California State Assembly

PUBLIC SAFETY

REGINALD BYRON JONES-SAWYER SR.
CHAIR

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AGENDA

Tuesday, June 29, 2021
9 a.m. -- State Capitol, Room 4202

SPECIAL ORDER

1.	SB 742	Pan	Vaccination sites: unlawful physical obstruction, intimidation, or picketing.(Urgency)

HEARD IN FILE ORDER

REGULAR ORDER OF BUSINESS

2.	SB 710	Bradford	District attorneys: conflicts of interest.
3.	SB 2	Bradford	PULLED BY COMMITTEE.
4.	SB 567	Bradford	Criminal procedure: sentencing.
5.	SB 731	Durazo	Criminal records: relief.
6.	SB 320	Eggman	Domestic violence protective orders: possession of a firearm.
7.	SB 358	Jones	Property crimes: mail theft.
8.	SB 215	Leyva	DNA evidence.
9.	SB 299	Leyva	Victim compensation: use of force by a law enforcement officer.
10.	SB 296	Limón	Code enforcement officers: safety standards.
11.	SB 23	Rubio	Disorderly conduct: distribution of intimate images: statute of limitations.
12.	SB 538	Rubio	Domestic violence and gun violence restraining orders.
13.	SB 16	Skinner	Peace officers: release of records.
14.	SB 81	Skinner	Sentencing: dismissal of enhancements.
15.	SB 317	Stern	Competence to stand trial.
16.	SB 519	Wiener	Controlled substances: decriminalization of certain hallucinogenic substances.

COVID FOOTER

SUBJECT:

We encourage the public to provide written testimony before the hearing by visiting the committee website at https://apsf.assembly.ca.gov/. Please note that any written testimony submitted to the committee is considered public comment and may be read into the record or reprinted. All are encouraged to watch the hearing from its live stream on the Assembly's website at https://www.assembly.ca.gov/todaysevents.

The Capitol will be open for attendance of this hearing. The public is strongly encouraged to participate via the web portal, Remote Testimony Stations on the Capitol grounds, or phone. Any member of the public attending a hearing in the Capitol will need to wear a mask at all times while in the building. We encourage the public to monitor the committee's website for updates.

Date of Hearing: June 29, 2021
Counsel: Nikki Moore

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

SB 742 (Pan) – As Amended March 4, 2021

As Proposed to be Amended in Committee

SUMMARY: Makes it a misdemeanor for a person to engage in obstruction, intimidation, harassment, or interference at a vaccination site, as specified. Specifically, **this bill**:

1) Makes it crime to knowingly approach within 30 feet of any person who is within 100 feet of the entrance of a vaccination site, seeking to enter or exit a vaccination site, or in any occupied motor vehicle seeking entry or exit, for the purpose of obstructing, injuring, harassing, intimidating, or interfering with that person or vehicle occupant in connection with any vaccination services.

2) Punishes this crime by a fine not exceeding one thousand dollars ($1,000), imprisonment in a county jail not exceeding six months, or by both that fine and imprisonment.

3) Defines, for purposes of this section:

   a) "Intimidation" to mean "to make a true threat directed to a person or group of persons with the intent of placing that person or group of persons in fear of bodily harm or death."

   b) Defines a "true threat" for purposes of this section to mean a statement where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals regardless of whether the person actually intends to act on the threat.

   c) "Physical obstruction" to mean "rendering ingress to or egress from a vaccination site, or rendering passage to or from a vaccination site, unreasonably difficult or hazardous."

   d) "Harass" to mean "the non-consensual and knowing approach within thirty (30) feet of another person or occupied motor vehicle for the purpose of passing a leaflet or handbill, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in a public way or on a sidewalk area."

   e) "Interfere with" to mean "to restrict a person's freedom of movement."

   f) "Vaccination services" to mean "the medical service of administering to an individual a dose of vaccine or other immunizing agent."

   g) "Vaccination site" to mean "the physical location where vaccination services are provided, including, but not limited to, a hospital, physician's office, clinic, or any retail

space or pop-up location made available for vaccination services."

4) Provides that the provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

5) Contains an urgency clause.

EXISTING LAW:

1) States that Congress shall make no law abridging the freedom of speech or the right of the people to peaceable assemble. (U.S. Const., 1st Amend.)

2) Prohibits the passage of any law which restrains or abridges the liberty of speech. (Cal. Const., Art. I, § 2(a).)

3) Provides that it is a misdemeanor, except upon private property, for a person to engage in picketing targeted at a funeral during the time period beginning one hour prior to the funeral and ending one hour after the conclusion of the funeral. Defines picketing to mean "protest activities engaged in by any person within 300 feet of a burial site, mortuary, or place of worship." (Pen. Code § 594.37.)

4) Provides that every person who, except a parent or guardian acting towards his or her minor child or ward, commits any of the following acts shall be subject to the punishment. (Pen. Code, § 423.2, subds. (a)-(f)):

   a) Intentionally injures, intimidates, interferes with, or attempts to do so , by means of force, threat of force, or physical obstruction, any person or entity because that person or entity is a reproductive health services client, provider, or assistant, or in order to intimidate any person or entity, or any class of persons or entities, from becoming or remaining a reproductive health services client, provider, or assistant;

   b) Intentionally injures, intimidates, interferes with, or attempts to do so, by means of force, threat of force, or physical obstruction, any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship;

   c) By nonviolent physical obstruction, intentionally injures, intimidates, or interferes with, or attempts to do so, any person or entity because that person or entity is a reproductive health services client, provider, or assistant, or in order to intimidate any person or entity, or any class of persons or entities, from becoming or remaining a reproductive health services client, provider, or assistant;

   d) By nonviolent physical obstruction, intentionally injures, intimidates, or interferes with, or attempts to do so, any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship;

   e) Intentionally damages or destroys the property of a person, entity, or facility, or attempts to do so, because the person, entity, or facility is a reproductive health services client,

provider, assistant, or facility; or

f) Intentionally damages or destroys the property of a place of religious worship. (Pen. Code, § 423.2.)

5) Makes a first violation involving nonviolent physical obstruction a misdemeanor, punishable by imprisonment in a county jail for a period of not more than six months and a fine not to exceed two thousand dollars ($2,000). (Pen. Code, § 423.3, subd. (a).)

6) Makes a second or subsequent violation involving nonviolent physical obstruction a misdemeanor, punishable by imprisonment in a county jail for a period of not more than six months and a fine not to exceed five thousand dollars ($5,000). (Pen. Code, § 423.3, subd. (b).)

7) Makes a first violation involving force, threat of force, or physical obstruction that is a crime of violence or intentional property damage a misdemeanor, punishable by imprisonment in a county jail for a period of not more than one year and a fine not to exceed twenty-five thousand dollars ($25,000). (Pen. Code, § 423.3, subd. (c).)

8) Makes a second or subsequent violation involving force, threat of force, or physical obstruction that is a crime of violence or intentional property damage a misdemeanor, punishable by imprisonment in a county jail for a period of not more than one year and a fine not to exceed fifty thousand dollars ($50,000). (Pen. Code, § 423.3, subd. (d).)

9) Defines "crime of violence" as an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another. (Pen. Code, § 423.1, subd. (a).)

10) Defines "interfere with" as meaning to restrict a person's freedom of movement. (Pen. Code, § 423.1, subd. (b).)

11) Defines "intimidate" as meaning to place a person in reasonable apprehension of bodily harm to herself or himself or to another. (Pen. Code, § 423.1, subd. (c).)

12) Defines "nonviolent" as meaning to conduct that would not constitute a crime of violence. (Pen. Code, § 423.1, subd. (d).)

13) Defines "physical obstruction" as rendering ingress to or egress from a reproductive health services facility or to or from a place of religious worship impassable to another person, or rendering passage to or from a reproductive health services facility or a place of religious worship unreasonably difficult or hazardous to another person. (Pen. Code, § 423.1, subd. (e).)

14) States that a defendant is guilty of intentional transmission of an infectious or communicable disease if all of the following apply:

a) The defendant knows that he or she or a third party is afflicted with an infectious or communicable disease;

b) The defendant acts with the specific intent to transmit or cause an afflicted third party to transmit that disease to another person;

c) The defendant or the afflicted third party engages in conduct that poses a substantial risk of transmission to that person; and,

d) The defendant or the third party transmits the infectious or communicable disease to the other person.

e) If exposure occurs through interaction with the defendant and not a third party, the person exposed to the disease during voluntary interaction with the defendant did not know that the defendant was afflicted with the disease. A person's interaction with the defendant is not involuntary solely on the basis of his or her lack of knowledge that the defendant was afflicted with the disease. (Health & Saf., § 120290, subd. (a).)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "SB 742 will protect health care workers and patients seeking COVID-19 vaccinations from facing intimidation, violations of privacy and obstruction by extremist protestors. For over a year, health care workers and scientists have worked side-by-side to develop and distribute effective coronavirus vaccines. The scope of COVID-19 vaccination efforts has required the use of spaces such as stadiums, fairgrounds, and pop-up sites not traditionally utilized for healthcare distribution. Current laws do not adequately balance the rights of individuals seeking healthcare with the First Amendment rights of protesters.

