law. *Morrissey v. Brewer* (1972) 408 U.S. 471, is the seminal case on the procedural due process rights of a supervised individual facing an alleged violation. *Morrissey* confirmed that a parolee's liberty, although restricted, is a significant interest such that its termination requires certain minimum due process protections. (*Id.* at p.482.) Before the state can return a parolee to prison, it must provide due process, including procedures which will prevent revocation because of "erroneous information or because of an erroneous evaluation." (*Id.* at p. 484.) The high court noted the necessity of a hearing structured to assure that "the finding of a parole violation will be based on verified facts and the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior." (*Ibid.*)

In *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 781-782, the United States Supreme Court applied its parole revocation due process jurisprudence to probation revocations. Again the Court held that the potential loss of liberty at stake at a probation revocation hearing is a serious deprivation entitling the probationer to be accorded due process. (*Ibid.*) The minimum due process requirements for a probation revocation proceeding are: (1) written notice of the claimed violation of probation; (2) disclosure of the evidence against the probationer; (3) an opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (5) a neutral and detached hearing body; and (6) a written statement by the fact-finder as to the evidence relied on and the reasons for revoking probation. (*Id.* at p. 786.)

With flash incarceration, the defendant does not have the legal rights associated with a fully contested violation hearing in front of a judge. To date, although several cases have raised the question about the constitutionality of flash incarceration, the courts have thus far declined to decide the issue. (See e.g., *People v. Superior Court (Ward)* (2014) 232 Cal.App.4th 345, 352, fn. 11; *In re Denson* (Oct. 15, 2013, G048279) [nonpub. opn.]; *People v. Cuadras* (March 6, 2015, E061367) [nonpub. opn.])

This bill seeks to address due process concerns in several ways. First, an offender would have to agree to the use of flash incarceration as a condition of probation or mandatory supervision at the time of granting probation or ordering mandatory supervision. Probation cannot be denied for refusing to do so. This bill also requires notice to defense counsel about the imposition of a period of flash incarceration so that the defendant might seek his or her attorney's advice. Most importantly, this bill permits a defendant to refuse the imposition of a specified use of flash incarceration, and instead request revocation hearing in front of a judge.

- 4) **Exemption for Proposition 36 Probationers:** Proposition 36 of 2000, the Substance Abuse and Crime Prevention Act, was a voter-approved initiative mandating judges to offer "first or second time non-violent adult drug offenders who use, possess, or transport illegal drugs for personal use" drug treatment in lieu of incarceration. In 2006, the Legislature amended Proposition 36 to allow for flash incarceration for up to five days [SB 1137 (Ducheny), Chapter 63, Statutes of 2006]. That provision was struck down in court because the amendments did not comply with constitutional requirements for amendments to initiative

statutes. (See *Gardner v. Schwarzenegger* (2009) 178 Cal.App.4th 1366.)

This bill does not raise the same concerns because it excludes from its provisions persons subject to Proposition 36.

- 5) **Effect on Persons Already on Supervised Release:** The defendants currently on probation or mandatory supervision have not agreed to be subject to flash incarceration or to waive a court hearing before this punishment is imposed. As to these defendants, it is arguable that the changes to the probationary process could not be retroactively applied without violating the ex post facto clause.

Ex post facto laws are those that: (1) criminalize and punish an act innocent when done, (2) aggravate or make a crime greater than it was when committed, (3) increase the punishment for a crime and apply such increases to crimes committed before the enactment of the law, or (4) alter the rules of evidence to require less or different evidence than required when the crime was committed. (See e.g., *Stogner v. California* (2003) 539 U.S. 607, 612; quoting *Calder v. Bull* (1798) 3 U.S. 386, 390-391.)

The provisions of this bill alter the rules of evidence against those on supervised release because a violation of a condition of supervised release need no longer be proven by a preponderance of evidence to result in additional jail time. So, an argument can be made that applying the new procedures in this bill to persons already on supervised release would violate the ex post facto clause. (But see *John L. v. Superior Court* (2004) 33 Cal.4th 158 [rejecting ex post facto challenge to the retroactive application of Proposition 21 which enacted changes in procedure to prove violations of juvenile probation].)

- 6) **Argument in Support:** According to the *Chief Probation Officers of California*, the sponsor of this bill, "One of the tools that has been successful in supervising and working with PRCS offenders is the use of intermediate sanctions like 'flash' incarceration, which was authorized under Realignment legislation.

"Flash' incarceration is a period of detention in county jail triggered by a violation of a condition of probation. The length of the detention period can range from one to ten consecutive days. Intermediate sanctions, like flash, balance holding offenders accountable for violations of their conditions of supervision while focusing on shorter disruptions from work, home, or programming which often results from longer term revocations.

"While the authority to use flash for PRCS offenders was provided under AB 109 Realignment, the statute does not equally afford this authority for offenders on probation or mandatory supervision. Thus, the existing mechanism to address violations of probation is to initiate revocation proceedings which is a much lengthier process and can result in custody time much longer than 10 days. ...

"SB 266 would give county probation departments the ability to utilize flash incarceration for a person on probation or mandatory supervision similar to existing authority for PRCS offenders. By extending this authority, county probation departments can continue to use this effective, evidence based tool for offenders under their supervision."

- 7) **Argument in Opposition:** According to the *Los Angeles County District Attorney*, "Our office is concerned that the proposed expansion of flash incarceration to defendants on probation or mandatory supervision will cede too much discretion to local probation departments to manage these populations...."

"SB 266 places no limit on the number of times flash incarceration terms may be imposed by probation departments. We believe that a person who has been punished multiple times by up to 10 days of flash incarceration, and then re-offends, should have his or her probation or mandatory supervision revoked. Moreover, repeated use of flash incarceration raises due process concerns as a defendant has no right to a hearing to contest the truth of the allegations that are the basis for the incarceration.

"SB 266 would also permit a defendant who has committed a new criminal offense while on probation to be punished by flash incarceration. We believe a person committing a new crime should have his or her probation or mandatory supervision revoked."

- 8) **Prior Legislation:** SB 419 (Block), of the 2013-2014 Legislative session, would have authorized the use of flash incarceration on defendants granted probation or placed on mandatory supervision. SB 419 was amended into unrelated bill.

REGISTERED SUPPORT / OPPOSITION:

Support

Chief Probation Officers of California (Sponsor)
AFSCME Local 685
Association for Los Angeles Deputy Sheriffs
Association of Deputy District Attorneys
California College and University Police Chiefs
California Narcotics Officers Association
California Police Chiefs Association
California Probation, Parole, and Correctional Association
California State Association of Counties
California State Lodge, Fraternal Order of Police
California State Sheriffs Association
Californians for Safety and Justice
Contra Costa County Board of Supervisors
Long Beach Police Officers Association
Los Angeles County Professional Peace Officers Association
Los Angeles Police Protective League
Los Angeles Probation Officers Union
Peace Officers Research Association of California
Riverside Sheriffs Association
Riverside County Board of Supervisors
Rural County Representatives of California
Sacramento County Deputy Sheriffs' Association
Sonoma County Public Defender
Urban Counties of California

Opposition

California Attorneys for Criminal Justice
Los Angeles County District Attorney's Office
Legal Services for Prisoners with Children

Analysis Prepared by: Sandy Uribe / PUB. S. / (916) 319-3744

Amendments Mock-up for 2015-2016 SB-266 (Block (S))

*****Amendments are in BOLD*****

Mock-up based on Version Number 97 - Amended Assembly 6/2/16
Submitted by: Sandy Uribe, Assembly Public Safety Committee

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. ~~The Legislature finds and declares all of the following:~~

~~(a) Intermediate sanctions, including, but not limited to, flash incarceration, balance holding offenders accountable for violations of their conditions of supervision while focusing on shorter and fewer disruptions from work, home, and programming.~~

~~(b) Strategies that combine evidence-based practices, including structured decisionmaking matrices, provide tools needed to respond to violations with a proportionately matched response through graduated sanctions.~~

~~(c) The use of structured sanction and reward policies based on evidence-based tools helps to maintain offender engagement in programs and assists in the process of positive behavior change.~~

~~(d) The use of incentives can be a powerful tool in shaping client behavior and promoting positive behavior change.~~

~~(e) Violations can be reduced when responses to noncompliant behavior are swift, certain, and proportional to the client's behavior.~~

SEC. 2. Section 1170 of the Penal Code, as amended by Section 1 of Chapter 378 of the Statutes of 2015, is amended to read:

~~1170. (a) (1) The Legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances. The Legislature further finds and declares that the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed~~

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by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion.

(2) Notwithstanding paragraph (1), the Legislature further finds and declares that programs should be available for inmates, including, but not limited to, educational programs, that are designed to prepare nonviolent felony offenders for successful reentry into the community. The Legislature encourages the development of policies and programs designed to educate and rehabilitate nonviolent felony offenders. In implementing this section, the Department of Corrections and Rehabilitation is encouraged to give priority enrollment in programs to promote successful return to the community to an inmate with a short remaining term of commitment and a release date that would allow him or her adequate time to complete the program.

(3) In any case in which the punishment prescribed by statute for a person convicted of a public offense is a term of imprisonment in the state prison or a term pursuant to subdivision (h) of any specification of three time periods, the court shall sentence the defendant to one of the terms of imprisonment specified unless the convicted person is given any other disposition provided by law, including a fine, jail, probation, or the suspension of imposition or execution of sentence or is sentenced pursuant to subdivision (b) of Section 1168 because he or she had committed his or her crime prior to July 1, 1977. In sentencing the convicted person, the court shall apply the sentencing rules of the Judicial Council. The court, unless it determines that there are circumstances in mitigation of the punishment prescribed, shall also impose any other term that it is required by law to impose as an additional term. Nothing in this article shall affect any provision of law that imposes the death penalty, that authorizes or restricts the granting of probation or suspending the execution or imposition of sentence, or expressly provides for imprisonment in the state prison for life, except as provided in paragraph (2) of subdivision (d). In any case in which the amount of preimprisonment credit under Section 2900.5 or any other law is equal to or exceeds any sentence imposed pursuant to this chapter, except for the remaining portion of mandatory supervision pursuant to subparagraph (B) of paragraph (5) of subdivision (h), the entire sentence shall be deemed to have been served, except for the remaining period of mandatory supervision, and the defendant shall not be actually delivered to the custody of the secretary or to the custody of the county correctional administrator. The court shall advise the defendant that he or she shall serve an applicable period of parole, postrelease community supervision, or mandatory supervision, and order the defendant to report to the parole or probation office closest to the defendant's last legal residence, unless the in-custody credits equal the total sentence, including both confinement time and the period of parole, postrelease community supervision, or mandatory supervision. The sentence shall be deemed a separate prior prison term or a sentence of imprisonment in a county jail under subdivision (h) for purposes of Section 667.5, and a copy of the judgment and other necessary documentation shall be forwarded to the secretary.

(b) When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. At least four days prior to the time set for imposition of judgment, either party or the victim, or the family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation. In determining the appropriate term, the court may consider the record in the case, the

~~probation officer's report, other reports, including reports received pursuant to Section 1203.03, and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected and the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law. A term of imprisonment shall not be specified if imposition of sentence is suspended.~~

~~(e) The court shall state the reasons for its sentence choice on the record at the time of sentencing. The court shall also inform the defendant that as part of the sentence after expiration of the term he or she may be on parole for a period as provided in Section 3000 or 3000.08 or postrelease community supervision for a period as provided in Section 3451.~~

~~(d) (1) When a defendant subject to this section or subdivision (b) of Section 1168 has been sentenced to be imprisoned in the state prison or county jail pursuant to subdivision (h) and has been committed to the custody of the secretary or the county correctional administrator, the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the secretary or the Board of Parole Hearings in the case of state prison inmates, or the county correctional administrator in the case of county jail inmates, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence. The court resentencing under this subdivision shall apply the sentencing rules of the Judicial Council so as to eliminate disparity of sentences and to promote uniformity of sentencing. Credit shall be given for time served.~~

~~(2) (A) (i) When a defendant who was under 18 years of age at the time of the commission of the offense for which the defendant was sentenced to imprisonment for life without the possibility of parole has served at least 15 years of that sentence, the defendant may submit to the sentencing court a petition for recall and resentencing.~~

~~(ii) Notwithstanding clause (i), this paragraph shall not apply to defendants sentenced to life without parole for an offense where the defendant tortured, as described in Section 206, his or her victim or the victim was a public safety official, including any law enforcement personnel mentioned in Chapter 4.5 (commencing with Section 830) of Title 3, or any firefighter as described in Section 245.1, as well as any other officer in any segment of law enforcement who is employed by the federal government, the state, or any of its political subdivisions.~~

~~(B) The defendant shall file the original petition with the sentencing court. A copy of the petition shall be served on the agency that prosecuted the case. The petition shall include the defendant's statement that he or she was under 18 years of age at the time of the crime and was sentenced to life in prison without the possibility of parole, the defendant's statement describing his or her remorse and work towards rehabilitation, and the defendant's statement that one of the following is true:~~

- ~~(i) The defendant was convicted pursuant to felony murder or aiding and abetting murder provisions of law.~~
- ~~(ii) The defendant does not have juvenile felony adjudications for assault or other felony crimes with a significant potential for personal harm to victims prior to the offense for which the sentence is being considered for recall.~~
- ~~(iii) The defendant committed the offense with at least one adult codefendant.~~
- ~~(iv) The defendant has performed acts that tend to indicate rehabilitation or the potential for rehabilitation, including, but not limited to, availing himself or herself of rehabilitative, educational, or vocational programs, if those programs have been available at his or her classification level and facility, using self-study for self-improvement, or showing evidence of remorse.~~
- ~~(C) If any of the information required in subparagraph (B) is missing from the petition, or if proof of service on the prosecuting agency is not provided, the court shall return the petition to the defendant and advise the defendant that the matter cannot be considered without the missing information.~~
- ~~(D) A reply to the petition, if any, shall be filed with the court within 60 days of the date on which the prosecuting agency was served with the petition, unless a continuance is granted for good cause.~~
- ~~(E) If the court finds by a preponderance of the evidence that the statements in the petition are true, the court shall hold a hearing to consider whether to recall the sentence and commitment previously ordered and to resentence the defendant in the same manner as if the defendant had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence. Victims, or victim family members if the victim is deceased, shall retain the rights to participate in the hearing.~~
- ~~(F) The factors that the court may consider when determining whether to recall and resentence include, but are not limited to, the following:~~
- ~~(i) The defendant was convicted pursuant to felony murder or aiding and abetting murder provisions of law.~~
- ~~(ii) The defendant does not have juvenile felony adjudications for assault or other felony crimes with a significant potential for personal harm to victims prior to the offense for which the sentence is being considered for recall.~~
- ~~(iii) The defendant committed the offense with at least one adult codefendant.~~

~~(iv) Prior to the offense for which the sentence is being considered for recall, the defendant had insufficient adult support or supervision and had suffered from psychological or physical trauma, or significant stress.~~

~~(v) The defendant suffers from cognitive limitations due to mental illness, developmental disabilities, or other factors that did not constitute a defense, but influenced the defendant's involvement in the offense.~~

~~(vi) The defendant has performed acts that tend to indicate rehabilitation or the potential for rehabilitation, including, but not limited to, availing himself or herself of rehabilitative, educational, or vocational programs, if those programs have been available at his or her classification level and facility, using self-study for self-improvement, or showing evidence of remorse.~~

~~(vii) The defendant has maintained family ties or connections with others through letter writing, calls, or visits, or has eliminated contact with individuals outside of prison who are currently involved with crime.~~

~~(viii) The defendant has had no disciplinary actions for violent activities in the last five years in which the defendant was determined to be the aggressor.~~

~~(G) The court shall have the discretion to recall the sentence and commitment previously ordered and to resentence the defendant in the same manner as if the defendant had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence. The discretion of the court shall be exercised in consideration of the criteria in subparagraph (B). Victims, or victim family members if the victim is deceased, shall be notified of the resentencing hearing and shall retain their rights to participate in the hearing.~~

~~(H) If the sentence is not recalled, the defendant may submit another petition for recall and resentencing to the sentencing court when the defendant has been committed to the custody of the department for at least 20 years. If recall and resentencing is not granted under that petition, the defendant may file another petition after having served 24 years. The final petition may be submitted, and the response to that petition shall be determined, during the 25th year of the defendant's sentence.~~

~~(I) In addition to the criteria in subparagraph (F), the court may consider any other criteria that the court deems relevant to its decision, so long as the court identifies them on the record, provides a statement of reasons for adopting them, and states why the defendant does or does not satisfy the criteria.~~

~~(J) This subdivision shall have retroactive application.~~

~~(e) (1) Notwithstanding any other law and consistent with paragraph (1) of subdivision (a), if the secretary or the Board of Parole Hearings or both determine that a prisoner satisfies the criteria~~

~~set forth in paragraph (2), the secretary or the board may recommend to the court that the prisoner's sentence be recalled.~~

~~(2) The court shall have the discretion to resentence or recall if the court finds that the facts described in subparagraphs (A) and (B) or subparagraphs (B) and (C) exist:~~

~~(A) The prisoner is terminally ill with an incurable condition caused by an illness or disease that would produce death within six months, as determined by a physician employed by the department.~~

~~(B) The conditions under which the prisoner would be released or receive treatment do not pose a threat to public safety.~~

~~(C) The prisoner is permanently medically incapacitated with a medical condition that renders him or her permanently unable to perform activities of basic daily living, and results in the prisoner requiring 24 hour total care, including, but not limited to, coma, persistent vegetative state, brain death, ventilator dependency, loss of control of muscular or neurological function, and that incapacitation did not exist at the time of the original sentencing.~~

~~The Board of Parole Hearings shall make findings pursuant to this subdivision before making a recommendation for resentence or recall to the court. This subdivision does not apply to a prisoner sentenced to death or a term of life without the possibility of parole.~~

~~(3) Within 10 days of receipt of a positive recommendation by the secretary or the board, the court shall hold a hearing to consider whether the prisoner's sentence should be recalled.~~

~~(4) Any physician employed by the department who determines that a prisoner has six months or less to live shall notify the chief medical officer of the prognosis. If the chief medical officer concurs with the prognosis, he or she shall notify the warden. Within 48 hours of receiving notification, the warden or the warden's representative shall notify the prisoner of the recall and resentencing procedures, and shall arrange for the prisoner to designate a family member or other outside agent to be notified as to the prisoner's medical condition and prognosis, and as to the recall and resentencing procedures. If the inmate is deemed mentally unfit, the warden or the warden's representative shall contact the inmate's emergency contact and provide the information described in paragraph (2).~~

~~(5) The warden or the warden's representative shall provide the prisoner and his or her family member, agent, or emergency contact, as described in paragraph (4), updated information throughout the recall and resentencing process with regard to the prisoner's medical condition and the status of the prisoner's recall and resentencing proceedings.~~

~~(6) Notwithstanding any other provisions of this section, the prisoner or his or her family member or designee may independently request consideration for recall and resentencing by contacting the chief medical officer at the prison or the secretary. Upon receipt of the request, the chief medical officer and the warden or the warden's representative shall follow the procedures~~

~~described in paragraph (4). If the secretary determines that the prisoner satisfies the criteria set forth in paragraph (2), the secretary or board may recommend to the court that the prisoner's sentence be recalled. The secretary shall submit a recommendation for release within 30 days in the case of inmates sentenced to determinate terms and, in the case of inmates sentenced to indeterminate terms, the secretary shall make a recommendation to the Board of Parole Hearings with respect to the inmates who have applied under this section. The board shall consider this information and make an independent judgment pursuant to paragraph (2) and make findings related thereto before rejecting the request or making a recommendation to the court. This action shall be taken at the next lawfully noticed board meeting.~~

~~(7) Any recommendation for recall submitted to the court by the secretary or the Board of Parole Hearings shall include one or more medical evaluations, a postrelease plan, and findings pursuant to paragraph (2).~~

~~(8) If possible, the matter shall be heard before the same judge of the court who sentenced the prisoner.~~

~~(9) If the court grants the recall and resentencing application, the prisoner shall be released by the department within 48 hours of receipt of the court's order, unless a longer time period is agreed to by the inmate. At the time of release, the warden or the warden's representative shall ensure that the prisoner has each of the following in his or her possession: a discharge medical summary, full medical records, state identification, parole or postrelease community supervision medications, and all property belonging to the prisoner. After discharge, any additional records shall be sent to the prisoner's forwarding address.~~

~~(10) The secretary shall issue a directive to medical and correctional staff employed by the department that details the guidelines and procedures for initiating a recall and resentencing procedure. The directive shall clearly state that any prisoner who is given a prognosis of six months or less to live is eligible for recall and resentencing consideration, and that recall and resentencing procedures shall be initiated upon that prognosis.~~

~~(11) The provisions of this subdivision shall be available to an inmate who is sentenced to a county jail pursuant to subdivision (h). For purposes of those inmates, "secretary" or "warden" shall mean the county correctional administrator and "chief medical officer" shall mean a physician designated by the county correctional administrator for this purpose.~~

~~(f) Notwithstanding any other provision of this section, for purposes of paragraph (3) of subdivision (h), any allegation that a defendant is eligible for state prison due to a prior or current conviction, sentence enhancement, or because he or she is required to register as a sex offender shall not be subject to dismissal pursuant to Section 1385.~~

~~(g) A sentence to state prison for a determinate term for which only one term is specified, is a sentence to state prison under this section.~~

~~(h) (1) Except as provided in paragraph (3), a felony punishable pursuant to this subdivision where the term is not specified in the underlying offense shall be punishable by a term of imprisonment in a county jail for 16 months, or two or three years.~~

~~(2) Except as provided in paragraph (3), a felony punishable pursuant to this subdivision shall be punishable by imprisonment in a county jail for the term described in the underlying offense.~~

~~(3) Notwithstanding paragraphs (1) and (2), where the defendant (A) has a prior or current felony conviction for a serious felony described in subdivision (c) of Section 1192.7 or a prior or current conviction for a violent felony described in subdivision (c) of Section 667.5, (B) has a prior felony conviction in another jurisdiction for an offense that has all the elements of a serious felony described in subdivision (c) of Section 1192.7 or a violent felony described in subdivision (c) of Section 667.5, (C) is required to register as a sex offender pursuant to Chapter 5.5 (commencing with Section 290) of Title 9 of Part 1, or (D) is convicted of a crime and as part of the sentence an enhancement pursuant to Section 186.11 is imposed, an executed sentence for a felony punishable pursuant to this subdivision shall be served in state prison.~~

~~(4) Nothing in this subdivision shall be construed to prevent other dispositions authorized by law, including pretrial diversion, deferred entry of judgment, or an order granting probation pursuant to Section 1203.1.~~

~~(5) (A) Unless the court finds that, in the interests of justice, it is not appropriate in a particular case, the court, when imposing a sentence pursuant to paragraph (1) or (2), shall suspend execution of a concluding portion of the term for a period selected at the court's discretion. For any defendant whose term is suspended pursuant to this paragraph prior to January 1, 2022, if the court suspends execution of a concluding portion of the term, the court may take a waiver from the defendant permitting flash incarceration by the probation officer during that concluding portion, pursuant to Section 1203.35.~~

~~(B) The portion of a defendant's sentenced term that is suspended pursuant to this paragraph shall be known as mandatory supervision, and, unless otherwise ordered by the court, shall commence upon release from physical custody or an alternative custody program, whichever is later. During the period of mandatory supervision, the defendant shall be supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation, for the remaining unserved portion of the sentence imposed by the court. The period of supervision shall be mandatory, and may not be earlier terminated except by court order. Any proceeding to revoke or modify mandatory supervision under this subparagraph shall be conducted pursuant to either subdivisions (a) and (b) of Section 1203.2 or Section 1203.3. During the period when the defendant is under that supervision, unless in actual custody related to the sentence imposed by the court, the defendant shall be entitled to only actual time credit against the term of imprisonment imposed by the court. Any time period which is suspended because a person has absconded shall not be credited toward the period of supervision.~~

~~(6) The sentencing changes made by the act that added this subdivision shall be applied prospectively to any person sentenced on or after October 1, 2011.~~

~~(7) The sentencing changes made to paragraph (5) by the act that added this paragraph shall become effective and operative on January 1, 2015, and shall be applied prospectively to any person sentenced on or after January 1, 2015.~~

~~(i) This section shall remain in effect only until January 1, 2017, and as of that date is repealed, unless a later enacted statute, that is enacted before that date, deletes or extends that date.~~

SEC. 3. Section 1203 of the Penal Code is amended to read:

1203. (a) As used in this code, “probation” means the suspension of the imposition or execution of a sentence and the order of conditional and revocable release in the community under the supervision of a probation officer. As used in this code, “conditional sentence” means the suspension of the imposition or execution of a sentence and the order of revocable release in the community subject to conditions established by the court without the supervision of a probation officer. It is the intent of the Legislature that both conditional sentence and probation are authorized whenever probation is authorized in any code as a sentencing option for infractions or misdemeanors.

(b) (1) Except as provided in subdivision (j), if a person is convicted of a felony and is eligible for probation, before judgment is pronounced, the court shall immediately refer the matter to a probation officer to investigate and report to the court, at a specified time, upon the circumstances surrounding the crime and the prior history and record of the person, which may be considered either in aggravation or mitigation of the punishment.

(2) (A) The probation officer shall immediately investigate and make a written report to the court of his or her findings and recommendations, including his or her recommendations as to the granting or denying of probation and the conditions of probation, if granted.

(B) Pursuant to Section 828 of the Welfare and Institutions Code, the probation officer shall include in his or her report any information gathered by a law enforcement agency relating to the taking of the defendant into custody as a minor, which shall be considered for purposes of determining whether adjudications of commissions of crimes as a juvenile warrant a finding that there are circumstances in aggravation pursuant to Section 1170 or to deny probation.

(C) If the person was convicted of an offense that requires him or her to register as a sex offender pursuant to Sections 290 to 290.023, inclusive, or if the probation report recommends that registration be ordered at sentencing pursuant to Section 290.006, the probation officer’s report shall include the results of the State-Authorized Risk Assessment Tool for Sex Offenders (SARATSO) administered pursuant to Sections 290.04 to 290.06, inclusive, if applicable.

(D) The probation officer may also include in the report his or her recommendation of both of the following:

(i) The amount the defendant should be required to pay as a restitution fine pursuant to subdivision (b) of Section 1202.4.

(ii) Whether the court shall require, as a condition of probation, restitution to the victim or to the Restitution Fund and the amount thereof.