"In January, for example, extremists disrupted vaccination efforts at Dodger Stadium, forcing hundreds of people-- many who had taken time off of work and driven hours for the opportunity to be vaccinated-- to return home without immunization. In Tennessee, a woman plowed through a tent in an effort to disrupt vaccine distribution-- narrowly missing health care workers and national guardsmen who were distributing the COVID-19 vaccine. A Nevada-based vaccination organization had to cancel two in-person events in December after anti-vaccination activists launched an online harassment campaign against it, fearing violence at the demonstrations. These extremists' actions not only physically endanger peoples' lives, but also violate their right to privacy while receiving medical care. As part of their intimidation tactics, protestors often harass and film individuals without their consent—sometimes even following them back to their cars or homes—and publicly post these videos online. The publicity and lack of consequences for anti-vaccine protesters in these incidents has only emboldened these groups to attempt similar disruptions in the future. It is imperative that we provide law enforcement with the tools to ensure safe distribution of vaccines, while preserving protestors' right to free speech.

"Every Californian who chooses to receive the COVID-19 vaccine to protect their health and the health of others or to abide by California state laws requiring proof of vaccination to return to school and the work place, should be able to get immunized safely and with their privacy protected. SB 742 will protect patients and front-line health care providers as they work to bring an end to this pandemic."

2) **First Amendment Jurisprudence Permits Restrictions on Speech and Advocacy When Narrowly Tailored and Sufficiently Justified**: The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." (U.S. Const, Amend. I, Section 1.) The California Constitution also protects free speech. "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." (Cal. Const. Art. I, § 2.) "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." (*Ashcroft v. American Civil Liberties Union* (2002) 535 U.S. 564, 573.)

Legislation that regulates the content of protected speech is subject to strict scrutiny, sometimes referred to by the courts as "exacting scrutiny" in this context. (*Reed v. Town of Gilbert, Ariz.* (2015) 135 576 U.S. 155.) To survive strict scrutiny, state action must be narrowly tailored to address a compelling government interest. (*Id.*)

Legislation that regulates the time, place, or manner of protected speech "must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so." (*Ward v. Rock Against Racism*, (1989) 491 U.S. 781, 798.)

It is a traditional exercise of the States "'police powers to protect the health and safety of their citizens." *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470. That interest may justify a special focus on unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests. See *Madsen v. Women's Health Center, Inc.* (1994) 512 U.S. 753; *NLRB v. Baptist Hospital, Inc.* (1979) 442 U.S. 773. The Supreme Court favors legislation that provides specific guidance to law enforcement authorities to facilitate an even-handed application of the law. (*Hill v. Colorado* (2000) 530 U.S. 703, 715.)

This bill implicates the First Amendment by restricting advocacy, including the non-consensual and knowing approach within thirty (30) feet of another person or occupied motor vehicle for the purpose of passing a leaflet or handbill, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in a public way or on a sidewalk area. This restriction applies within 100 feet of a vaccine site. Thus, this bill limits the public's right to engage in counseling and advocacy. The prior version of this bill also prohibited picketing, but that restriction has been removed.

3) **Precedent for "Buffer" Zones**: Laws regulating speech near medical centers have developed largely through the lens of activity near reproductive clinics.

Federal law, the Freedom of Access to Clinic Entrances (FACE) Act, passed in 1994, prohibits intentional property damage and the use of "'force or threat of force or…physical obstruction' to 'injure, intimidate or interfere with' someone entering a health care facility." States have passed similar laws, some prohibiting specific activities such as vandalism or obstruction at clinics, while others limit protests aimed at clinic patients by either creating 'buffer' zones around clinics that bar protestors entirely or establishing floating 'bubble zones' of several feet around a person who is within a specific distance of a clinic; protesters are prohibited from crossing into that "bubble zone" without the person's consent.

In 2001, California passed the California Freedom of Access to Clinic and Church Entrances Act, which provided state criminal and civil penalties for interference with rights to reproductive health services and religious worship.

The Supreme Court has reviewed numerous state laws restricting speech near reproductive centers. In *Hill v. Colorado,* the U.S. Supreme Court upheld Colorado's law establishing an eight-foot zone around a person approaching a reproductive facility, preventing a person from knowingly approaching a person without consent to engage in advocacy activities.

In contrast, in 2014, the U.S. Supreme Court struck down a Massachusetts law that placed a 35-foot buffer zone around reproductive clinic entrances. The Massachusetts "buffer" zone made it a "crime to knowingly stand on a 'public way or sidewalk' within 35 feet of an entrance or driveway to any 'reproductive health care facility,' defined as 'a place, other than within or upon the grounds of a hospital, where abortions are offered or performed.'" (*McCullen v. Cookley* (2014) 573 U.S. 474.) The Court held the law violated the First Amendment holding that creating 35-foot buffer zones around all abortion clinics was not justified by congestion in front of one clinic on Saturday mornings.

The COVID-19 pandemic has educated the public about the spread of viruses through speaking, coughing, and touching. It is now well understood knowledge that a person speaking or singing emits enough particles to result in virus transmission. (See *Scientists to Choirs: Group Singing Can Spread the Coronavirus, Despite What CDC May Say*, Los Angeles Times, available at https://www.latimes.com/world-nation/story/2020-06-01/coronavirus-choir-singing-cdc-warning.

It is also scientifically established that COVID-19 can travel up to 30 feet from a person who is speaking or singing. "Given various combinations of environmental conditions and patient characteristics, emitted clouds of pathogen-bearing droplets may travel up to 7–8 [meters]." (Jonathan Borak, *Airborne Transmission of COVID-19*, Oxford University Press on behalf of the Society of Occupational Medicine (2020). See also, Jordan Culver, *6 Feet Enough for Social Distancing? MIT Researcher Says Droplets Carrying Coronavirus Can Travel up to 27 Feet*, USA Today, March 31, 2020, available at https://www.usatoday.com/story/news/health/2020/03/30/coronavirus-social-distancing-mit-researcher-lydia-bourouiba-27-feet/5091526002/.) Distance is also relevant to the transmission of other diseases including measles: "Closeness matters," according to Dr. Matthew Zahn, chairman of the Infectious Diseases Society of America's public health committee. (*Why Measles Is So Contagious and How to Protect Yourself,* available at https://www.healthline.com/health-news/heres-how-measles-spreads#Early-symptoms-easy-to-miss.)

Additionally, the Delta variant of COVID-19 is reported to be even more contagious than earlier versions of the virus. "Delta, formerly known as B.1.617.2, is believed to be the most transmissible variant yet, spreading more easily than both the original strain of the virus and the Alpha variant first identified in Britain. Public health officials there have said that Delta could be 50 percent more contagious than Alpha, though precise estimates of its infectiousness vary." (Emily Anthes, *The Delta Variant: What Scientists Know*, June 22, 2021, New York Times, available at https://www.nytimes.com/2021/06/22/health/delta-variant-covid.html.) The continued evolution of the COVID virus warrants continued caution regarding the spread of the virus.

Based on these scientific findings this bill creates a 30-foot buffer zone around a person entering a vaccine site. In contrast to *Cookley*, *supra*, this bill is arguably narrowly tailored to serve the compelling state interest of preventing transmission of COVID-19.

4) **This Bill Focuses on Conduct Not Speech**: Oral protests, shouting, chanting, singing, and other forms of verbal communication all pose the risk of transmission of virus and disease. While a person may choose to attend a rally and expose themselves to political speech, in large part they cannot choose where they receive medical services. This bill would limit all political advocacy within a 30-foot radius of a person in order to protect their, and the public's, safety by preventing the transmission of disease.

When the Supreme Court examined Colorado's statute creating a buffer zone near abortion clinics, it used a three-part test to determine the law was constitutional: 1) The regulation is not a "regulation of speech" but a regulation of where some speech may occur;" 2) the regulation was not adopted "because of disagreement with the message it conveys;" and, 3) the State's interests in protecting safe access to medical care and privacy, and providing the police with clear guidelines, are unrelated to the content of the demonstrators' speech. (*Hill v. Colorado* (2000) 530 U.S. 703.)

Arguably, this bill is narrowly drawn to limit activity that facilitates and accelerates the transmission of all communicable diseases. California has a compelling interest in protecting all people, and particularly vulnerable populations like children and the elderly, from the spread of disease. In establishing a 30-foot "buffer" within 100 feet of the entrance of a vaccine site, the State ensures that all people are able to receive medical services while protecting their health and safety, and prevents the fear of harassment or assault by persons due to aerosolized saliva and the spread of other bodily fluids.

This bill does not single out one political position relating to vaccines or any medical treatment for that matter, whether one is advocating for or against any position. This bill would restrict all advocacy that creates a substantial danger of the transmission of virus and disease. The government has a compelling interest in permitting individuals to receive medical services without fearing that they might actually catch a virus or disease in the process.

Health and Safety Code Section 120290 makes it a crime for a person intentionally to transmit an infectious disease. By imposing a 30-foot buffer zone around vaccination sites, this bill seeks to provide clear guidance for the public and law enforcement to understand what behavior constitutes activity that threatens to violate Section 120290 and the provisions proposed by this bill.

"The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." (*Hill*, at 791.) This bill is agnostic to a speaker's message — any sustained attempt at advocacy is improper within the 30-foot buffer zone near a vaccine site.