(E) The report shall be made available to the court and the prosecuting and defense attorneys at least five days, or upon request of the defendant or prosecuting attorney nine days, prior to the time fixed by the court for the hearing and determination of the report, and shall be filed with the clerk of the court as a record in the case at the time of the hearing. The time within which the report shall be made available and filed may be waived by written stipulation of the prosecuting and defense attorneys that is filed with the court or an oral stipulation in open court that is made and entered upon the minutes of the court.

(3) At a time fixed by the court, the court shall hear and determine the application, if one has been made, or, in any case, the suitability of probation in the particular case. At the hearing, the court shall consider any report of the probation officer, including the results of the SARATSO, if applicable, and shall make a statement that it has considered the report, which shall be filed with the clerk of the court as a record in the case. If the court determines that there are circumstances in mitigation of the punishment prescribed by law or that the ends of justice would be served by granting probation to the person, it may place the person on probation. If probation is denied, the clerk of the court shall immediately send a copy of the report to the Department of Corrections and Rehabilitation at the prison or other institution to which the person is delivered.

(4) The preparation of the report or the consideration of the report by the court may be waived only by a written stipulation of the prosecuting and defense attorneys that is filed with the court or an oral stipulation in open court that is made and entered upon the minutes of the court, except that a waiver shall not be allowed unless the court consents thereto. However, if the defendant is ultimately sentenced and committed to the state prison, a probation report shall be completed pursuant to Section 1203c.

(c) If a defendant is not represented by an attorney, the court shall order the probation officer who makes the probation report to discuss its contents with the defendant.

(d) If a person is convicted of a misdemeanor, the court may either refer the matter to the probation officer for an investigation and a report or summarily pronounce a conditional sentence. If the person was convicted of an offense that requires him or her to register as a sex offender pursuant to Sections 290 to 290.023, inclusive, or if the probation officer recommends that the court, at sentencing, order the offender to register as a sex offender pursuant to Section 290.006, the court shall refer the matter to the probation officer for the purpose of obtaining a report on the results of the State-Authorized Risk Assessment Tool for Sex Offenders administered pursuant to Sections 290.04 to 290.06, inclusive, if applicable, which the court shall

consider. If the case is not referred to the probation officer, in sentencing the person, the court may consider any information concerning the person that could have been included in a probation report. The court shall inform the person of the information to be considered and permit him or her to answer or controvert the information. For this purpose, upon the request of the person, the court shall grant a continuance before the judgment is pronounced.

(e) Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any of the following persons:

(1) Unless the person had a lawful right to carry a deadly weapon, other than a firearm, at the time of the perpetration of the crime or his or her arrest, any person who has been convicted of arson, robbery, carjacking, burglary, burglary with explosives, rape with force or violence, torture, aggravated mayhem, murder, attempt to commit murder, trainwrecking, kidnapping, escape from the state prison, or a conspiracy to commit one or more of those crimes and who was armed with the weapon at either of those times.

(2) Any person who used, or attempted to use, a deadly weapon upon a human being in connection with the perpetration of the crime of which he or she has been convicted.

(3) Any person who willfully inflicted great bodily injury or torture in the perpetration of the crime of which he or she has been convicted.

(4) Any person who has been previously convicted twice in this state of a felony or in any other place of a public offense which, if committed in this state, would have been punishable as a felony.

(5) Unless the person has never been previously convicted once in this state of a felony or in any other place of a public offense which, if committed in this state, would have been punishable as a felony, any person who has been convicted of burglary with explosives, rape with force or violence, torture, aggravated mayhem, murder, attempt to commit murder, trainwrecking, extortion, kidnapping, escape from the state prison, a violation of Section 286, 288, 288a, or 288.5, or a conspiracy to commit one or more of those crimes.

(6) Any person who has been previously convicted once in this state of a felony or in any other place of a public offense which, if committed in this state, would have been punishable as a felony, if he or she committed any of the following acts:

(A) Unless the person had a lawful right to carry a deadly weapon at the time of the perpetration of the previous crime or his or her arrest for the previous crime, he or she was armed with a weapon at either of those times.

(B) The person used, or attempted to use, a deadly weapon upon a human being in connection with the perpetration of the previous crime.

(C) The person willfully inflicted great bodily injury or torture in the perpetration of the previous crime.

(7) Any public official or peace officer of this state or any city, county, or other political subdivision who, in the discharge of the duties of his or her public office or employment, accepted or gave or offered to accept or give any bribe, embezzled public money, or was guilty of extortion.

(8) Any person who knowingly furnishes or gives away phencyclidine.

(9) Any person who intentionally inflicted great bodily injury in the commission of arson under subdivision (a) of Section 451 or who intentionally set fire to, burned, or caused the burning of, an inhabited structure or inhabited property in violation of subdivision (b) of Section 451.

(10) Any person who, in the commission of a felony, inflicts great bodily injury or causes the death of a human being by the discharge of a firearm from or at an occupied motor vehicle proceeding on a public street or highway.

(11) Any person who possesses a short-barreled rifle or a short-barreled shotgun under Section 33215, a machinegun under Section 32625, or a silencer under Section 33410.

(12) Any person who is convicted of violating Section 8101 of the Welfare and Institutions Code.

(13) Any person who is described in subdivision (b) or (c) of Section 27590.

(f) When probation is granted in a case which comes within subdivision (e), the court shall specify on the record and shall enter on the minutes the circumstances indicating that the interests of justice would best be served by that disposition.

(g) If a person is not eligible for probation, the judge shall refer the matter to the probation officer for an investigation of the facts relevant to determination of the amount of a restitution fine pursuant to subdivision (b) of Section 1202.4 in all cases where the determination is applicable. The judge, in his or her discretion, may direct the probation officer to investigate all facts relevant to the sentencing of the person. Upon that referral, the probation officer shall immediately investigate the circumstances surrounding the crime and the prior record and history of the person and make a written report to the court of his or her findings. The findings shall include a recommendation of the amount of the restitution fine as provided in subdivision (b) of Section 1202.4.

(h) If a defendant is convicted of a felony and a probation report is prepared pursuant to subdivision (b) or (g), the probation officer may obtain and include in the report a statement of the comments of the victim concerning the offense. The court may direct the probation officer not to obtain a statement if the victim has in fact testified at any of the court proceedings concerning the offense.

(i) A probationer shall not be released to enter another state unless his or her case has been referred to the Administrator of the Interstate Probation and Parole Compacts, pursuant to the Uniform Act for Out-of-State Probationer or Parolee Supervision (Article 3 (commencing with Section 11175) of Chapter 2 of Title 1 of Part 4) and the probationer has reimbursed the county that has jurisdiction over his or her probation case the reasonable costs of processing his or her request for interstate compact supervision. The amount and method of reimbursement shall be in accordance with Section 1203.1b.

(j) In any court where a county financial evaluation officer is available, in addition to referring the matter to the probation officer, the court may order the defendant to appear before the county financial evaluation officer for a financial evaluation of the defendant's ability to pay restitution, in which case the county financial evaluation officer shall report his or her findings regarding restitution and other court-related costs to the probation officer on the question of the defendant's ability to pay those costs.

Any order made pursuant to this subdivision may be enforced as a violation of the terms and conditions of probation upon willful failure to pay and at the discretion of the court, may be enforced in the same manner as a judgment in a civil action, if any balance remains unpaid at the end of the defendant's probationary period.

(k) Probation shall not be granted to, nor shall the execution of, or imposition of sentence be suspended for, any person who is convicted of a violent felony, as defined in subdivision (c) of Section 667.5, or a serious felony, as defined in subdivision (c) of Section 1192.7, and who was on probation for a felony offense at the time of the commission of the new felony offense.

(l) For any person granted probation prior to January 1, ~~2022~~ **2021**, at the time the court imposes probation, the court may take a waiver from the defendant permitting flash incarceration by the probation officer, pursuant to Section 1203.35.

~~SEC. 4.~~ **SEC. 2.** Section 1203.35 is added to the Penal Code, to read:

1203.35. (a) (1) In any case where the court grants probation or imposes a sentence that includes mandatory supervision, the county probation department is authorized to use flash incarceration for any violation of the conditions of probation or mandatory supervision if, at the time of granting probation or ordering mandatory supervision, the court obtains from the defendant a waiver to a court hearing prior to the imposition of a period of flash incarceration. ~~The waiver shall authorize the probation officer, if the person on probation or mandatory supervision does not agree to accept a recommended period of flash incarceration upon a finding of a violation, to address the alleged violation by filing a declaration or revocation request with the court. The probation department shall notify the court, public defender, district attorney, and sheriff of each imposition of flash incarceration.~~ **Probation shall not be denied for refusal to sign the waiver.**

(2) Each county probation department shall develop a response matrix that establishes protocols for the imposition of graduated sanctions for violations of the conditions of probation to determine appropriate interventions to include the use of flash incarceration.

(3) A supervisor shall approve the term of flash incarceration prior to the imposition of flash incarceration.

(4) ~~Probation shall not be denied for refusal to sign the waiver.~~ **Upon a decision to impose a period of flash incarceration, the probation department shall notify the court, public defender, district attorney, and sheriff of each imposition of flash incarceration.**

(5) If the person on probation or mandatory supervision does not agree to accept a recommended period of flash incarceration, upon a determination that there has been a violation, the probation officer is authorized to address the alleged violation by filing a declaration or revocation request with the court.

(b) For purposes of this section, “flash incarceration” is a period of detention in a county jail due to a violation of an offender’s conditions of probation or mandatory supervision. The length of the detention period may range between one and 10 consecutive days. Shorter, but if necessary more frequent, periods of detention for violations of an offender’s conditions of probation or mandatory supervision shall appropriately punish an offender while preventing the disruption in a work or home establishment that typically arises from longer periods of detention. In cases where there are multiple violations in a single incident, only one flash incarceration booking is authorized and may range between one and 10 consecutive days.

(c) This section shall not apply to any defendant sentenced pursuant to Section 1210.1.

(d) This section shall remain in effect only until January 1, ~~2022~~, **2021**, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, ~~2022~~ **2021**, deletes or extends that date.

~~SEC. 5.~~ **SEC. 3.** Section 4019 of the Penal Code is amended to read:

4019. (a) The provisions of this section shall apply in all of the following cases:

(1) When a prisoner is confined in or committed to a county jail, industrial farm, or road camp or any city jail, industrial farm, or road camp, including all days of custody from the date of arrest to the date on which the serving of the sentence commences, under a judgment of imprisonment or of a fine and imprisonment until the fine is paid in a criminal action or proceeding.

(2) When a prisoner is confined in or committed to the county jail, industrial farm, or road camp or any city jail, industrial farm, or road camp as a condition of probation after suspension of imposition of a sentence or suspension of execution of sentence in a criminal action or proceeding.

(3) When a prisoner is confined in or committed to the county jail, industrial farm, or road camp or any city jail, industrial farm, or road camp for a definite period of time for contempt pursuant to a proceeding other than a criminal action or proceeding.

(4) When a prisoner is confined in a county jail, industrial farm, or road camp or a city jail, industrial farm, or road camp following arrest and prior to the imposition of sentence for a felony conviction.

(5) When a prisoner is confined in a county jail, industrial farm, or road camp or a city jail, industrial farm, or road camp as part of custodial sanction imposed following a violation of postrelease community supervision or parole.

(6) When a prisoner is confined in a county jail, industrial farm, or road camp or a city jail, industrial farm, or road camp as a result of a sentence imposed pursuant to subdivision (h) of Section 1170.

(7) When a prisoner participates in a program pursuant to Section 1203.016 or Section 4024.2. Except for prisoners who have already been deemed eligible to receive credits for participation in a program pursuant to Section 1203.016 prior to January 1, 2015, this paragraph shall apply prospectively.

(b) Subject to the provisions of subdivision (d), for each four-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned by the sheriff, chief of police, or superintendent of an industrial farm or road camp.

(c) For each four-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has not satisfactorily complied with the reasonable rules and regulations established by the sheriff, chief of police, or superintendent of an industrial farm or road camp.

(d) This section does not require the sheriff, chief of police, or superintendent of an industrial farm or road camp to assign labor to a prisoner if it appears from the record that the prisoner has refused to satisfactorily perform labor as assigned or that the prisoner has not satisfactorily complied with the reasonable rules and regulations of the sheriff, chief of police, or superintendent of any industrial farm or road camp.

(e) A deduction shall not be made under this section unless the person is committed for a period of four days or longer.

(f) It is the intent of the Legislature that if all days are earned under this section, a term of four days will be deemed to have been served for every two days spent in actual custody.

(g) The changes in this section as enacted by the act that added this subdivision shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after the effective date of that act.

(h) The changes to this section enacted by the act that added this subdivision shall apply prospectively and shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after October 1, 2011. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law.

(i) (1) This section shall not apply, and no credits may be earned, for periods of flash incarceration imposed pursuant to Section 3000.08 or 3454.

(2) Credits earned pursuant to this section for a period of flash incarceration pursuant to Section 1203.35 shall, if the person's probation or mandatory supervision is revoked, count towards the term to be served.

(j) This section shall remain in effect only until January 1, ~~2022~~ **2021**, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, ~~2022~~ **2021**, deletes or extends that date.

~~SEC. 6.~~ **SEC. 4** Section 4019 is added to the Penal Code, to read:

4019. (a) The provisions of this section shall apply in all of the following cases:

(1) When a prisoner is confined in or committed to a county jail, industrial farm, or road camp or any city jail, industrial farm, or road camp, including all days of custody from the date of arrest to the date on which the serving of the sentence commences, under a judgment of imprisonment or of a fine and imprisonment until the fine is paid in a criminal action or proceeding.

(2) When a prisoner is confined in or committed to the county jail, industrial farm, or road camp or any city jail, industrial farm, or road camp as a condition of probation after suspension of imposition of a sentence or suspension of execution of sentence in a criminal action or proceeding.

(3) When a prisoner is confined in or committed to the county jail, industrial farm, or road camp or any city jail, industrial farm, or road camp for a definite period of time for contempt pursuant to a proceeding other than a criminal action or proceeding.

(4) When a prisoner is confined in a county jail, industrial farm, or road camp or a city jail, industrial farm, or road camp following arrest and prior to the imposition of sentence for a felony conviction.

(5) When a prisoner is confined in a county jail, industrial farm, or road camp or a city jail, industrial farm, or road camp as part of custodial sanction imposed following a violation of postrelease community supervision or parole.

(6) When a prisoner is confined in a county jail, industrial farm, or road camp or a city jail, industrial farm, or road camp as a result of a sentence imposed pursuant to subdivision (h) of Section 1170.

(7) When a prisoner participates in a program pursuant to Section 1203.016 or Section 4024.2. Except for prisoners who have already been deemed eligible to receive credits for participation in a program pursuant to Section 1203.016 prior to January 1, 2015, this paragraph shall apply prospectively.

(b) Subject to the provisions of subdivision (d), for each four-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned by the sheriff, chief of police, or superintendent of an industrial farm or road camp.

(c) For each four-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has not satisfactorily complied with the reasonable rules and regulations established by the sheriff, chief of police, or superintendent of an industrial farm or road camp.

(d) This section does not require the sheriff, chief of police, or superintendent of an industrial farm or road camp to assign labor to a prisoner if it appears from the record that the prisoner has refused to satisfactorily perform labor as assigned or that the prisoner has not satisfactorily complied with the reasonable rules and regulations of the sheriff, chief of police, or superintendent of any industrial farm or road camp.

(e) A deduction shall not be made under this section unless the person is committed for a period of four days or longer.

(f) It is the intent of the Legislature that if all days are earned under this section, a term of four days will be deemed to have been served for every two days spent in actual custody.

(g) The changes in this section as enacted by the act that added this subdivision shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after the effective date of that act.

(h) The changes to this section enacted by the act that added this subdivision shall apply prospectively and shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after October 1, 2011. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law.

(i) This section shall not apply, and no credits may be earned, for periods of flash incarceration imposed pursuant to Section 3000.08 or 3454.

(j) This section shall become operative on January 1, ~~2022~~ **2021**.

Date of Hearing: June 21, 2016

Counsel: Stella Choe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY

Reginald Byron Jones-Sawyer, Sr., Chair

SB 448 (Hueso) – As Amended January 4, 2016

As Proposed to be Amended in Committee

SUMMARY: Requires a person convicted of a felony, on or after January 1, 2017, for which the person is required to register as a sex offender, to register his or her Internet identifiers, as defined, to law enforcement. Specifically, **this bill:**

- 1) Replaces sections enacted by Proposition 35, also known as the Californians Against Sexual Exploitation Act (CASE Act), approved by California voters on November 6, 2012, that have been enjoined by pending litigation.
- 2) States that the provisions of this bill applies to a person who is convicted of a felony on or after January 1, 2017, requiring registration pursuant to the Sex Offender Registration Act, if a court determines at the time of sentencing that any of the following apply:
 - a) The person used the Internet to collect any private information to identify a victim of the crime to further the commission of the crime;
 - b) The person was convicted of specified sections prohibiting human trafficking and used the internet to traffic a victim of the crime; or,
 - c) The person was convicted of specified sections prohibiting child pornography and used the internet to prepare, publish, distribute, send, exchange, or download the obscene matter or matter depicting a minor engaging in sexual conduct, as defined.
- 3) Defines, for purposes of this bill, "Internet identifier" to mean "any electronic mail address or user name used for instant messaging or social networking that is actually used for direct communication between users on the Internet in a manner that makes the communication not accessible to the general public." "Internet identifier" does not include Internet passwords, date of birth, social security number, or PIN number.
- 4) Defines, for purposes of this bill, "private information" to mean "any information that identifies or describes an individual, including, but not limited to, his or her name; electronic mail, chat, instant messenger, social networking, or similar name used for Internet communication; social security number; account numbers; passwords; personal identification numbers; physical description; physical location; home address; home telephone number; education; financial matters; medical or employment history; and statements made by, or attributed to, the individual."
- 5) Requires persons subject to the bill's provisions to send written notice to the law enforcement agency or agencies with which he or she is currently registered when he or she establishes or

changes an Internet identifier within 30 working days of the addition or change, as specified, and requires the law enforcement agency to make this information available to the Department of Justice (DOJ).

- 6) Specifies that a person who fails to provide his or her Internet identifiers, as required by this bill, is guilty of a misdemeanor, punishable by imprisonment in the county jail not to exceed six months.
- 7) Excludes Internet identifiers from the information that law enforcement may disclose to the public regarding a person required to register as a sex offender when necessary to ensure the public safety concerning that specific person.
- 8) Provides, notwithstanding any other law, a designated law enforcement entity shall only use an Internet identifier or release that Internet identifier to another law enforcement entity, for the purpose of investigating a sex-related crime, a kidnapping, or human trafficking.
- 9) Authorizes a designated law enforcement entity to disclose or authorize persons or entities to disclose an Internet identifier if required by court order.
- 10) States the Legislative finding and declaration that in order to protect the rights afforded by the First Amendment to the United States Constitution, it is necessary that Internet identifier information provided to law enforcement agencies by registrable sex offenders as part of their registration not be made generally available to the public.
- 11) States that it is the intent of the Legislature to further the objectives of the CASE Act, an initiative measure enacted by the approval of Proposition 35 at the November 6, 2012, statewide general election, by amending its provisions to conform with the requirements of the court in the case of *Doe v. Harris* (Case numbers 13-15263 and 13-15267).

EXISTING LAW:

- 1) Requires a person convicted of enumerated sex offenses and sexually-related human trafficking crimes to register within five working days of coming into a city or county, with law enforcement officials, as specified. (Pen. Code, § 290.)
- 2) Provides generally that a person's sex offender registration must be updated annually, within five working days of a registrant's birthday. (Pen. Code, § 290.012, subd. (a).)
- 3) Specifies that a transient sex offender registrant must register in the jurisdiction where the registrant is physically present every 30 days, as specified, as well as annually, within five working days' of the registrant's birthday. (Pen. Code, § 290.011.)
- 4) States that sex offender registrants must provide the following information:
 - a) A signed statement giving information as required by the DOJ and giving the name and address of the person's employer and place of employment;
 - b) The fingerprints and a current photograph of the person taken by the registering official;

- c) The license plate number of any vehicle owned by, regularly driven by, or registered in the name of the person;
 - d) A signed statement by the registrant acknowledging that he or she may have a duty to register in any other state upon relocation; and,
 - e) Adequate proof of residence. (Pen. Code, § 290.015.)
- 5) Provides that it is a crime for any person who is required to register to willfully violate the requirements of the Sex Offender Registration Act. (Pen. Code § 290.018.)
 - 6) States that a person who is required to register as a sex offender based on a misdemeanor conviction who willfully violates any requirement of the Sex Offender Registration Act is guilty of a misdemeanor. (Pen. Code § 290.018, subd. (a).)
 - 7) Provides that a person who is required to register as a sex offender based on a felony conviction who willfully violates any requirement of the Sex Offender Registration Act is guilty of a felony. (Pen. Code § 290.018, subd. (b).)
 - 8) Specifies that any person who fails to provide proof of residence regardless of the offense upon which the duty to register is based, is guilty of a misdemeanor punishable by imprisonment in a county jail not exceeding six months. (Pen. Code, § 290.018, subd. (h).)

FISCAL EFFECT: Unknown.

COMMENTS:

- 1) **Author's Statement:** According to the author, "In November of 2012 California voters overwhelmingly approved Proposition 35, also known as the Californians Against Sexual Exploitation Act (CASE Act). The act is the most popular initiative in California's history, and was approved with 81% of the vote and is the first initiative to receive over 10 million votes. California voters wanted to insure that sex offenders provide their online identities to law enforcement. Unfortunately, the 9th Circuit Court of Appeals has rendered that portion of the proposition unconstitutional. This bill addresses those constitutional concerns.

"The internet, with all of its benefits, has become a place for sexual predators to thrive. In June of this year the federal government in Operation Broken Heart arrested 1140 child predators in 41 states that were using the internet to distribute child pornography, entice children for sexual purposes, sell children into prostitution, and engage in sexual tourism. This bill would ensure that sex offenders who have already used the internet in the commission of their crime provide their online identifiers to law enforcement. This vital tool will assist law enforcement if they ever have to investigate these individuals again for future violations."

- 2) **Sex Offender Registration:** Existing law specifies that if a person has been convicted of a sexually based offense, he or she is required to register as a sex offender. (Pen. Code, § 290, subd. (c) (includes all offenses where registration is required if committed on or after July 1, 1944).) California requires sex offenders to register for life, unlike some other jurisdictions that have a tiering system in place that dictates the duration of time an offender must register

as a sex offender. This means that even after a person has completed probation or parole, the person will still be monitored as a sex offender for the rest of his or her life. (Pen. Code, § 290, subd. (b).)

"The purpose of [Penal Code Section 290] is to assure that persons convicted of the crimes enumerated therein shall be readily available for police surveillance at all times because the Legislature deemed them likely to commit similar offenses in the future. The statute is thus regulatory in nature, intended to accomplish the government's objective by mandating certain affirmative acts." (*In re Leon Casey Alva* (2004) 33 Cal.4th 254, 264.)

The registration statute does not distinguish crimes based on severity and instead requires any person convicted of a listed crime to register annually within five days of his or her birthday. (Pen. Code, § 290.012, subd. (a).) Transient offenders, however, must register every 30 days in addition to the annual registration. (Pen. Code, § 290.011.) Although most registerable offenses are felonies, there some alternate felony/misdemeanor penalties and a few straight misdemeanors. (Pen. Code, § 243.4 (sexual battery); Pen. Code, § 266c (obtaining sexual consent by fraud); Pen. Code, §§ 311.1, 311.2(c), 311.4, 311.11 (child pornography); Pen. Code, § 647.6 (annoying or molesting a child); and Pen. Code, § 314(1)(2) (indecent exposure).)

- 3) **Proposition 35:** In November of 2012, California voters enacted Proposition 35, which modified many provisions of California's human trafficking laws. Specifically, Proposition 35 expanded the definition of human trafficking and increased criminal penalties and fines for human trafficking offenses. The proposition specified that the fines collected are to be used for victim services and law enforcement. In criminal trials, the proposition makes evidence of sexual conduct by a victim of human trafficking inadmissible for the purposes of attacking the victim's credibility or character in court. The proposition also lowered the evidentiary requirements for showing of force in cases of minors.

Proposition 35 also required all registered sex offenders to provide the names of their Internet providers and identifiers to local law enforcement agencies. Such identifiers include e-mail addresses, user names, screen names, or other personal identifiers for Internet communication and activity. The proposition required a registrant who changes his or her Internet service account or changes or adds an Internet identifier to notify law enforcement within 24 hours of such changes. (See Proposition 35 voter guide available at the Secretary of State's website, <<http://www.voterguide.sos.ca.gov/past/2012/general/propositions/35/analysis.htm>> (as of Apr. 22, 2015).)

Immediately following the passage of Proposition 35, a District Court granted an order enjoining the implementation of the parts of the proposition that requires registered sex offenders to provide identifying information about their online accounts to local law enforcement agencies. On November 18, 2014, the Ninth Circuit Court affirmed the District Court's order granting the preliminary injunction, concluding that "Appellees are likely to succeed on the merits of their First Amendment challenge." (See *Doe v. Harris*, 2014 U.S. App. LEXIS 21808 (9th Cir. Nov. 18, 2014).)

Due to litigation, the provisions in Proposition 35 related to Internet identifiers have never gone into effect. Currently, these provisions are pending a permanent injunction because the court has declared them to violate the First Amendment of the United States Constitution and

therefore cannot be enforced. (See Order Staying Case of April 7, 2015 and Scheduling Order of October 26, 2015, 12-cv-05713-THE, *Doe v. Harris*.) Should this bill be signed into law, the bill's contents will likely have to be reviewed by the lower court that issued the original injunction to determine whether the Constitutional concerns have been addressed.

- 4) **First Amendment Considerations:** The First Amendment to the United States Constitution guarantees to all citizens the right to freedom of speech and association. The pertinent Clause of the First Amendment, applied to the States through the Fourteenth amendment. (*Thornhill v. Alabama*, 310 U.S. 88, 95 (1940) provides that "Congress shall make no law . . . abridging the freedom of speech" (United States Constitution. Amend. I.) Generally, sex offenders who have completed their terms of imprisonment and completed parole have all of the other rights and benefits accorded to all citizens.

In *Reno v. ACLU* (1997) 521 U.S. 844, the Supreme Court stated that "The Internet is an international network of interconnected computers . . . enab[ling] tens of millions of people to communicate with one another and to access vast amounts of information from around the world. The Internet is a unique and wholly new medium of worldwide human communication." (Id. at 850.)

"Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods. These methods are constantly evolving and difficult to categorize precisely. [A]ll of these methods can be used to transmit text; most can transmit sound, pictures and moving video images. Taken together, these tools constitute a unique medium – known to its members as cyberspace - located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet."

Following its expansive discussion of the many benefits of the Internet, the Court turned its attention to First Amendment issues, finding that the "CDA [Communications Decency Act] is a content-based regulation of speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech," citing *Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, 1048-1051. The Court further stated that the CDA, as a criminal statute, "may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." As a practical matter, this increased deterrent effect, coupled with the risk of discriminatory enforcement of vague regulations, poses greater First Amendment concerns than those implicated by the civil regulations reviewed in *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727 (1996).

"Given the vague contours of the statute, it unquestionably silences some speakers whose messages would be entitled to constitutional protection. The CDA's burden on protected speech cannot be justified if it could be avoided by a more carefully drafted statute. We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." (*Id.* at 874.)

The Court further held that the Government may not reduce the adult population to only what

is fit for children. "Regardless of the strength of the government's interest in protecting children, the level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox," citing *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74-75 (1983).

The Court concluded, "As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship." (*Id.* at 885.)

The United States Supreme Court reaffirmed the principles recited by *Reno v. ACLU*, *supra*, in *Ashcroft v. ACLU* (2004) 542 U.S. 656, when it stated, "The purpose [of the strict scrutiny test] is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to assure that legitimate speech is not chilled or punished. For that reason, the test does not begin with the status quo of existing regulations, then ask whether the challenged restriction has some additional ability to achieve Congress' legitimate interest. Any restriction on speech could be justified under that analysis. Instead, the court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives." (*Id.*)

In *Ashcroft v. The Free Speech Coalition* (2002) 535 U.S. 234, the Supreme Court further stated that "the mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it. The government 'cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts,' " citing *Stanley v. Georgia* (1969) 394 U.S. 557, 566. First amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.

"[T]he government may not prohibit speech because it increases the chances that an unlawful act will be committed at some indefinite future time," *Ashcroft v. The Free Speech Coalition*, *supra*, at 253, citing *Hess v. Indiana*, 414 U.S. 105, 108 (1973). "[T]he government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse. Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct." (*Ashcroft*, *supra*, at 253-254.)

The provisions in the CASE Act that this bill seeks to replace have been found to violate the First Amendment. (*Doe v. Harris* (9th Cir. 2014) 772 F.3d 563.) To begin its analysis, the Ninth Circuit Court of Appeal determined the Act to be a content-neutral restriction, even though the Act singles out registered sex-offenders as a category of speakers. (*Id.* at 575.) The Court's rationale was that since the restrictions in the Act did not target certain types of speech, it was content-neutral, thus intermediate scrutiny was applied. In order to survive this standard, the Act must be "narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." (*Id.* at 576-577, citing *Ward v. Rock Against Racism* (1989) 491 U.S. 781, 791.) The Court acknowledged that California has a substantial interest in protecting children from sex offenders who use the internet to facilitate the internet to facilitate that exploitation. (*Id.* at

577.) However, the statute must not "burden substantially more speech than is necessary to further the government's legitimate interests." (*Ibid.*)

The Court concluded that the statute violated the First Amendment by unnecessarily chilling speech in at least three ways: (1) the Act does not make clear what sex offenders are required to report, (2) there are insufficient safeguards preventing the public release of the information sex offenders do report, and (3) the 24-hour reporting requirement is onerous and overbroad. (*Ibid.*) This bill narrows the applicability of its requirements and places safeguards on when this information should be disclosed in order to address these specific concerns.

- 5) **Constitutional Challenges to Similar Policy in Other Jurisdictions:** Recently similar statutes have been found to be unconstitutional in Illinois, Michigan and Nebraska. In Illinois, a state court ruled that an Illinois law that requires all email addresses and sites a sex offender uses or plans to use, including Facebook and Ebay, to be registered with police is overly broad and therefore unconstitutional. The judge that issued the order stated that "ordering a sex offender to report all access to Internet sites 'clearly chills offenders from engaging in expressive activity that is otherwise perfectly proper, and the statute is therefore insufficiently narrow.'" He additionally noted that the purpose of restrictions on sex offenders who live in the community "are not meant as a penalty, but for the safety of those living around them." (Brady-Lunny, "Judge: Sex Offender Rule Unconstitutional" <http://www.pantagraph.com/news/judge-sex-offender-requirement-is-unconstitutional/article_8c569d46-b7a8-5175-8359-dfe58c0ab7a6.html> (June 11, 2015).)

Michigan and Nebraska have also had similar statutes enjoined or held unconstitutional. (*Doe v. Snyder*, 2015 U.S. Dist. LEXIS 41675 (E.D.Mich. Mar. 13, 2015); (*Doe v. Nebraska* (D.Neb. 2012) 898 F. Supp. 2d 1086).) On the other hand, the Tenth Circuit Court found that Utah's statute did not violate the Constitution. (*Doe v. Schurtleff* (10th Cir. 2010) 628 F.3d 1217.) The rulings by courts in these other jurisdictions are not binding on California courts. Thus, whether this bill adequately addresses the Ninth Circuit Court's concerns raised in *Doe v. Harris* (2014 U.S. App. LEXIS 21808 (9th Cir. Nov. 18, 2014)) is yet to be determined.

- 6) **Argument in Support:** According to *Safer California Foundation*, a co-sponsor of this bill, "In order to provide law enforcement with a tool to investigate sex trafficking online, Proposition 35 required all registered sex offenders in California to submit their Internet identifiers to the local law enforcement agencies in the jurisdiction in which they are registered.

"Between July 1, 2010 and June 30, 2012, California's nine anti-trafficking task forces initiated 2,552 investigations, identified 1,277 victims of human trafficking, and arrested 1,798 individuals. 72% were Americans.

"In the age of the internet, human trafficking has become increasingly easier for traffickers to find and abuse their victims. According to a 2012 report by the Attorney General, 'The business of sex trafficking, in particular, has moved online. Traffickers use the Internet to increase their reach, both in recruiting victims through social media and finding clients via advertisement posted on classified advertising websites.'"

- 7) **Argument in Opposition:** According to *California Reform Sex Offender Laws*, "Requiring an individual to reveal his or her internet identifier is a violation of that individual's

constitutional right of free speech. Specifically, it is a violation of the First Amendment of the U.S. Constitution which protects a person's right to exercise free of speech 'anonymously.'

"The U.S. Supreme Court recently determined: 'Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights and of the First Amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society.' *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 357 (1995)

"If SB 448 becomes law, the anonymity of registered citizens, who are unpopular individuals in today's intolerant society, would be suppressed. That is, they will be unable to express their opinions on topics such as SB 448 due to fear of retaliation.

"The right of anonymous speech is of great importance in the context of internet sites. The U.S. Supreme Court has strongly implied and lower appellate courts have affirmatively ruled that when accessed from one's home the internet constitutes a "public forum" for purposes of the First Amendment. *Doe v. Harris*, 772 F.3d 563, 574 (9th Cir. 2014), quoting *Reno v. ACLU*, 521 U.S. 844, 870 (1997)."

8) **Prior Legislation:**

- a) AB 755 (Galgiani), of the 2011-12 Legislation Session, would have required every registered sex offender to inform the law enforcement agency with which he or she last registered of all Internet identifiers or service providers and must sign a statement acknowledging this responsibility. AB 755 failed passage in this Committee.
- b) AB 543 (Torres), of the 2011-12 Session, would have made it a misdemeanor, punishable by up to six months in the county jail and/or a fine of not more than \$1,000, for any person who is granted probation or placed on parole for the conviction of a crime that requires him or her to register as a sex offender to use any Internet social networking Web site, as defined, during that period of probation or parole if the victim of the offense was under 18 years of age at the time of the offense and the Internet was used in the commission of the crime. AB 543 failed passage in the Committee on Appropriations.
- c) AB 653 (Galgiani), of the 2011-12 Legislation Session, would have required a person required to register as a sex offender report his or her Internet accounts and Internet identifiers, defined to include e-mail addresses and designations used for the purposes of chatting, instant messaging, social networking, or other similar Internet communication, to local law enforcement. AB 653 died in this Committee.
- d) AB 179 (Portantino), of the 2009-10 Legislative Session, would have mandated a person required to register as a sex offender, or a person who is released as a sexually violent predator, as specified, to report all e-mail addresses and IM identities at the time of registration. AB 179 was considerably narrowed to address costs and was ultimately gutted and amended into a bill related to corporate taxation laws.
- e) AB 1850 (Galgiani), of the 2009-10 Legislative Session, provided that any person sentenced to probation or released on parole for an offense that requires him or she to

register as a sex offender, as specified, from using the Internet under certain circumstances. AB 1850 was held on the Assembly Appropriations Committee's Suspense File.

- f) AB 2208 (Torres), of the 2009-10 Legislative Session, provided that, commencing January 1, 2011, in any case in which a defendant is granted probation or parole for an offense that requires him or her to register as a sex offender, as specified, and either the victim of the offense was under 18 years of age at the time of the offense, or the Internet was used in the commission of the crime, the defendant shall be prohibited from accessing an Internet social networking Web site during the period of time he or she is on probation or parole. AB 2208 was held on the Assembly Appropriations Committee's Suspense file.
- g) SB 1204 (Runner), of the 2009-10 Legislative Session, requires every registered sex offender to inform the law enforcement agency with which he or she last registered of all of his or her online addresses, e-mail addresses, and IM user names by December 31, 2011 and thereafter at the time of original registration and within 30 days of establishing a new online account. This information, may, upon request, be shared with the DOJ or other law enforcement agencies. SB 1204 was held on the Assembly Appropriations Committee's Suspense File.
- h) AB 841 (Portantino), of the 2007-08 Legislative Session, would have provided that any time a person required to register or re-register as a sex offender, as specified, he or she shall provide all e-mail addresses and IM addresses that he or she may use or is using. AB 841 was significantly narrowed in Assembly Appropriations Committee and ultimately gutted and amended in the Senate into a bill related to health care.

REGISTERED SUPPORT / OPPOSITION:

Support

Safer California Foundation (Co-Sponsor)
San Diego Police Officers Association Inc. (Co-Sponsor)
Association of Deputy District Attorneys
Association for Los Angeles Deputy Sheriffs
California Against Slavery
California Association of Code Enforcement Officers
California College and University Police Chiefs Association
California Narcotic Officers Association
Crime Victims United of California
Los Angeles County District Attorney's Office
Los Angeles County Probation Officers' Union AFCSME, Local 685
Los Angeles Deputy Sheriffs
Los Angeles Police Protective League
Peace Officers Research Association of California
Sacramento County District Attorney's Office
Riverside Sheriffs' Association

Opposition

California Reform Sex Offender Laws
Legal Services for Prisoners with Children

15 private individuals

Analysis Prepared by: Stella Choe / PUB. S. / (916) 319-3744

Amendments Mock-up for 2015-2016 SB-448 (Hueso (S))

*****Amendments are in BOLD*****

Mock-up based on Version Number 95 - Amended Assembly 1/4/16
Submitted by: Stella Choe, Public Safety

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. It is the intent of the Legislature to further the objectives of the Californians Against Sexual Exploitation Act, an initiative measure enacted by the approval of Proposition 35 at the November 6, 2012, statewide general election, by amending its provisions to conform with the requirements of the court in the case of Doe v. Harris (Case numbers 13-15263 and 13-15267).

SEC. 2. Section 290.012 of the Penal Code is amended to read:

290.012. (a) Beginning on his or her first birthday following registration or change of address, the person shall be required to register annually, within five working days of his or her birthday, to update his or her registration with the entities described in subdivision (b) of Section 290. At the annual update, the person shall provide current information as required on the Department of Justice annual update form, including the information described in paragraphs (1) to (4), inclusive, of subdivision (a) of Section 290.015. The registering agency shall give the registrant a copy of the registration requirements from the Department of Justice form.

(b) In addition, every person who has ever been adjudicated a sexually violent predator, as defined in Section 6600 of the Welfare and Institutions Code, shall, after his or her release from custody, verify his or her address no less than once every 90 days and place of employment, including the name and address of the employer, in a manner established by the Department of Justice. Every person who, as a sexually violent predator, is required to verify his or her registration every 90 days, shall be notified wherever he or she next registers of his or her increased registration obligations. This notice shall be provided in writing by the registering agency or agencies. Failure to receive this notice shall be a defense to the penalties prescribed in subdivision (f) of Section 290.018.

(c) In addition, every person subject to the Act, while living as a transient in California, shall update his or her registration at least every 30 days, in accordance with Section 290.011.

(d) No entity shall require a person to pay a fee to register or update his or her registration pursuant to this section. The registering agency shall submit registrations, including annual updates or changes of address, directly into the Department of Justice California Sex and Arson Registry (CSAR).

SEC. 3. Section 290.014 of the Penal Code is amended to read:

290.014. (a) If any person who is required to register pursuant to the Act changes his or her name, the person shall inform, in person, the law enforcement agency or agencies with which he or she is currently registered within five working days. The law enforcement agency or agencies shall forward a copy of this information to the Department of Justice within three working days of its receipt.