This bill would regulate all advocacy conduct, regardless of the viewpoint expressed, in

certain spaces for the purpose of ensuring public safety and medical privacy, preventing the transmission of disease, and providing police with clear and enforceable rules.

5) **Which Medical Facilities are Protected?:** This bill would prohibit activity that increases the risk of the transmission of viruses and diseases when a person seeks medical services. It places distance protections around temporary and pop-up locations vaccine sites, and also any permanent structure where vaccines are distributed. This will necessarily include a vast number of health care provider facilities, including hospitals and reproductive health centers. However, the bill's provisions do not cover all medical facilities, specifically, those facilities where vaccines are not administered. It also includes sites that administer vaccines that are not COVID-19, including for viruses that are not airborne.

In *Hill*, the law was applied to all health care facilities in the State. The court said that the fact that "the coverage of a statute is broader than the specific concern that led to its enactment is of no constitutional significance. What is important is that all persons entering or leaving health care facilities share the interests served by the statute. It is precisely because the Colorado Legislature made a general policy choice that the statute is assessed under the constitutional standard set forth in *Ward*, 491 U.S. at 791, rather than a more strict standard." (*Hill*, at 730-31.)

Arguably, this bill is both over and under inclusive. It may be considered over inclusive because it includes vaccine sites that do not administer COVID-19 vaccines. It may be considered under inclusive because it does not include all existing medical facilities in California.

The purpose of this bill is to protect individuals from being harassed or otherwise interfered with when approaching medical centers that provide vaccines. The interest in limiting a person's right to engage in debate with a person who may be seeking vaccination is to limit the fear of the spread of disease, and the actual spread of disease by limiting close encounters and providing individuals space to peacefully approach the medical facility. While COVID-19 spurred this concern and this bill, there are other airborne diseases that pose similar risks as COVID-19. Additionally, there are principles of medical privacy that support an individual's right to receive services without being questioned about what services they are seeking. Including all sites that provide vaccines, not just COVID-19, helps avoid inquiries into an individual's medical choices. "[T]he First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests." *Hill*, *supra*, citing *Madsen v Women's Health Center* (1994) 512 U.S. 753, 772-73.

Uncertainty about the future of COVID-19 and its variants, as well as other potential, future viruses, mean that vaccine sites will continue to operate well into the future. In fact, at this point, it is unclear how long a COVID-19 vaccine is effective—it could be as few as six months or as long as a few years. (See Katherine Wu, *The Only Way We'll Know When We Need COVID-19 Boosters*, June 23, 2021, The Atlantic, available at https://www.theatlantic.com/science/archive(/2021/06/covid-19-vaccine-booster-shots-probably-inevitable/619272/.) "To keep our bodies from slipping back toward our immunological square one, where the virus could pummel the population again, researchers are looking to vaccine boosters—another round of shots that will buoy our defenses. Around the world, scientists have already begun to dole out these jabs on an experimental basis,

tinkering with their ingredients, packaging, and dosing in the hope that they'll be ready long before they're needed." (*Id.*)

By limiting debate outside all vaccine providers, this bill appears to establish a clear and enforceable standard that avoids ambiguity in its application, for the benefit of the public and law enforcement.

6) **Definition of True Threat:** The definition of "true threat" included in this bill is taken from *Virginia v. Black* (2003) 538 US. 343, 360.

7) **"Knowingly Approach" Standard:** This bill would prohibit knowingly approaching a person a person within 30 feet to engage in advocacy, protest, and education within 100 feet of a vaccination site. One purpose, as discussed above, is to prevent the risk of transmission of virus. This standard also recognizes that individuals may feel uncomfortable with unwelcome contact in light of the pandemic. (Melinda Fakuade, *Crowds Might be Anxiety-Inducing After Covid-19. Here's How to Manage It*, Mar. 8, 2021, available at https://www.vox.com/the-goods/22290011/crowd-avoidance-psychologist-anxiety-pandemic-anniversary.)

   This protects the person who takes care to avoid interacting with others en route to a vaccination site. If a protest draws a police response, law enforcement will have a clear understanding on exactly what distance a person is prohibited from engaging in advocacy. This approach protects speech that does not implicate the concerns that this bill addresses like incidental conversations or people walking near each other without the purpose of advocacy, protest, or education. This standard would also permit stationary advocacy — so long as a person engaging in advocacy within 100 feet of a vaccine site does not proactively approach a person within 30 feet, they would not violate this provision.

8) **"Interfere With:"** The definition for "interfere with" comes from the FACE Act, 18 U.S.C. § 248(e)(2).

9) **Argument in Support**: According to *The California Medical Association,* The CMA "on behalf of the more than 50,000 members, is pleased to support SB 742 (Pan). This bill would make it a misdemeanor for a person to engage in the physical obstruction, intimidation, or picketing target at a vaccination site. SB 742 is an urgent and timely measure which would protect individuals receiving care at vaccinations sites.

   "SB 742 seeks to protect people who are getting vaccinations from facing intimidation and obstruction by providing law enforcement tools to act swiftly and decisively to ensure the rights and freedoms of those who choose to get vaccinated; it also preserves the protestors' critical First Amendment right to peacefully assemble and protest at a safe distance. These changes will help Californians get safely vaccinated and remove a potential challenge to an already anxious process for some people.

   "In the most publicized incident, Californians simply seeking the COVID-19 vaccine at Dodger Stadium were stopped by a mob of extremists that brought the facility to a halt. Endangering patients and health care workers for nearly an hour, anti-vaxxers worked to intimidate and harass a relatively captive audience. Some participants were in fear during the chaos, as they were in vehicles, unsure of what was happening as they were being yelled at

by anti-vaxxers (none of whom were following any CDC COVID-19 safety guidelines).

"Californians should not be forced to endure harassment and intimidation while they seek care and treatment during a global pandemic. Furthermore, they should not be prevented from receiving care due by those that don't believe in the efficacy of vaccinations."

10) **Argument in Opposition**:

a) According to *A Voice for Choice Advocacy*, "A Voice for Choice Advocacy thanks the committee and the author for their amendments on SB742, which reduce our opposition to the bill wording. However, we still believe the bill is overly broad and unnecessary.

"The bill is completely unnecessary given existing California law:

• Penal Code Section 404.6 (inciting a riot) states "(a) Any use of force or violence, disturbing the public peace, or any threat to use force or violence, if accompanied by immediate power of execution, by two or more persons acting together, and without authority of law, is a riot. (b) As used in this section, disturbing the public peace may occur in any place of confinement. Place of confinement means any state prison, county jail, industrial farm, or road camp, or any city jail, industrial farm, or road camp, or any juvenile hall, juvenile camp, juvenile ranch, or juvenile forestry camp.")"."
• Penal Code Section 408 (unlawful assembly) states "every person who participates in any rout or unlawful assembly is guilty of a misdemeanor."
• Penal Code Section 415 (disturbing the peace) states "Any of the following persons shall be punished by imprisonment in the county jail for a period of not more than 90 days, a fine of not more than four hundred dollars ($400), or both such imprisonment and fine:

> Any person who unlawfully fights in a public place or challenges another person in a public place to fight.
> Any person who maliciously and willfully disturbs another person by loud and unreasonable noise.
> Any person who uses offensive words in a public place which are inherently likely to provoke an immediate violent reaction."

"The California legislature may constitutionally impose reasonable restrictions on protected speech provided the restrictions are (1) justified without regard for the content of the regulated speech; (2) narrowly tailored to serve a significant government interest; and (3) leave open ample alternative channels for communication of the information contained in the speech. (Ward v. Rock Against Racism (1989) 491 U.S. 781, 791.).

"If the Assembly Public Safety Committee does move this bill forward A Voice for Choice Advocacy asks for three further amendments to be made so that these three criteria are met:

• Change the definition of "(3) "Harass" means the non-consensual and knowing approach within thirty (30) feet of another person or occupied motor vehicle for the purpose of passing a leaflet or handbill, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in a public way or on a sidewalk area." None of this current description in the bill constitutes harassing behavior and would be

considered unconstitutional with respect to first amendment rights of free speech. We ask that the definition of harass is changed to align with California Penal Code Section 653.2: "A knowing and willful course of conduct directed at a specific person that is a reasonable person would consider as seriously alarming, seriously annoying, seriously tormenting, or seriously terrorizing the persona and serves no legitimate person."
• Narrow the definition of "vaccination sites" to mass vaccination sites. With more and more professions being given the ability to vaccinate (such as optometrists, podiatrists and dentists), this bill would restrict handing out informational flyers on many of California's main streets.
• Align with California Public Utilities Code Section 22742 and California Elections Code Section 18370, to clarify that the 100ft is from the room where vaccination occurs.

"On behalf of A Voice for Choice Advocacy, I ask you to oppose SB 742 because it is duplicative of current California Penal Code statutes. If you choose to move the bill forward, we ask you to make these three clarification amendments."

b) According to the *The Right of Life League of Southern California*, "SB-742 IS AN UNCONSTITUTIONAL VIOLATION OF DUE PROCESS

"Protections against vagueness are based on due process. To satisfy the constitutional requirement of due process of law, a penal statute must (1) be sufficiently definite to provide adequate notice of the conduct proscribed, and (2) provide sufficiently definite guidelines for the police in order to prevent arbitrary and discriminatory enforcement. (T obe, supra, 9 Cal.4th at pp. 1106–1107, 40 Cal.Rptr.2d 402, 892 P.2d 1145.)" A llen v. City of Sacramento (2015) 234 Cal. App. 4th 41, as modified on denial of reh'g (Mar. 6, 2015). SB-742 does not meet this standard.