~~(b)(1) If any person who is required to register pursuant to the Act for a crime where the use of the Internet was essential to the commission of the crime adds or changes an Internet identifier, as described in Section 290.024, the person shall send written notice of the addition or change to the law enforcement agency or agencies with which he or she is currently registered within five working days. Each person to whom this paragraph applies at the time this paragraph becomes effective shall immediately provide the information required by this paragraph within five working days.~~

~~(2)(A) A law enforcement agency to which an Internet identifier is submitted pursuant to this subdivision, Section 290.012, or Section 290.015 shall make the Internet identifier available to the Department of Justice.~~

~~(B) Except as provided in subparagraph (A), a law enforcement agency to which an Internet identifier is submitted pursuant to this subdivision, Section 290.012, or Section 290.015 may only release that Internet identifier to another law enforcement agency for the sole purpose of preventing or investigating a sex-related crime, a kidnapping, or human trafficking.~~

~~(C) Notwithstanding Sections 290.45 and 290.46, a law enforcement agency shall not disclose an Internet identifier submitted pursuant to this subdivision, Section 290.012, or Section 290.015 to the public, except that the Attorney General may disclose an Internet identifier to another person if the Attorney General has determined, based on specific, articulable facts, that the disclosure is likely to protect members of the public from sex-related crimes, kidnappings, or human trafficking, and the person to whom the disclosure is made signs an oath promising to use the information only for the identified purpose, to maintain the confidentiality of the information, and to refrain from disclosing the information to anyone who has not been granted access to the information by the Attorney General.~~

(b) If any person who is required to register Internet identifiers pursuant to Section 290.024 adds or changes an Internet identifier, as defined in Section 290.024, the person shall send written notice by mail of the addition or change to the law enforcement agency or agencies with which

he or she is currently registered within 30 working days of the addition or change. The law enforcement agency or agencies shall make the information available to the Department of Justice.

SEC. 4. Section 290.015 of the Penal Code, as amended November 6, 2012, by initiative Proposition 35, Section 12, is amended to read:

290.015. (a) A person who is subject to the Act shall register, or reregister if he or she has previously registered, upon release from incarceration, placement, commitment, or release on probation pursuant to subdivision (b) of Section 290. This section shall not apply to a person who is incarcerated for less than 30 days if he or she has registered as required by the Act, he or she returns after incarceration to the last registered address, and the annual update of registration that is required to occur within five working days of his or her birthday, pursuant to subdivision (a) of Section 290.012, did not fall within that incarceration period. The registration shall consist of all of the following:

(1) A statement in writing signed by the person, giving information as shall be required by the Department of Justice and giving the name and address of the person's employer, and the address of the person's place of employment if that is different from the employer's main address.

(2) The fingerprints and a current photograph of the person taken by the registering official.

(3) The license plate number of any vehicle owned by, regularly driven by, or registered in the name of the person.

~~(4) If the person is required to register for a crime where the use of the Internet was essential to the commission of the crime, a list of any and all Internet identifiers used by the person for communicative purposes, as defined in Section 290.024.~~

(4) A list of all Internet identifiers actually used by the person, as required by Section 290.024.

(5) A statement in writing, signed by the person, acknowledging that the person is required to register and update the information in paragraph (4), as required by this chapter.

(6) Notice to the person that, in addition to the requirements of the Act, he or she may have a duty to register in any other state where he or she may relocate.

(7) Copies of adequate proof of residence, which shall be limited to a California driver's license, California identification card, recent rent or utility receipt, printed personalized checks or other recent banking documents showing that person's name and address, or any other information that the registering official believes is reliable. If the person has no residence and no reasonable expectation of obtaining a residence in the foreseeable future, the person shall so advise the registering official and shall sign a statement provided by the registering official stating that fact. Upon presentation of proof of residence to the registering official or a signed statement that the

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person has no residence, the person shall be allowed to register. If the person claims that he or she has a residence but does not have any proof of residence, he or she shall be allowed to register but shall furnish proof of residence within 30 days of the date he or she is allowed to register.

(b) Within three days thereafter, the registering law enforcement agency or agencies shall forward the statement, fingerprints, photograph, and vehicle license plate number, if any, to the Department of Justice.

(c) (1) If a person fails to register in accordance with subdivision (a) after release, the district attorney in the jurisdiction where the person was to be paroled or to be on probation may request that a warrant be issued for the person's arrest and shall have the authority to prosecute that person pursuant to Section 290.018.

(2) If the person was not on parole or probation or on postrelease community supervision or mandatory supervision at the time of release, the district attorney in the following applicable jurisdiction shall have the authority to prosecute that person pursuant to Section 290.018:

(A) If the person was previously registered, in the jurisdiction in which the person last registered.

(B) If there is no prior registration, but the person indicated on the Department of Justice notice of sex offender registration requirement form where he or she expected to reside, in the jurisdiction where he or she expected to reside.

(C) If neither subparagraph (A) nor (B) applies, in the jurisdiction where the offense subjecting the person to registration pursuant to this Act was committed.

SEC. 5. Section 290.015 of the Penal Code, as amended by Section 17 of Chapter 867 of the Statutes of 2012, is repealed.

SEC. 6. Section 290.018 of the Penal Code, is amended to read:

290.018. (a) Any person who is required to register under the Act based on a misdemeanor conviction or juvenile adjudication who willfully violates any requirement of the act is guilty of a misdemeanor punishable by imprisonment in a county jail not exceeding one year.

(b) Except as provided in subdivisions (f), (h), and (j), any person who is required to register under the act based on a felony conviction or juvenile adjudication who willfully violates any requirement of the act or who has a prior conviction or juvenile adjudication for the offense of failing to register under the act and who subsequently and willfully violates any requirement of the act is guilty of a felony and shall be punished by imprisonment in the state prison for 16 months, or two or three years.

(c) If probation is granted or if the imposition or execution of sentence is suspended, it shall be a condition of the probation or suspension that the person serve at least 90 days in a county jail.

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The penalty described in subdivision (b) or this subdivision shall apply whether or not the person has been released on parole or has been discharged from parole.

(d) Any person determined to be a mentally disordered sex offender or who has been found guilty in the guilt phase of trial for an offense for which registration is required under the act, but who has been found not guilty by reason of insanity in the sanity phase of the trial, or who has had a petition sustained in a juvenile adjudication for an offense for which registration is required pursuant to Section 290.008, but who has been found not guilty by reason of insanity, who willfully violates any requirement of the act is guilty of a misdemeanor and shall be punished by imprisonment in a county jail not exceeding one year. For any second or subsequent willful violation of any requirement of the act, the person is guilty of a felony and shall be punished by imprisonment in the state prison for 16 months, or two or three years.

(e) If, after discharge from parole, the person is convicted of a felony or suffers a juvenile adjudication as specified in this act, he or she shall be required to complete parole of at least one year, in addition to any other punishment imposed under this section. A person convicted of a felony as specified in this section may be granted probation only in the unusual case where the interests of justice would best be served. When probation is granted under this act, the court shall specify on the record and shall enter into the minutes the circumstances indicating that the interests of justice would best be served by the disposition.

(f) Any person who has ever been adjudicated a sexually violent predator, as defined in Section 6600 of the Welfare and Institutions Code, and who fails to verify his or her registration every 90 days as required pursuant to subdivision (b) of Section 290.012, shall be punished by imprisonment in the state prison or in a county jail not exceeding one year.

(g) Except as otherwise provided in subdivision (f), any person who is required to register or reregister pursuant to Section 290.011 and willfully fails to comply with the requirement that he or she reregister no less than every 30 days is guilty of a misdemeanor and shall be punished by imprisonment in a county jail for at least 30 days, but not exceeding six months. A person who willfully fails to comply with the requirement that he or she reregister no less than every 30 days shall not be charged with this violation more often than once for a failure to register in any period of 90 days. Any person who willfully commits a third or subsequent violation of the requirements of Section 290.011 that he or she reregister no less than every 30 days shall be punished in accordance with either subdivision (a) or (b).

(h) Any person who fails to provide proof of residence as required by paragraph ~~(5)~~ (7) of subdivision (a) of Section 290.015, regardless of the offense upon which the duty to register is based, is guilty of a misdemeanor punishable by imprisonment in a county jail not exceeding six months.

(i) Any person who fails to provide his or her Internet identifiers, as required by paragraph (4) of Section 290.015, regardless of the offense upon which the duty to register is based, is guilty of a misdemeanor punishable in a county jail not exceeding six months.

(j) Any person who is required to register under the act who willfully violates any requirement of the act is guilty of a continuing offense as to each requirement he or she violated.

(k) In addition to any other penalty imposed under this section, the failure to provide information required on registration and reregistration forms of the Department of Justice, or the provision of false information, is a crime punishable by imprisonment in a county jail for a period not exceeding one year. Nothing in this subdivision shall be construed to limit or prevent prosecution under any applicable provision of law.

(l) Whenever any person is released on parole or probation and is required to register under the act but fails to do so within the time prescribed, the parole authority or the court, as the case may be, shall order the parole or probation of the person revoked. For purposes of this subdivision, "parole authority" has the same meaning as described in Section 3000.

~~SEC. 6.~~ SEC. 7. Section 290.024 of the Penal Code is amended to read:

290.024. For purposes of this ~~chapter,~~ *chapter*:

~~"Internet identifier" means an electronic mail address, user name, screen name, or similar identifier actually used to participate in online communications, including, but not limited to, Internet forum discussions, Internet chat room discussions, emailing, instant messaging, social networking, or similar methods of communicating online. For the purpose of this chapter, an "Internet identifier" does not include Internet passwords, or any electronic mail address, user name, screen name, or similar identifier used solely to read online content, or solely for transactions with a lawful commercial enterprise or government agency concerning a lawful commercial or governmental transaction with that enterprise or agency.~~

(a) A person who is convicted of a felony on or after January 1, 2016, 2017 requiring registration pursuant to the Act, shall register his or her Internet identifiers if a court determines at the time of sentencing that any of the following apply:

(1) The person used the Internet to collect any private information to identify a ~~the~~ victim of the crime to further the commission of the crime.

*(2) The person was convicted of a felony pursuant to subdivision (b) or (c) of Section 236.1 and used an electronic communication device, as defined under subdivision (b) of Section 653.2, ~~the~~ **internet** to traffic a ~~the~~ victim of the crime.*

*(3) The person was convicted of a felony pursuant to Chapter 7.5 (commencing with Section 311) and used an electronic communication device, as defined under subdivision (b) of Section 653.2, ~~the~~ **internet** to prepare, publish, distribute, send, exchange, or download the obscene matter or matter depicting a minor engaging in sexual conduct, as defined in subdivision (d) of Section 311.4.*

(b) For purposes of this chapter:

(1) "Internet identifier" means any electronic mail address or user name used for instant messaging or social networking that is actually used for direct communication between users on the Internet in a manner that makes the communication not accessible to the general public. "Internet identifier" does not include Internet passwords, date of birth, social security number, or PIN number.

(2) "Private information" means any information that identifies or describes an individual, including, but not limited to, his or her name; electronic mail, chat, instant messenger, social networking, or similar name used for Internet communication; social security number; account numbers; passwords; personal identification numbers; physical description; physical location; home address; home telephone number; education; financial matters; medical or employment history; and statements made by, or attributed to, the individual.

~~SEC. 7.~~ **SEC. 8.** *Section 290.45 of the Penal Code is amended to read:*

290.45. (a) (1) Notwithstanding any other ~~provision of~~ law, and except as provided in paragraph (2), any designated law enforcement entity may provide information to the public about a person required to register as a sex offender pursuant to Section 290, by whatever means the entity deems appropriate, when necessary to ensure the public safety based upon information available to the entity concerning that specific person.

(2) The law enforcement entity shall include, with the disclosure, a statement that the purpose of the release of information is to allow members of the public to protect themselves and their children from sex offenders.

(3) Community notification by way of an Internet Web site shall be governed by Section 290.46, and a designated law enforcement entity may not post on an Internet Web site any information identifying an individual as a person required to register as a sex offender except as provided in that section unless there is a warrant outstanding for that person's arrest.

(b) Information that may be provided pursuant to subdivision (a) may include, but is not limited to, the offender's name, known aliases, gender, race, physical description, photograph, date of birth, address, which shall be verified prior to publication, description and license plate number of the offender's vehicles or vehicles the offender is known to drive, type of victim targeted by the offender, relevant parole or probation conditions, crimes resulting in classification under this section, and date of release from confinement, but excluding information that would identify the victim. *It shall not include any Internet identifier submitted pursuant to this chapter.*

(c) (1) The designated law enforcement entity may authorize persons and entities who receive the information pursuant to this section to disclose information to additional persons only if the entity determines that disclosure to the additional persons will enhance the public safety and

identifies the appropriate scope of further disclosure. A law enforcement entity may not authorize any disclosure of this information by ~~its placement~~ *placing that information* on an Internet Web ~~site~~ *site, and shall not authorize disclosure of Internet identifiers submitted pursuant to this chapter, except as provided in subdivision (h).*

(2) A person who receives information from a law enforcement entity pursuant to paragraph (1) may disclose that information only in the manner and to the extent authorized by the law enforcement entity.

(d) (1) A designated law enforcement entity and its employees shall be immune from liability for good faith conduct under this section.

(2) Any public or private educational institution, day care facility, or any child care custodian described in Section 11165.7, or any employee of a public or private educational institution or day care facility which in good faith disseminates information as authorized pursuant to subdivision (c) shall be immune from civil liability.

(e) (1) Any person who uses information disclosed pursuant to this section to commit a felony shall be punished, in addition and consecutive to any other punishment, by a five-year term of imprisonment pursuant to subdivision (h) of Section 1170.

(2) Any person who uses information disclosed pursuant to this section to commit a misdemeanor shall be subject to, in addition to any other penalty or fine imposed, a fine of not less than five hundred dollars (\$500) and not more than one thousand dollars (\$1,000).

(f) For purposes of this section, “designated law enforcement entity” means the Department of Justice, every district attorney, the Department of Corrections, the Department of the Youth Authority, and every state or local agency expressly authorized by statute to investigate or prosecute law violators.

(g) The public notification provisions of this section are applicable to every person required to register pursuant to Section 290, without regard to when his or her crimes were committed or his or her duty to register pursuant to Section 290 arose, and to every offense described in Section 290, regardless of when it was committed.

(h) (1) Notwithstanding any other law, a designated law enforcement entity shall only use an Internet identifier submitted pursuant to this chapter, or release that Internet identifier to another law enforcement entity, for the purpose of investigating a sex-related crime, a kidnapping, or human trafficking.

(2) A designated law enforcement entity shall not disclose or authorize persons or entities to disclose an Internet identifier submitted pursuant to this chapter to the public or other persons, except as required by court order.

~~SEC. 7.~~~~SEC. 8.~~ **SEC. 9.** The Legislature finds and declares that ~~Section 3~~ of this act, which amends ~~Section 290.014~~ ~~290.45~~ of the Penal Code, imposes a limitation on the public's right of access to the meetings of public bodies or the writings of public officials and agencies within the meaning of Section 3 of Article I of the California Constitution. Pursuant to that constitutional provision, the Legislature makes the following findings to demonstrate the interest protected by this limitation and the need for protecting that interest:

In order to protect the rights afforded by the First Amendment to the United States Constitution, it is necessary that Internet identifier information provided to law enforcement agencies by registerable sex offenders as part of their registration not be made generally available to the public.

~~SEC. 8.~~~~SEC. 9.~~ **SEC. 10.** This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to protect the rights afforded by the First Amendment to the United States Constitution while furthering the objectives of the Californians Against Sexual Exploitation Act, an initiative measure enacted by the approval of Proposition 35 at the November 6, 2012, statewide general election, at the earliest possible time, it is necessary that this act take effect immediately.

Date of Hearing: June 21, 2016

Counsel: Stella Choe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY

Reginald Byron Jones-Sawyer, Sr., Chair

SB 759 (Anderson) – As Amended June 2, 2015

SUMMARY: Repeals the provision of law that makes inmates placed in a Security Housing Unit (SHU), or other specified segregation units ineligible to earn credits and instead requires the California Department of Corrections and Rehabilitation (CDCR) to establish regulations to allow those inmates to earn credits. Specifically, **this bill:**

- 1) Requires CDCR, no later than July 1, 2017, to establish regulations to allow specified inmates placed in a SHU, Psychiatric Services Unit (PSU), Behavioral Management Unit (BMU), or an Administrative Segregation Unit (ASU) to earn credits during the time he or she is in the SHU, PSU, BMU, or ASU.
- 2) Allows for regulations to establish separate classifications of serious disciplinary infractions to determine the rate of restoration of credits, the time period required before forfeited credits or a portion thereof may be restored, and the percentage of forfeited credits that may be restored for those time periods, not to exceed those percentages authorized for general population inmates.
- 3) States that the regulations shall provide for credit earning for inmates who successfully complete specific program performance objectives.

EXISTING LAW:

- 1) States that a person who is placed in a SHU, PSU, BMU, or an ASU for specified misconduct, or upon validation as a prison gang member or associate, is ineligible to earn custody credits during the time he or she is in the SHU, PSU, BMU, or the ASU for that misconduct, as specified. (Pen. Code, § 2933.6, subd. (a).)
- 2) Specifies the offenses for which an inmate, if placed in a SHU, PSU, BMU, or an ASU due to a violation of one of the offenses, is not eligible to receive credits. (Pen. Code, § 2933.6, subd. (b).)
- 3) Provides that the loss of credits prescribed above does not apply if the administrative finding of the misconduct is overturned or if the person is criminally prosecuted for the misconduct and is found not guilty. (Pen. Code, § 2933.6, subd. (c).)

FISCAL EFFECT: Unknown.

COMMENTS:

- 1) **Author's Statement:** According to the author, "California's prison system has five Security Housing Units (SHUs) managed by the California Department of Corrections and Rehabilitation (CDCR). These "supermax" facilities are used for the long-term isolation of prisoners because of rules violations or because of their perceived status as gang members or associates. Housing prisoners in long-term isolation has been widely condemned by human rights advocates. A 2011 report by the United Nations Special Rapporteur called on all countries to ban the practice except in very limited circumstances and only for very short durations.

"Prisoners are housed in cells averaging 2' x 10' for 23-24 hours per day, released only for showers and exercise in an enclosed cage. Both the large number of prisoners confined in these units and the length of time they spend there (the average length of a SHU term has been six years), demonstrate that our policies are much harsher than other states.

"In July 2011, prisoners housed in SHUs went on hunger strike to protest their conditions of confinement. This strike lasted 30 days. In the fall of 2011, prisoners again went on hunger strike for another 30 days. The CDCR subsequently initiated broad policy changes concerning gang validations and introduced a new Step Down Program to provide isolated prisoners with specific steps to earn their way out of the SHU. At the same time, prisoners who had been held in SHU for more than 10 years filed a class action lawsuit, supported by the Center for Constitutional Rights, Legal Services for Prisoners with Children and others, challenging practices related to long term isolation.

"The case, *Asker v. Brown*, was settled in September 2015 and is now in the process of being implemented. Under terms of the agreement, prisoners will no longer serve SHU terms for perceived gang affiliation. The settlement requires the CDCR to conduct hearings on everyone assigned to SHU because of gang affiliation to determine whether they should remain in solitary. So far over 1,000 hearings have been held and 80% of the prisoners housed in isolation have been cleared for transfer to general population. It is important to add that no significant incidents have resulted from these transfers."

- 2) **History of CDCR's Security Housing Units:** CDCR has SHUs in five of its institutions - Pelican Bay State Prison, California State Prison in Corcoran, California Correctional Institution in Tehachapi, California State Prison in Sacramento, and California Institution for Women.

Until recently, inmates were assigned to the SHU for two reasons. First, an inmate could be sent to the SHU for a determinate time period as punishment for violating the rules or regulations of the prison. Second, an inmate could be placed in the SHU for an indeterminate period of time if the inmate is validated as a member or associate of one of the designated prison gangs.

Historically, an inmate who was placed in the SHU as a validated gang member or associate would serve the remainder of his or her sentence in the SHU, unless the Institutional Gang Investigator determined that the inmate has had no gang activity for six years, or the inmate agrees to debrief. Debriefing requires the inmate to provide gang investigators with detailed information on alleged gang members and associates. Most SHU inmates would choose not to debrief for fear of their personal safety or fear of retribution against their families. The six-year inactive standard was also very difficult to meet because any innocuous art work or

communication could be interpreted as gang activity.

On July 1, 2011, approximately 5,300 inmates in nine CDCR institutions began refusing meals; the number of inmates peaked to more than 6,500 two days later. The number of inmates gradually decreased until the hunger strike ended on July 20, 2011. The hunger strike led by inmates housed in the Pelican Bay State Prison's SHU to protest the conditions of the SHU. The inmates had five core demands: (1) Individual accountability, rather than group punishment, indefinite SHU status, and restricted privileges; (2) Abolish debriefing policy and modify active/inactive gang status criteria; (3) Comply with U.S. Commission 2006 Recommendations regarding an end to long-term solitary confinement; (4) Provide adequate food; and, (5) Expand and provide constructive programming and privileges for indefinite SHU status inmates.

At the end of the hunger strike, CDCR officials agreed to do the following: authorize watchcaps for purchase and state issue; authorize wall calendars for purchase in canteen; authorization of exercise equipment in SHU yards; authorize annual photographs for disciplinary free inmates; approve proctors for college examinations; use CDCR ombudsman to monitor and audit food services; authorize sweatpants for purchase/annual package; authorize hobby items; and, allow one photo to family per year. CDCR also agreed to conduct comprehensive reviews of the SHU policies that include behavior-based components, increased privileges based on disciplinary-free behavior, a step-down process for SHU inmates, and a system that better defines and weighs necessary points in the validation process. (Office of the Inspector General, Immediate and Expedited Review and Assessment of CDCR's Response to the Issues Raised by the Hunger Strike (Oct. 17, 2011) pp. 1-2.)

Following the first hunger strike, CDCR implemented a 24-month pilot program entitled "Security Threat Group (STG) Identification, Prevention, and Management Instructional Memorandum" in October 2012. Under the STG Plan, gang members and affiliates were placed in a step-down program that provides for graduated housing, privileges, and personal interaction with the goal of integrating participants back into the general population of the prisons. There are five steps in the Step Down Program. An inmate must remain in Steps One and Two for a minimum of six months each. An inmate must remain in Steps Three and Four for minimum of one year each. Steps One through Four are completed in the SHU. Step Five is in the general population, but the inmate is monitored for gang activity. While there are recommended time frames for each step, there is no limitation on how long an inmate may remain in each step. Debriefing is still available for inmates who do not wish to participate or complete the step-down program.

The STG plan also changed how an inmate can be placed in the SHU. Under the previous rules, a validated gang member or associate can be placed in the SHU upon validation. Under the STG Plan, a validated associate must also have a rules violation in order to be placed in the SHU. However, a validated gang member may still be placed in the SHU upon validation. Additionally, the STG plan includes both prison gangs and street gangs, potentially allowing a more expansive group of inmates to be placed in the SHU.

On July 8, 2013, approximately 30,000 inmates joined in on a second hunger strike led by Pelican Bay State Prison SHU inmates. The inmates wanted more substantive changes to CDCR's policy for validating inmates as gang leaders or accomplices. Under the STG Plan,

gang members were still being placed in the SHU without requiring any rules violations and there was still no time limitation to how long a person may remain in the SHU based on gang affiliation. The hunger strike ended on September 5, 2013, with the promise of legislative hearings on the use and conditions of solitary confinement in California's prisons.

(<http://articles.latimes.com/2013/sep/05/local/la-me-ff-prison-strike-20130906>) (as of June 16, 2016.)

On October 9, 2013, the Legislature held a joint Assembly and Senate hearing on CDCR's STG pilot program. At the hearing, CDCR officials stated that there were about 4,000 inmates held in the SHUs and over half were there for alleged gang connections. There CDCR officials also discussed the implementation of the STG pilot program which involved conducting reviews of inmates in the SHU to determine whether their continued placement in the SHU was appropriate. CDCR expected that many inmates would be released to general population after those reviews took place. However, advocates noted that the STG program still did not provide a limit on the length of time a person could be placed in the SHU and still did not provide a meaningful review of the person's placement in the SHU by an entity outside of CDCR.

On June 2, 2014, a federal judge authorized hundreds of SHU inmates to join litigation filed on behalf of 10 inmates who had been in the SHU for more than 10 years challenging the state's use of solitary confinement on a prolonged basis as a violation of the Eighth Amendment's prohibition against cruel and unusual punishment. On September 1, 2015, CDCR settled the lawsuit. The terms of the settlement include moving to an offense-based system rather than prisoners being sent to solitary based solely on gang affiliation; there will be limits on how long an inmate can be placed in the SHU (although some inmates may still be placed in restricted housing which is not subject to the same limits); and prisoner representatives will be able to monitor the implementation of the settlement terms and meet with CDCR officials when to ensure compliance with the settlement terms. (See Settlement Terms, No. C 09-05796 CW, *Ashker v. Governor of the State of California, et al.* (9-1-15).)

- 3) **Argument in Support:** According to the *American Friends Service Committee*, the sponsor of this bill, "SB 759 is needed because prisoners in isolation have had no opportunity to earn credits towards release since these credits were removed in budget language in 2010 – without any legislative hearings or opportunities to question whether the policy made sense. One thing we do know is that it took away hope from many people whose sentences should have been shortened because they were not receiving disciplinary write-ups. It also costs the taxpayers a great deal of money for every extra year a person spends behind bars.

"As you know, California is under court order to reduce its prison population and to put in place permanent solutions to the overcrowding problem. In other words, a one time reduction will not satisfy the court. Earned credits are a way to provide incentives to people inside to program and prepare for release, while also providing structural ways to keep the population down.

"When the Department began to hold case by case reviews of everyone in SHU for other-than-disciplinary reasons, over 70% of the people receiving hearings have been approved for transfer to the general population. Since the court settlement in the Ashker case, in September 2015, such hearings have accelerated and 80% of people reviewed are being transferred to general population. There have been no significant incidents as a result of

these transfers. . . ."

4) **Prior Legislation:**

- a) AB 1652 (Ammiano), of the 2013-2014 Legislative Session, would have deleted the provision of law making a person who is placed in a SHU upon validation as a gang member or associate ineligible to earn custody credits. AB 1652 failed passage on the Assembly Floor.
- b) SB 892 (Hancock), of the 2013-2014 Legislative Session, would have placed additional due process procedures for determining if an inmate is a member of or an associate of a gang, and subject to placement in a SHU. SB 892 died on Assembly Floor.