"As written, SB-742 does not define what it means to "knowingly approach." May an advocate stand, holding a sign or offering a pamphlet, while people pass? What if the advocate turns his sign towards a person? Does this fall within the law's definition of "harassment" in subsection (c)(3)?

"As drafted, the bill does not explain how a protester could tell whether "a person is making the approach within 100 feet of the entrance of a vaccination site and is seeking to enter."

"How is this provision enforceable? The wording "making an approach" presumes the person's unspoken and objectively unknowable intent from a minimum of 100 feet away. Likewise, the phrase "is seeking to enter" is similarly vague and unknowable. Suppose someone is walking down a public sidewalk towards a Walgreens where vaccinations of all sorts routinely take place. May a climate change activist advocate or offer a pamphlet to this person while he walks by? May a Black Lives Matter proponent hold up a sign or extend her fist in the air as the person approaches her? By offering a pamphlet or holding a sign, is the advocate arguably "knowingly" approaching the person while the person is walking towards the Walgreens? Is that sufficient to trigger the violation? Moreover, the walking person's intent to approach or enter a vaccination site might change as the person nears or passes the vaccination site (perhaps he forgot his keys or wallet). How can the climate activist or the BLM proponent know the person's intent?"

11) **Related Legislation**:

a) AB 1356 (Bauer-Kahan), would create new crimes under the California Freedom of Access to Clinic Act directed at videotaping, photographing, or recording patients or providers within 100 feet of the facility ("buffer" zone) or disclosing or distributing those images; would make violent or repeated offenses under the Act alternatively punishable as felonies; would update and expand online privacy laws and peace officer trainings relative to anti-reproduction-rights offenses. AB 1356 is pending before the Senate Public Safety Committee.

b) SB 35 (Umberg), would expand limitations on electioneering including establish a buffer zone to prevent electioneering with the immediate vicinity of a person standing in line to vote. SB 35 is pending before this committee.

12) **Prior Legislation**:

a) SB 661 (Lieu), Ch. 354, Stats. 2012, prohibited picketing, except on private property, targeted at a funeral during a time period beginning one hour prior to the funeral and ending one hour after the conclusion of the funeral.

b) SB 888 (Lieu), of the 2007-08 Legislative Session, would have banned picketing, except on private property, targeted at a funeral during a time period beginning one hour prior to the funeral and ending one hour after the conclusion of the funeral. SB 888 was vetoed by the governor.

c) AB 279 (Huff), of the 2007-08 Legislation Session, would have made it an infraction for a person to disrupt a funeral service for a member or former member of the Armed Services and imposes a $250 fine, in addition to any other penalty provided by law. AB 279 was never heard by Assembly Judiciary Committee.

d) AB 2702 (Keene), of the 2005-06 Legislative Session, would have created a new misdemeanor for picketing within 300 feet of a burial site, mortuary, or church, and allowed a court to award damages including, but not limited to, punitive damages, and may also award injunctive relief, attorney's fees, and any other appropriate relief against a person who violates the above provision. AB 2707 failed passage in this Committee.

e) SB 780 (Ortiz), Ch. 899, Statutes of 2001, created the California Freedom of Access to Clinic and Church Entrances Act, which provided state criminal and civil penalties for interference with rights to reproductive health services and religious worship.

REGISTERED SUPPORT / OPPOSITION:

Support

American Academy of Pediatrics, California
California Academy of Family Physicians
California Academy of Preventive Medicine
California Association of Public Authorities for IHSS
California Children's Hospital Association

California Health and Wellness
California Immunization Coalition
California Medical Association
California School Nurses Organization
California Society of Anesthesiologists
Children's Specialty Care Coalition
County Health Executives Association of California (CHEAC)
Generation Up
Health Net
ProtectUs
Teens for Vaccines INC.
United Farm Workers

Oppose

A Voice for Choice Advocacy
California Family Council
Pacific Justice Institute
Right to Life League of Southern California
Right to Life of Central California
Right to Life of Kern County
V Is for Vaccine

Analysis Prepared by: Nikki Moore / PUB. S. / (916) 319-3744

Amended Mock-up for 2021-2022 SB-742 (Pan (S))

Mock-up based on Version Number 98 - Amended Senate 3/4/21
Submitted by: Nikki Moore, Assembly Public Safety Committee

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

SECTION 1. Section 594.39 is added to the Penal Code, to read:

594.39. ~~(a) It is unlawful, except upon private property, for a person to engage in physical obstruction, intimidation, or picketing targeted at a vaccination site during the time period beginning one hour prior to the vaccination services beginning, and ending one hour after the conclusion of the vaccination services.~~

(a) It is unlawful to knowingly approach within thirty (30) feet of any person while a person is making the approach within 100 feet of the entrance of a vaccination site and is seeking to enter or exit a vaccination site, or any occupied motor vehicle seeking entry or exit, for the purpose of obstructing, injuring, harassing, intimidating, or interfering with such person or vehicle occupant in connection with any vaccination services.

(b) A violation of subdivision (a) is punishable by a fine not exceeding one thousand dollars ($1,000), imprisonment in a county jail not exceeding six months, or by both that fine and imprisonment.

(c) For purposes of this section:

(1) "Intimidation" ~~means to place a person in reasonable apprehension of bodily harm to themselves or to another.~~ means to make a true threat directed to a person or group of persons with the intent of placing that person or group of persons in fear of bodily harm or death. A "true threat" for purposes of this section, means a statement where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals regardless of whether the person actually intends to act on the threat.

(2) "Physical obstruction" means rendering ingress to or egress from a vaccination site, or rendering passage to or from a vaccination site, unreasonably difficult or hazardous ~~to another person~~.

(3) "Harass" means the non-consensual and knowing approach within thirty (30) feet of another person or occupied motor vehicle for the purpose of passing a leaflet or handbill, displaying a sign

to, or engaging in oral protest, education, or counseling with such other person in a public way or on a sidewalk area.

~~(3) "Picketing," for purposes of this section only, means protest activities engaged in by a person within 300 feet of a vaccination site.~~

~~(4) "Targeted at" means directed at or toward a person seeking, receiving, or providing vaccination services.~~

(4) "Interfere with" means to restrict a person's freedom of movement

(5) "Vaccination services" means the medical service of administering to an individual a dose of vaccine or other immunizing agent.

(6) "Vaccination site" means the physical location where vaccination services are provided, including, but not limited to, a hospital, physician's office, clinic, or any retail space or pop-up location made available for vaccination services.

(d) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

SEC. 3. 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 California Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to ensure public peace and safety during the process of distributing vaccinations during the ongoing COVID-19 pandemic and public health crisis, it is necessary for this measure to go into immediate effect.

Date of Hearing: June 29, 2021
Counsel: Cheryl Anderson

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

SB 710 (Bradford) – As Amended May 20, 2021

SUMMARY: Requires an elected district attorney or the Attorney General to recuse themselves from a decision relating to investigating, charging, or prosecuting a peace officer for alleged criminal conduct while on duty if that district attorney or Attorney General has received a monetary benefit creating a conflict of interest, as specified. Specifically, **this bill**:

1) Provides that a conflict of interest exists when both of the following occurs:

   a) A district attorney or the Attorney General investigating, charging, or prosecuting a peace officer for alleged criminal conduct while on duty received a monetary benefit from any of the following, at any point between the time they filed to run for office until the conclusion of their term in that office: a member organization or association solely representing law enforcement: (i) that is involved in the investigation, (ii) that employed the officer at the time the alleged crime was committed, or, (iii) of which the officer is or was a member at the time of the alleged crime; and,

   b) The member organization or association makes criminal representation available to its employees or members under investigation for alleged criminal conduct that occurred while on duty.

2) Defines "member organization or association" as a formal or legal organization representing individuals and includes unions.

3) Defines "monetary benefit" as any financial benefit and includes a direct financial campaign contribution.

4) Defines "peace officer" as specified in current law.

5) Requires a district attorney or the Attorney General to recuse themselves from a decision related to investigating, charging, or prosecuting a peace officer for alleged criminal conduct while on duty if the district attorney or the Attorney General has a conflict of interest.

6) States that when a district attorney recuses themselves because a monetary benefit has created a conflict, the Attorney General shall assume responsibility for investigating, charging, or prosecuting the peace officer, unless the Attorney General has a conflict of interest.

7) Provides that if the Attorney General investigating, charging, or prosecuting the peace officer has a conflict of interest, the Attorney General must recuse themselves and appoint a special prosecutor to investigate, charge, or prosecute the peace officer.

8) Makes findings and declarations, including that prosecutors and police have a unique relationship. Prosecutors rely on police as their primary witnesses and they work hand-in-hand on a daily basis, often developing close relationships. As a result, there is a widespread perception that prosecutors are subject to undue influence when investigating peace officers accused of crimes alleged to have occurred on duty. When prosecutors accept financial support from associations solely representing peace officers, the public's confidence that they will objectively review allegations of criminal conduct by the officers represented by that association is further undermined.