REGISTERED SUPPORT / OPPOSITION:

Support

American Friends Service Committee (Sponsor)
Friends Committee on Legislation of California (Co-sponsor)
American Civil Liberties Union of California
California Attorneys for Criminal Justice
California Catholic Conference
Californians United for a Responsible Budget
Drug Policy Alliance
Ella Baker Center for Human Rights
Legal Services for Prisoners with Children
Prison Law Office

One private individual

Opposition

None

Analysis Prepared by: Stella Choe / PUB. S. / (916) 319-3744

Date of Hearing: June 21, 2016

Counsel: Sandy Uribe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY

Reginald Byron Jones-Sawyer, Sr., Chair

SB 813 (Leyva) – As Amended March 31, 2016

SUMMARY: Eliminates any statute of limitation for specified sex offenses. Specifically, **this bill:**

- 1) Provides that prosecution for the following offenses may commence at any time:
 - a) Rape, as specified;
 - b) Spousal rape, as specified;
 - c) Rape in concert, as specified;
 - d) Sodomy, as specified;
 - e) Lewd acts upon a child involving "substantial sexual conduct," as specified;
 - f) Continuous sexual abuse of a child;
 - g) Oral copulation, as specified; and,
 - h) Sexual penetration, as specified.
- 2) Specifies that the elimination of the statute of limitations shall only apply to crimes that were committed on or after January 1, 2017, or for which the statute of limitations that was in effect before January 1, 2017 has not run as of that date.
- 3) Makes technical conforming changes to related statutes.

EXISTING LAW:

- 1) Provides that there is no statute of limitations for crimes punishable by death, or by imprisonment in the state prison for life, or by life without the possibility of parole. (Pen. Code, § 799.)
- 2) Provides that prosecution for crimes punishable by imprisonment for eight years or more and not otherwise covered must be commenced within six years after commission of the offense. (Pen. Code, § 800.)

- 3) Provides that prosecution for other felonies punishable by less than eight years must be commenced within three years after commission of the offense. (Pen. Code, § 801.)
- 4) Provides that, notwithstanding any other time limitations, for specified sex crimes that are alleged to have been committed when the victim was under the age of 18, prosecution may be commenced any time prior to the victim's 40th birthday. (Pen. Code, § 801.1, subd. (a).)
- 5) Provides that prosecution for a felony offense requiring sex offender registration shall be commenced within 10 years after commission of the offense. (Pen. Code, § 801.1, subd. (b).)
- 6) Provides that a criminal complaint may be filed within one year after a report to a law enforcement agency that a person was the victim of a sexual offense while under the age of 18 years. To file such a complaint, the applicable limitation period must have expired and the alleged crime must have involved substantial sexual conduct corroborated by evidence, as specified. (Pen. Code, § 803, subd. (f).)
- 7) Provides that, notwithstanding any other limitation of time, a criminal complaint may be filed within one year of the date on which the identity of the suspect is conclusively established by deoxyribonucleic acid (DNA) testing if specified conditions are met. (Pen. Code, § 803, subd. (g)(1).)
- 8) Provides that if more than one time period described in the statute of limitations scheme applies, the time for commencing an action is governed by that period that expires the latest in time. (Pen. Code, § 803.6, subd. (a).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "The purpose of the 'Justice for Victims Act' is simple: To prevent rapists and sexual predators from evading legal consequences in California simply because the statute of limitations has run its course. Regardless of when a rape or sexual assault is discovered or reported, survivors of sexual offenses must have an opportunity to seek justice in a court of law. SB 813 does not change the burden of proof and victims will still have to prove their allegations in court. All this bill does is extend the opportunity for victims to have their day in court since there should never be an expiration date on justice."
- 2) **Statute of Limitations Generally:** 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. (Pen. Code, § 804.)

The statute of limitations serves several important purposes in a criminal prosecution, including staleness, prompt investigation, and repose. The statute of limitations protects persons accused of crime 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. With the passage of time, memory fades, witnesses die or otherwise become unavailable, and physical evidence becomes unobtainable or contaminated.

The statute of limitations also 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.

Additionally, the statute of limitations reflects 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 irrebuttable 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) 539 U.S. 607, 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." (*Id.* at p. 615.)

The amount of time a prosecuting agency may charge an alleged defendant varies based on the crime. In general, the limitations period is related to the seriousness of the offense as reflected in the length of punishment established by the Legislature. (*People v. Turner* (2005) 134 Cal.App.4th 1591, 1594-1595; see, e.g., Pen. Code, §§ 799-805.) After a comprehensive review of criminal statutes of limitation in 1984, the Law Revision Commission recommended that the length of a "limitations statute should generally be based on the seriousness of the crime." (17 Cal. Law Revision Com. Rep. (1984) p. 313.) The Legislature overhauled the entire statutory scheme with this recommendation in mind. In *People v. Turner, supra*, 134 Cal.App.4th 1591, the court summarized the recommendations of the Law Revision Commission:

The use of seriousness of the crime as the primary factor in determining the length of the applicable statute of limitations was designed to strike the right balance between the societal interest in pursuing and punishing those who commit serious crimes, and the importance of barring stale claims. It also served the procedural need to provid[e] predictability and promote uniformity of treatment for perpetrators and victims of all serious crimes. The commission suggested that the seriousness of an offense could easily be determined in the first instance by the classification of the crime as a felony rather than a misdemeanor. Within the class of felonies, a long term of imprisonment is a determination that it is one of the more serious felonies; and imposition of the death penalty or life in prison is a determination that society views the crime as the most serious. (*People v. Turner, supra*, 134 Cal.App.4th at pp. 1594-1595, citations omitted.)

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.)

The court is required to construe application of the statute of limitations strictly in favor of the defendants. (*People v. Zamora* (1976) 18 Cal.3d 538, 574; *People v. Lee* (2000) 82 Cal.App.4th 1352, 1357-1358.)

- 3) **Statute of Limitations for Sex Crimes:** The prosecution for a felony sex offense subject to mandatory sex offender registration must be commenced within 10 years after the commission of the offense. (Pen. Code, § 801.1, subd. (b).) Additionally, the statute of limitations for the sex offenses implicated in this bill (rape, sodomy, lewd and lascivious acts, continuous sexual abuse of a child, oral copulation, or forcible sexual penetration) is until the victim's 28th birthday, if the crime was committed when the victim was under 18. (Pen. Code, § 801.1, subd. (a).)

In addition to these two statutes of limitations, there are two tolling provisions for prosecution of specified sex offenses. (See Pen. Code, § 803.)

First, a prosecution can be commenced within one year of the date a person of any age reports to California law enforcement 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:

- (1) The limitation period specified in Section 800, 801, or 801.1, whichever is later, has expired;
- (2) The crime involved substantial sexual conduct, as specified, excluding masturbation that is not mutual; and,
- (3) There is independent evidence that corroborates the victim's allegation. (Pen. Code, § 803, subd. (f).)

Alternatively, a prosecution can be commenced 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; 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. (Pen. Code, § 803, subd. (g).)

Finally, the statute of limitations can be extended indefinitely if the sex crime is charged under an alternate sentencing scheme or penalty provision. So, if a sex crime is prosecuted under the One Strike Law, it is not subject to a statute of limitations but can be commenced

at any time. (See *People v. Hale* (2012) 204 Cal.App.4th 961 [for a sex crime punishable by life there is no limitation].)

- 4) **Practical Considerations:** There is a strong public policy against eliminating the statute of limitations. Memories fade as time passes. Evidence that might have been gathered by the police is lost. Witnesses move or die. Sex crimes are often based on witness and/or victim testimony and such testimony is most reliable soon after the crime is committed. In passing these exceptions, the Legislature has sought to balance the victim's rights with the rights of the accused. Fairness and due process demand prosecution be commenced in a reasonable time so the accused may be able to gather evidence to prove his or her innocence. It seems a rejection of firmly rooted public policy to eliminate the statute of limitations altogether in these cases when several other exceptions already exist to ensure prosecution.

Moreover, elimination of the statute of limitations will not necessarily get victims the justice they deserve. In cases where there is no DNA, prosecutors may have to tell a victim that even though the case is not time barred, there is not enough evidence to bring the case to trial.

- 5) **Ex Post Facto:** In *Stogner v. United States, supra*, 539 U.S. 607 the Supreme 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. (*Id.* at pp. 610-611, 616.) However, extension of an existing statute of limitations is not ex post facto as long as the prior limitations period has not expired. (*Id.* at pp. 618-619.)

This bill states that the provisions eliminating the statute of limitations for the specified crimes will apply either only to crimes committed after its effective date, or to crimes for which a statute of limitations that was in effect before its effective date has not run as of that date. In other words, the bill extends current limitations periods, but does not try to revive time-barred cases. Therefore, there do not appear to be any ex post facto concerns raised by this bill.

- 6) **Argument in Support:** According to the *California Women's Law Center*, a sponsor of this bill, "Currently, the statute of limitations for the prosecution of a felony sex offense is just 10 years, while the prosecution of sexual offenses against a minor must be commenced prior to the victim's 40th birthday. These statute of limitations, which allow perpetrators to escape justice because of the passage of an arbitrary measure of time, are grossly unfair to survivors of sexual offenses. Our laws should protect the rights of victims who have the courage to come forward whenever they feel safe doing so. Instead, the current laws silence victims and protect their assailants...."

"SB 813 will send the message to victims of sexual violence that California takes these heinous crimes seriously and that the law is on their side. It will empower victims as they make the important decision to report the crimes committed against them. And SB 813 will diminish one of sexual predator's most powerful weapons: the silence of men and women who survive their attacks."

- 7) **Argument in Opposition:** According to the *Sonoma County Public Defender's Office*, "There are a number of scenarios which demonstrate the difficulties with eliminating the statute of limitations for rape.

"The average person called upon to defend themselves against allegations of a sexual assault that happened 15, 20, or 30 years ago would be hard pressed to remember where they were and who they were with. If the defendant were innocent, it would be even more difficult because they might not even know their accuser.

"The dangers of false accusations are not limited to imaginary situations. In the last 10 years, there have been high profile accusations that turned out to be false; i.e., in 2006, the accusations of rape against 3 members of the Duke University lacrosse team and in November 2014, the horrific rape allegations against 7 members of a fraternity at the University of Virginia detailed in the now discredited *Rolling Stone* article.

"There are numerous stories of people imprisoned for rape convictions after being falsely accused who were later exonerated by DNA, the victim recanting, the discovery of false confessions or other evidence. We have included a few of these tragic stories- both from California and around the country.

"After spending 16 years in prison, Luis Varga who had been sentenced to 55 years in prison was finally exonerated by DNA.

"Larry Davis, 57, and Alan Northop, 49, were false convicted of raping a housekeeper in 1993 and spent 17 years in prison before being exonerated by DNA.

"Brian Keith Banks, a former American football linebacker who spent more than five years in prison after being falsely accused of rape by a classmate. His conviction overturned in 2012 after his accuser was secretly recorded admitting she had fabricated the story.

"After 28 years, Clarence Moses-El, who had been sentenced to 48 years in prison after a neighbor said she dreamed he was the man who raped her and beat her in the dark. He was released after the court vacated his conviction and the DA finally turned over a confession that he had received two years earlier from another inmate.

"In 2013, Stanley Wrice, who had been sentenced to 100 years for rape, was freed from prison after serving 30 years. The judge threw out Wrice's confession and conviction finding that he had falsely confessed after being beaten in the face and groin by Chicago police.

"Being falsely charged with sexual assault is also traumatic. People lose their jobs, schooling, and reputation in the community. It is expensive to defend against false rape allegations. Even when the charges are dismissed, the accusations live on the Internet haunting the individual forever."

8) **Prior Legislation:**

- a) SB 46 (Alquist), of the 2009-10 Legislative Session, would have eliminated the statute of limitations for specified sex crimes when the alleged victim was under the age of 14 at the time of the offense. SB 46 failed passage in the Senate Public Safety Committee.
- b) SB 256 (Alquist) of the 2007-2008 Legislative Session, would have eliminated the statute of limitations for specified sex crimes. SB 256 failed passage in the Senate Public Safety

Committee.

- c) SB 261 (Speier) of the 2005-2006 Legislative Session, would have eliminated the statute of limitations for specified sex crimes. SB 261 was held in the Senate Appropriations Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

California Women's Law Center (Sponsor)
AFSCME Local 685
Alameda County District Attorney's Office
Association for Los Angeles Deputy Sheriffs
Association of Deputy District Attorneys
California Association of Marriage and Family Therapists
California District Attorneys Association
California Police Chiefs Association
California Protective Parents Association
City of West Hollywood
Crime Victims United of California
End Rape Statute of Limitations Campaign
Los Angeles County District Attorney's Office
Los Angeles County Professional Peace Officers Association
Los Angeles Police Protective League
Los Angeles Probation Officers Union
National Association of Social Workers- California Chapter
National Council of Jewish Women/Los Angeles
National Organization for Women, Hollywood Chapter
Orange County Sheriff's Department
Peace Officers Research Association of California
Riverside Sheriffs Association
San Bernardino County District Attorney's Office
San Diego County District Attorney's Office
Santa Clara District Attorney's Office

Two Private Individuals

Opposition

American Civil Liberties Union of California
California Attorneys for Criminal Justice
California Public Defenders Association
Legal Services for Prisoners with Children
Sonoma County Public Defender's Office