EXISTING LAW:

1) Sets forth the requirements of a motion to disqualify a district attorney, city attorney, or city prosecutor. (Pen. Code, § 1424.)

2) Provides that a motion to disqualify may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial. (Pen. Code, § 1424, subd. (a)(1).)

3) Provides that if a court finds a prosecuting attorney deliberately or intentionally withheld relevant, material exculpatory evidence or information in violation of the law, and the violation occurred in bad faith, the court may disqualify the prosecuting attorney. (Pen. Code, § 1424.5, subds. (a) & (b)(1).)

4) States that a motion to disqualify may be directed at the entire prosecutor's office if there is sufficient evidence that other employees of the prosecuting attorney's office knowingly and in bad faith participated in or sanctioned the intentional withholding of the relevant, material exculpatory evidence or information and that withholding is part of a pattern and practice of violations. (Pen. Code, § 1424.5, subd. (b)(2).)

5) Prohibits a lawyer from representing a client when "the lawyer has...a legal business, financial, professional, or personal relationship with or to a party or witness in the same matter." (Rules Prof. Conduct, rule 1.7.)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "SB 710 is a straightforward measure that would address the conflict of interest between prosecutors and law enforcement officers who have committed misconduct. This bill will require prosecutors who have received a monetary benefit from an association that solely represents law enforcement to recuse themselves from the investigation, charging, and prosecution of an officer who is a member of that association. Communities throughout our state are rightfully critical of the relationship between district attorneys and law enforcement associations. This is a clear ethical issue, and our criminal justice system will benefit greatly by addressing this conflict of interest."

2) **California Rules of Professional Conduct – Conflict of Interest**: "The California Rules of Professional Conduct are intended to regulate professional conduct of attorneys licensed by

the State Bar through discipline." (< http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct > [as of June 16, 2021].)

Under Rule 1.7(b), a lawyer may not, without informed written consent from each affected client, and as further specified, represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person, or by the lawyer's own interests.

Even when a significant risk requiring a lawyer to comply with Rule 1.7(b) is not present, where the lawyer has, or knows that another lawyer in the lawyer's firm, has a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter, a lawyer may not represent a client without written disclosure of the relationship to the client, and as further specified. (Cal. Rules Prof. Conduct, rule 1.7(c).)

"The primary purpose of this prophylactic rule is to prevent situations in which an attorney might compromise [their] representation of the client in order to advance the attorney's own financial or personal interests" (*Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal. 4th 525, 546 [applying former Rule 3-310].)

This rule does not explicitly preclude a prosecutor from receiving financial support from an organization or association that is financing opposing counsel, and it is unclear if the reach of this rule includes a relationship between a campaign donor and a prosecutor.

3) **Statutory Disqualification (Recusal) of Prosecutor on the Ground of Conflict of Interest**: Penal Code section 1424 governs disqualification of a prosecutor: a disqualification motion "may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial." (Pen. Code, § 1424, subd. (a)(1).) The motion may be directed at an individual prosecutor or the entire prosecutor's office. (See *People v. Hernández* (1991) 235 Cal.App.3d 674, 680.)

The test for disqualification has two parts. First, the moving party must show a conflict, such that the "circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner." (*People v. Conner* (1983) 34 Cal.3d 141, 148; accord, *People v. Cannedy* (2009) 176 Cal.App.4th 1474, 1479–1480.) Second, to warrant disqualification the conflict must be "'so grave as to render it unlikely that defendant will receive fair treatment during all portions of the criminal proceedings.'" (*People v. Eubanks* (1996) 14 Cal.4th 580, 592.) The "threshold necessary for recusing an entire office is higher than that for an individual prosecutor." (*Cannedy, supra*, 176 Cal.App.4th at p. 1481.) "'The showing of conflict of interest necessary to justify so drastic a remedy must be especially persuasive. [Citation.]'" (*Id.* at p. 1482.)

Importantly, Penal Code section 1424 addresses prosecutorial conflicts that implicate a defendant's right to a fair trial. This bill is aimed at preventing a defendant from possibly receiving more favorable treatment because of a prosecutorial conflict of interest.

Further, the remedy in Penal Code section 1464 – disqualification (recusal) of the prosecution – isn't available until charges have been filed. This bill seeks to address a conflict of interest which might result in the prosecution not filing charges against peace

officers in the first place.

This bill contemplates disqualifying the entire office. Does a monetary contribution to the elected district attorney or Attorney General – the head of the office – rise to that level? (*Younger v. Superior Court* (1978) 77 Cal.App.3d 892 [(decided before enactment of Pen. Code, § 1464) conflict wall could not be effectively created with third-ranking administrative prosecutor in the office].)

4) **First Amendment and Free Political Speech Considerations**: "Political contribution involves an exercise of fundamental freedom protected by the First Amendment to the United States Constitution and article I, section 2 of the California Constitution." (*Woodland Hills Residents Asso v. City Council of L.A.* (1980) 26 Cal.3d 938, 946 (*Woodland Hills*).) "Governmental restraint on political activity must be strictly scrutinized and justified only by compelling state interest." (*Ibid.*)

In *Woodland Hills*, the California Supreme Court considered whether disqualifying a city council member from acting on a development proposal because the developer had made a campaign contribution to that member would threaten constitutionally protected political speech and associational freedoms. (*Woodland Hills, supra,* 26 Cal.App.3d at p. 946.) The Court noted that while disqualifying contribution recipients from voting would not prohibit contributions, it would nonetheless curtail contributors' constitutional rights. (*Id.* at pp. 946-947.) "Representative government would be thwarted by depriving certain classes of voters (i.e., developers, builders, engineers, and attorneys who are related in some fashion to developers) of the constitutional right to participate in the electoral process." (*Id.* at p. 947.) According to the Court:

> Public policy strongly encourages the giving and receiving of campaign contributions. Such contributions do not automatically create an appearance of unfairness. Adequate protection against corruption and bias is afforded through the Political Reform Act and criminal sanctions.

(*Ibid.*) The Court noted the Political Reform Act provided for disclosure of campaign contributions by recipients of contributions rather than disqualification. (*Id.* at p. 945.)

The campaign contributions at issue in this bill may be more akin to those in the judicial system, as addressed by the *United States Supreme Court in Williams-Yulee v. Florida Bar* (2015) 575 U.S. 433. There, the High Court addressed a local bar rule banning judicial candidates from soliciting campaign contributions. In concluding that the First Amendment permitted this restriction on speech, the Court reasoned:

> Judges are not politicians, even when they come to the bench by way of the ballot. And a State's decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office. A State may assure its people that judges will apply the law without fear or favor—and without having personally asked anyone for money.

(*Id.* at pp. 437-438.) The Court held that states have a compelling interest in preserving public confidence in their judiciaries. When a state adopts a narrowly-tailored restriction like

the one at issue, those principles do not conflict. (*Id.* at p. 436.)

Proponents of this bill contend that to the extent it implicates political speech, it is narrowly tailored to address a compelling state interest. They contend it is narrowly tailored in that it would not prohibit law enforcement associations from contributing to district attorneys' or Attorney Generals' campaigns. Nor would it prohibit district attorneys or Attorney Generals from accepting such contributions. Instead, the bill would require a district attorney or Attorney General to recuse themselves from the investigation or prosecution of an officer alleged to have committed a crime while on duty if they received a monetary benefit from an association also providing the officer with representation. Proponents contend that maintaining public confidence in the integrity of prosecutors and their investigations of alleged criminal conduct by on-duty officers is a compelling state interest.

5) **Argument in Support**: According to the *Prosecutors Alliance of California*, the sponsor of this bill, "Prosecutors play a fundamental role in pursuing accountability for all who have broken the law, including peace officers. Yet California peace officers have seriously harmed or killed hundreds of people and only a handful have faced criminal consequences. As a result, many communities believe that district attorneys are failing to investigate and prosecute police officers with the same objectivity as they do other members of the community. When a district attorney accepts a monetary benefit from an association that represent peace officers, the public's confidence that the district attorney will fairly review allegations of an officer's criminal conduct is critically undermined. When the same association also provides representation to the officer for the criminal investigation, the conflict of interest is even greater, crossing the threshold of what is ethically permissible for any attorney. [¶]...[¶]

"SB 710 is narrowly tailored to address the unique situation of law enforcement associations contributing to prosecutors' campaigns and then also providing direct representation to an individual suspected of committing a crime. SB 710 does not repeal the right of these associations to make these contributions, nor the right of district attorney candidates to accept those contributions. Rather, the bill will require a district attorney to simply recuse themselves from the investigation or prosecution of an officer alleged to have committed a crime on-duty only if the district attorney received a monetary benefit from an association that also provides representation to the officer for the criminal investigation.

"This bill advances a compelling state interest in maintaining public confidence in the integrity of prosecutors and their investigations of police wrongdoing. The all-too-common act of prosecutors accepting campaign contributions from law enforcement associations, and then failing to hold accountable members of those associations for seemingly criminal acts, corrodes public trust in an institution whose legitimacy hinges on the public's faith in its fairness and impartiality and undermines the integrity of state power more broadly."

6) **Argument in Opposition**: According to the *Santa Ana Police Officers Association*, "This bill is a blatant attempt to infringe upon the first amendment rights of peace officer organizations to participate in the political process. Cops alone are singled out here for creating a conflict of interest with these prosecutors.

"Teachers can contribute to the DA and AG and have no restrictions on prosecutions of the educators. Same for doctors, corporate polluters and wildfire-causing utility companies. No

limits on DA or AG authority to prosecute such organizations.

"Curiously, SB 710 allows criminal defense attorneys and anti-police organizations to contribute to the DA or AG without any concern about a similar conflict of interest.

"Does this bill really claim that these sworn officers of the court are improperly influenced by a small contribution made by a cop group? Should lawmakers be prohibited from accepting campaign contributions from organizations that have business before the legislature?"

REGISTERED SUPPORT / OPPOSITION:

Support

Prosecutors Alliance California (Sponsor)
Asian Americans Advancing Justice - California
Asian Solidarity Collective
California Attorneys for Criminal Justice
California Changelawyers
California for Safety and Justice
California Public Defenders Association (CPDA)
Californians United for a Responsible Budget
Change Begins With Me Indivisible Group
Communities United for Restorative Youth Justice (CURYJ)
Community Advocates for Just and Moral Governance
Contra Costa County District Attorney's Office
Del Cerro for Black Lives Matter
Democratic Club of Vista
Drug Policy Alliance
Ella Baker Center for Human Rights
Friends Committee on Legislation of California
Govern for California
Grassroots Law Project
Hillcrest Indivisible
Hope for All: Helping Others Prosper Economically
Initiate Justice
Legal Services for Prisoners with Children
Los Angeles County District Attorney's Office
Los Angeles Regional Reentry Partnership (LARRP)
Mission Impact Philanthropy
Nextgen California
Partnership for the Advancement of New Americans
Pillars of the Community
Racial Justice Coalition of San Diego
Riseup
San Diego Progressive Democratic Club
Sd-qtpoc Colectivo
Showing Up for Racial Justice (SURJ) San Diego
Showing Up for Racial Justice North County San Diego

Smart Justice California
Social Workers for Equity & Leadership
Team Justice
The Dream Corps
Think Dignity
Uncommon Law
Uprise Theatre
We the People - San Diego
Young Women's Freedom Center

Oppose

California Coalition of School Safety Professionals
California District Attorneys Association
California School Employees Association
Los Angeles School Police Officers Association
Palos Verdes Police Officers Association
Peace Officers Research Association of California (PORAC)
Riverside Sheriffs' Association
Santa Ana Police Officers Association

Analysis Prepared by: Cheryl Anderson / PUB. S. / (916) 319-3744

Date of Hearing: June 29, 2021
Counsel: Matthew Fleming

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

SB 2 (Bradford) – As Amended May 20, 2021

PULLED BY COMMITTEE.

Analysis Prepared by: Matthew Fleming / PUB. S. / (916) 319-3744

Date of Hearing: June 29, 2021
Counsel: Sandy Uribe

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

SB 567 (Bradford) – As Amended May 20, 2021

As Proposed to be Amended in Committee

SUMMARY: Requires that any aggravating factors, except for prior convictions, relied upon by the court to impose a sentence exceeding the middle term either for a criminal offense or for an enhancement be submitted to the trier of facts and found to be true, or be admitted by the defendant. Specifically, **this bill**:

1) Provides that when a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall, in its sound discretion, order imposition of a sentence not to exceed the middle term, except as provided below.

2) Allows a court to impose a sentence exceeding the middle term when there are circumstances in aggravation that justify a term of imprisonment exceeding the middle term and when those facts have been stipulated to by the defendant, or found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial.

3) Requires the court, upon the request of the defendant, to bifurcate the trial on the circumstances in aggravation from the trial of charges and enhancements. Except the defendant cannot request a bifurcated trial on enhancements that are an element of the charged offense or where it is otherwise authorized by law.

4) Provides that the jury shall not be informed of the bifurcated allegations until there has been a conviction on the charged offense.

5) Specifies, however, that the court may consider the defendant's prior conviction in determining sentencing based on a certified record of conviction without submitting the prior conviction to a jury.

6) Clarifies the requirements in existing law that the court shall set forth on the record the facts and reasons for choosing the sentence imposed and that the court may not impose an upper term by using the fact of any enhancement upon which the sentence is imposed.

EXISTING LAW:

1) Declares that the purpose of imprisonment for crime is punishment; that 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; and 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. (Pen. Code, § 1170, subd. (a)(1).)

2) Provides, until January 1, 2022, that 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. (Pen. Code, § 1170, subd. (b).)

3) Provides, until January 1, 2022, that when a sentencing enhancement specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. (Pen. Code, § 1170.1, subd. (d).)

4) Provides that sentencing choices requiring a statement of a reason include "[s]electing one of the three authorized prison terms referred to in section 1170(b) for either an offense or an enhancement." (Cal. Rules of Court, rule 4.406(b)(4).)

5) Requires the sentencing judge to consider relevant criteria enumerated in the Rules of Court. (Cal. Rules of Court, rule 4.409.)

6) Provides that, in exercising discretion to select one of the three authorized prison terms referred to in section 1170(b), "the sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision. The relevant circumstances may be obtained from the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any evidence introduced at the sentencing hearing." (Cal. Rules of Court, rule 4.420(b).)

7) Prohibits the sentencing court from using a fact charged and found as an enhancement as a reason for imposing the upper term unless the court exercises its discretion to strike the punishment for the enhancement. (Cal. Rules of Court, rule 4.420(c).)

8) Prohibits the sentencing court from using a fact that is an element of the crime to impose a greater term. (Cal. Rules of Court, rule 4.420(d).)

9) Enumerates circumstances in aggravation, relating both to the crime and to the defendant, as specified. (Cal. Rules of Court, rule 4.421.)

10) Enumerates circumstances in mitigation, relating both to the crime and to the defendant, as specified. (Cal. Rules of Court, rule 4.423.)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "Before 2007, Penal Code section 1170(b) required that judges impose a middle term in sentencing unless there are circumstances in aggravation or mitigation of a crime that warrants a lower or upper term. The law allowed a judge to determine what the aggravating and mitigating circumstances are after consideration of items such as the trial record; the probation officers' report; statements in aggravation or mitigation submitted by the parties, the victim, or the victim's family; and any further evidence introduced at the sentencing hearing.

"In 2007, the US Supreme Court held in *Cunningham v. California* that California's determinate sentencing law was unconstitutional. The court ruled that California's law impermissibly allowed judges to impose an upper/maximum term based upon aggravating facts that were never presented to a jury and deemed to be true beyond a reasonable doubt, thus violating the 6th Amendment to the United States Constitution right to a trial by jury.

"In 2007, the Legislature adopted a temporary law (SB 40) allowing judges to impose any of the three sentencing terms so long as they state a reason for any of the sentences. SB 40 was passed during another period of mass incarceration; it had support from law enforcement entities and faced opposition from California Attorneys for Criminal Justice and Office of the Public Defenders from the City and County of San Francisco. In passing SB 40, the Legislature eliminated the presumption of applying the middle term. This law became operative on January 1, 2009, and has led to individuals serving maximum prison sentences without the opportunity to effectively refute alleged aggravating facts.

"The sunset to SB 40 has been extended multiple times via SB 1701 (2008), AB 2263 (2010), SB 463 (2013) and AB 2590 (2016) and is to sunset on January 1, 2022 under current law. It is time for us to revisit the determinate sentencing structure we have in place for the last 11 years to actively decide what of it is desirable, and serves the general welfare and the interest of justice.

"Beyond the specific issue of determinate sentencing is the mass incarceration trend in American and California societies that has been part of the policy framework of the carceral system for decades. We are now in a period of reckoning that requires us to confront the reality and interconnectedness of racism and inequality, which has allowed injustices to permeate our institutions and deprive people of liberty and the ability to exercise their human potential for good. That trend in our carceral system has been a collective detriment that needs to be reversed, and this bill is a small step in the right direction of creating a criminal justice system that is more humane and better for the general welfare.

"As of 2010, 77 percent of state prison inmates were serving a determinate sentence. Most convicted felons in California receive a determinate sentence based on a triad sentence structure (with a lower, middle, and upper term).

"Given the prevalence of this sentencing structure and the studies that show that long sentences do not deter people from committing crime and are counter-productive to rehabilitating people and bringing them back to the fold of our society, we need to ensure that the harshest sentences receive the greatest scrutiny and justification before they are meted out.

"It is important, proper, and constitutionally conforming to change the law to ensure that aggravating facts are presented to the jury before a judge imposes a maximum sentence as decided in *Cunningham v. California*. Further, when the record submitted by parties could be incorrect, we need to ensure that the individuals facing time have the ample ability to dispute information in the record that might not be true. Additionally, when judges state the reasons for their sentence, it is not too much to ask to have them include the supporting facts to justify their rational because the liberty of a human being is worth the careful consideration. These small changes will help prevent individuals from serving maximum

sentences when lower terms are more appropriate based on the facts.

"This bill also allows a defendant the option of stipulating to the aggravated facts in lieu of a finding by the jury for the purpose of efficiency and cost savings, should the defendant chose [sic] to forego his or her constitutional rights. This could save time from having to establish the facts. And in the case of a bench trial, this bill allows the court to be the finder of facts."

2) **Background:** The Sixth Amendment right to a jury applies to any factual finding, other than that of a prior conviction, necessary to warrant any sentence beyond the presumptive maximum. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; *Blakely v. Washington* (2004) 524 U.S. 296, 301, 303-04.)

In *Cunningham v. California* (2007) 549 U.S. 270, the United States Supreme Court held California's Determinate Sentencing Law (DSL) violated a defendant's right to trial by jury by placing sentence-elevating fact finding within the judge's province. (*Id.* at p. 274.) The DSL authorized the court to increase the defendant's sentence by finding facts not reflected in the jury verdict. Specifically, the trial judge could find factors in aggravation by a preponderance of evidence to increase the offender's sentence from the presumptive middle term to the upper term and, as such, was constitutionally flawed. The Court stated, "Because the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the sentence cannot withstand measurement against our Sixth Amendment precedent." (*Id.* at p. 293.)

The Supreme Court provided direction as to what steps the Legislature could take to address the constitutional infirmities of the DSL:

> "As to the adjustment of California's sentencing system in light of our decision, the ball . . . lies in [California's] court. We note that several States have modified their systems in the wake of Apprendi and Blakely to retain determinate sentencing. They have done so by calling upon the jury - either at trial or in a separate sentencing proceeding - to find any fact necessary to the imposition of an elevated sentence. As earlier noted, California already employs juries in this manner to determine statutory sentencing enhancements. Other States have chosen to permit judges genuinely to exercise broad discretion . . . within a statutory range, which, everyone agrees, encounters no Sixth Amendment shoal. California may follow the paths taken by its sister States or otherwise alter its system, so long as the State observes Sixth Amendment limitations declared in this Court's decisions." (*Cunningham*, *supra*, 549 U.S. at pp. 293-294.)

Following *Cunningham*, the Legislature amended the DSL, specifically Penal Code sections 1170 and 1170.1, to make the choice of lower, middle, or upper prison terms one within the sound discretion of the court. (See SB 40 (Romero) - Chapter 3, Statutes of 2007 & SB 150 (Wright), Chapter 171, Statutes of 2009.) This approach was embraced by the California Supreme Court in *People v. Sandoval* (2007) 41 Cal.4th 825, 843-852. The procedure removed the mandatory middle term and the requirement of weighing aggravation against mitigation before imposition of the upper term. Now, the sentencing court is permitted to impose any of the three terms in its discretion, and need only state reasons for the decision so that it will be subject to appellate review for abuse of discretion. (*Id.* at pp. 843, 847.)

SB 40 (Romero), the first of a series of legislation to provide a fix to the constitutional shortcomings of the DSL, contained a sunset provision so that the amendment to the DSL would be repealed on a certain date if further legislative action was not taken before that date. According to intent language contained in SB 40, "It is the intent of the Legislature in enacting this provision to respond to the decision of the United States Supreme Court in *Cunningham v. California*, 2007 U.S. LEXIS 1324 (U.S. 2007). It is the further intent of the Legislature to maintain stability in California's criminal justice system while the criminal justice and sentencing structures in California sentencing are being reviewed." Following SB 40 (Romero), several bills have extended the sunset date on the amended DSL to continue allowing judges the discretion to impose the lower, middle or upper term of imprisonment authorized by statute. The amended DSL will sunset on January 1, 2022.

This bill would allow a court to impose a sentence for a criminal offense which exceeds the middle term only when there are circumstances in aggravation that justify a term of imprisonment exceeding the middle term and when those facts have been submitted to the factfinder and proven beyond a reasonable doubt, or when admitted by the defendant. However, this requirement would not apply to proving prior convictions, which can still be proven by a certified record of conviction.

It should be noted that Penal Code section 1170.1, which provides in part, that the court shall in its discretion, impose the term for an *enhancement* that best serves the interest of justice is also set to expire on January 1, 2022. However, as introduced, this bill neither extended the sunset date on that provision nor amends the statute which becomes operative on January 1, 2022 to require imposition of the middle term on an enhancement unless aggravating factors are submitted to the finder of fact or admitted by the defendant. Without doing one or the other, California's sentencing scheme with regards to enhancements would not only be inconsistent but would once again become unconstitutional. The suggested committee amendments would amend Penal Code section 1170.1 to be consistent with the approach taken in this bill for Penal Code section 1170. Specifically, when sentencing on an enhancement that provides for a lower, middle, or upper term, the court may only exceed the middle term when circumstances in aggravation, except for the fact of a prior conviction, have been admitted by the defendant, or found true by the trier of fact.

3) **Solutions from Other States**: Several other states have faced the same sentencing dilemma as California. Washington was in the very same position as California in that Washington had its sentencing structure ruled unconstitutional. (*Blakely*, *supra*, 542 U.S. at pp. 305-306.) In response, the Washington Legislature created a bifurcated trial process in which a jury would decide certain aggravating factors after the jury had found the defendant guilty. (*Cunningham*, *supra*, 549 U.S. at 294, fn. 17.) In addition to Washington, several other states have adopted a bifurcated trial model: Alaska, Arizona, Kansas, Minnesota, North Carolina, Oregon and Colorado. (*Ibid.*; see also Stemen & Wilhelm, *Finding the Jury: State Legislative Responses to Blakely v. Washington*, 18 Fed. Sentencing Rptr. 7 (Oct. 2005) (majority of affected states have retained determinate sentencing systems).)

This bill seeks to take the same approach the Washington Legislature by establishing a bifurcated system. If the defendant requests a trial on the circumstances in aggravation alleged in the indictment or information, it shall be bifurcated from the trial of charges and enhancements. The jury will not be informed of the allegations until there has been a

conviction on the charged offense.

4) **Would Jury Trials on Aggravating Factors Burden the Criminal Justice System**? California already provides a statutory requirement of a jury trial for many enhancing factors. For example, to subject a defendant to the punishment prescribed by Penal Code Section 667.61, a jury must find true the underlying facts such as great bodily injury, mayhem or torture, the use of a deadly weapon, tying or binding, or administration of a controlled substance by force. (Pen. Code, § 667.61, subds. (d), (e) and (i).) In a "Three-Strikes" case, a defendant's prior conviction must be pleaded and proved. (Pen. Code, § 1170.12, subd. (a).) The facts that permit enhancements of punishments for violating various drug laws must also be pleaded and proved. (See e.g. Health and Saf. Code, §§ 11353.1, subd. (b); 11353.4. subd. (c); 11353.6, subd. (e).)

   Moreover, in *Blakely*, *supra*, 542 U.S. 296, the United States Supreme Court acknowledged that a defendant could waive his Sixth Amendment right and consent to judicial fact-finding either as part of a plea-agreement or as part of a bifurcated trial (*Id.*, at p. 310.) As a practical matter, this procedure is often utilized in California courtrooms. For example, although a defendant has a statutory right to a trial by jury on his prior convictions (Pen. Code, § 1025; *People v. Kelii* (1999) 21 Cal.4th 452), defendants often waive that right or admit the priors. It should also be noted that most criminal proceedings are resolved by plea. Therefore, while jury trial on aggravating factors would impact the judicial system, not all cases would result in these trials.

5) **Argument in Support**: According to the *California Attorneys for Criminal Justice*, the sponsor of this bill, "This bill makes critical changes to the state's felony sentencing law to ensure that courts impose a maximum sentence only for the worst-of-the-worst offenses. By reserving the upper term for crimes where there is evidence of aggravating facts, SB 567 assures a proper balance. This approach is consistent with the original intent of California's triad law and recent U.S. Supreme Court decisions.

   "California is currently operating under a temporary felony sentencing law that expires at the end of this year. Upon conviction, current law allows a judge to impose three possible terms: lower, middle, or upper/maximum term. This approach is inconsistent with the guiding principle of our felony sentencing law when it was first adopted in the 1970's. When the Legislature passed the determinate sentencing triad law structure it was designed to reserve the upper terms for only when aggravating facts exist. Absent aggravating facts everyone would receive the middle term unless mitigating facts justified the low term. The underlying principle is that maximum sentences are to be reserved for the worst-of-the-worst offenses....

   "The approach in SB 567 is rooted in the original intent of California's determinate sentencing law as it reserves the maximum term for the worst-of-the-worst offenses. It also protects the right to jury trial as described in the Cunningham decision. This legislation restores confidence that our felony sentencing laws are being implemented as originally intended and to ensure fair and proportionate sentencing. No one should receive a maximum sentence unless the prosecution can prove that aggravating facts exist."

6) **Argument in Opposition**: According to the *Orange County District Attorney's Office*, "Senate Bill 567 seeks to undermine the Legislature's sensible response to *Cunningham v. California* (2007) 549 U.S. 270. In Cunningham, the Supreme Court of the United States

held that California's 1977 determinate sentencing scheme, as it stood, was not sufficiently advisory. A judge was required to impose the middle term unless it found facts in aggravation, rendering the middle term the true statutory maximum. Any facts in aggravation thus had to be proven beyond a reasonable doubt to a jury.

"Three months after the decision in *Cunningham*, on March 30, 2007, the Legislature passed Senate Bill 40, which amended Penal Code section 1170 so that trial courts were empowered to take holistic consideration of a case and impose the mitigated, middle, or aggravated term as appropriate. This true advisory scheme modeled the federal sentencing scheme approved of by the Supreme Court.

"Further, these are factors that presumably a defendant would not a want a jury to hear and consider in determining whether he or she is guilty beyond a reasonable doubt of the statutory elements of an offense. The defendant would have a strong argument that evidence in support of holistic aggravating factors are irrelevant as to guilt and unduly prejudicial. (Evid. Code, §§ 350 & 352.) There is thus the very real possibility that the People would be completely precluded from proving a case in aggravation, even in very serious cases with vulnerable victims or significant public safety concerns.

"Senate Bill 567 is primed to generate costly and time-consuming litigation because it does not address when the factors in aggravation must be pled and how the new penalty phase will be structured."

7) **Related Legislation**: SB 81 (Skinner), creates a presumption that it is in the furtherance of justice to dismiss an enhancement upon the court's finding that one of specified circumstances is true. SB 81 will be heard in this committee today.

8) **Prior Legislation**:

   a) SB 1016 (Monning), extended the sunset date from January 1, 2017 to January 1, 2022 for provisions of law which provide that the court shall, in its discretion, impose the term or enhancement that best serves the interest of justice.

   b) SB 1202 (Leno), of the 2015-2016 Legislative Session, would have provided that aggravating factors relied upon by the court to impose an upper term sentence must be tried to the jury and found to be true beyond a reasonable doubt, and that trial of all facts pled in aggravation of sentence must be bifurcated. SB 1202 was held on suspense in the Assembly Appropriations Committee.

   c) AB 765 (Ammiano), of the 2013-14 Legislative Session, would have prohibited imposition of the upper term of imprisonment unless aggravating factors were found to be true by the finder of fact. AB 765 was held on the Assembly Appropriations suspense file.

   d) SB 463 (Pavley), Chapter 598, Statutes of 2013, extended the sunset provision on Penal Code Section 1170 to January 1, 2017.

   e) AB 520 (Ammiano), of the 2011-12 Legislative Session, would have prohibited imposition of the upper term of imprisonment unless aggravating factors were found to

be true by the finder of fact. AB 520 was amended to a different subject matter.

f) SB 576 (Calderon), Chapter 361, Statutes of 2011, extended the sunset provisions on Penal Code section 1170 to January 1, 2014.

g) AB 2263 (Yamada), Chapter 256, Statutes of 2010, extended the sunset provisions on Penal Code section 1170 to January 1, 2012.

h) SB 150 (Wright), Chapter 171, Statutes of 2009, eliminated the presumption of the middle term relating to sentencing enhancements found in Penal Code section 1170.1, subdivision (d).

i) SB 1701 (Romero), Chapter 416, Statutes of 2008, extended to January 1, 2011, the provisions of SB 40 which were originally due to sunset on January 1, 2009.

j) SB 40 (Romero), Chapter 3, Statutes of 2007, amended California's DSL to eliminate the presumption for the middle term and to state that where a court may impose a lower, middle or upper term in sentencing a defendant, the choice of appropriate term shall be left to the discretion of the court.

REGISTERED SUPPORT / OPPOSITION:

Support

California Attorneys for Criminal Justice (Sponsor)
Communities United for Restorative Youth Justice (CURYJ) (Co-Sponsor)
Legal Services for Prisoners With Children (Co-Sponsor)
California Public Defenders Association (CPDA)
Ella Baker Center for Human Rights
Los Angeles County District Attorney's Office
San Francisco Public Defender

Oppose

California District Attorneys Association

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

Amended Mock-up for 2021-2022 SB-567 (Bradford (S))

Mock-up based on Version Number 96 - Amended Senate 5/20/21
Submitted by: Sandy Uribe, Office Name

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

SECTION 1. Section 1170 of the Penal Code, as amended by Section 15 of Chapter 29 of the Statutes of 2020, is amended to read:

1170. (a) (1) The Legislature finds and declares that the purpose of sentencing is public safety achieved through punishment, rehabilitation, and restorative justice. When a sentence includes incarceration, this purpose is best served by terms that are proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances.

(2) The Legislature further finds and declares that programs should be available for inmates, including, but not limited to, educational, rehabilitative, and restorative justice programs that are designed to promote behavior change and to prepare all eligible offenders for successful reentry into the community. The Legislature encourages the development of policies and programs designed to educate and rehabilitate all eligible offenders. In implementing this section, the Department of Corrections and Rehabilitation is encouraged to allow all eligible inmates the opportunity to enroll in programs that promote successful return to the community. The Department of Corrections and Rehabilitation is directed to establish a mission statement consistent with these principles.

(3) In any case in which the sentence 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 they had committed their 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 sentence 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, except for a remaining portion of mandatory supervision imposed 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 the county correctional administrator. The court shall advise the defendant that they 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) (1) When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall, in its sound discretion, order imposition of a sentence not to exceed the middle term, except as otherwise provided in paragraph (2).

(2) The court may impose a sentence exceeding the middle term only when there are circumstances in aggravation of the crime that justify the imposition of a term of imprisonment exceeding the middle term, and those facts have been stipulated to by the defendant, or have been found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial. Except where an aggravating fact is an element of the charged offense or it is otherwise authorized by law, upon request of a defendant, trial on the circumstances in aggravation alleged in the indictment or information shall be bifurcated from the trial of charges and enhancements. The jury shall not be informed of the bifurcated allegations until there has been a conviction of a felony offense.

(3) Notwithstanding paragraphs (1) and (2), the court may consider the defendant's prior convictions in determining sentencing based on a certified record of conviction without submitting the prior convictions to a jury.

(4) 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. 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.

(5) The court shall set forth on the record the facts and reasons for choosing the sentence imposed. 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 they 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 a 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, the county correctional administrator in the case of county jail inmates, or the district attorney of the county in which the defendant was sentenced, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if they 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. The court resentencing under this paragraph may reduce a defendant's term of imprisonment and modify the judgment, including a judgment entered after a plea agreement, if it is in the interest of justice. The court may consider postconviction factors, including, but not limited to, the inmate's disciplinary record and record of rehabilitation while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the inmate's risk for future violence, and evidence that reflects that circumstances have changed since the inmate's original sentencing so that the inmate's continued incarceration is no longer in the interest of justice. 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 been incarcerated for at least 15 years, 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 it was pled and proved that the defendant tortured, as described in Section 206, their 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 the defendant 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 their 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 themselves of rehabilitative, educational, or vocational programs, if those programs have been available at their 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 one or more of the statements specified in clauses (i) to (iv), inclusive, of subparagraph (B) is true, the court shall recall the sentence and commitment previously ordered and hold a hearing 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 resentence the defendant to a term of imprisonment with the possibility of parole 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 defendant was sentenced to life without the possibility of parole.

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

(iv) Prior to the offense for which the defendant was sentenced to life without the possibility of parole, 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 themselves of rehabilitative, educational, or vocational programs, if those programs have been available at their 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 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 (F). 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 or the defendant is resentenced to imprisonment for life without the possibility of parole, 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 the sentence is not recalled or the defendant is resentenced to imprisonment for life without the possibility of parole 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.

(K) Nothing in this paragraph is intended to diminish or abrogate any rights or remedies otherwise available to the defendant.

(e) (1) Notwithstanding any other law and consistent with paragraph (1) of subdivision (a), if the secretary determines that a prisoner satisfies the criteria set forth in paragraph (2), the secretary 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 12 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 them 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.

(3) Within 10 days of receipt of a positive recommendation by the secretary, 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 12 months or less to live shall notify the chief medical officer of the prognosis. If the chief medical officer concurs with the prognosis, they 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 their 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 their 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 may recommend to the court that the prisoner's sentence be recalled. The secretary shall submit a recommendation for release within 30 days.

(7) Any recommendation for recall submitted to the court by the secretary 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 their 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 12 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.

(12) This subdivision does not apply to a prisoner sentenced to death or a term of life without the possibility of parole.

(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 the defendant is required to register as a sex offender shall not be subject to dismissal pursuant to Section 1385.

(g) A sentence to the 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 the 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 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) When the court is imposing a judgment pursuant to this subdivision concurrent or consecutive to a judgment or judgments previously imposed pursuant to this subdivision in another county or counties, the court rendering the second or other subsequent judgment shall determine the county or counties of incarceration and supervision of the defendant.

(7) 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.

(8) 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.

(9) Notwithstanding the separate punishment for any enhancement, any enhancement shall be punishable in county jail or state prison as required by the underlying offense and not as would be required by the enhancement. The intent of the Legislature in enacting this paragraph is to abrogate

the holding in People v. Vega (2014) 222 Cal.App.4th 1374, that if an enhancement specifies service of sentence in state prison, the entire sentence is served in state prison, even if the punishment for the underlying offense is a term of imprisonment in the county jail.

SECTION 2. Section 1170,1 of the Penal Code is amended to read:

(a) Except as otherwise provided by law, and subject to Section 654, when any person is convicted of two or more felonies, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same or by a different court, and a consecutive term of imprisonment is imposed under Sections 669 and 1170, the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements for prior convictions, prior prison terms, and Section 12022.1. The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements. The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses. Whenever a court imposes a term of imprisonment in the state prison, whether the term is a principal or subordinate term, the aggregate term shall be served in the state prison, regardless as to whether or not one of the terms specifies imprisonment in a county jail pursuant to subdivision (h) of Section 1170.

(b) If a person is convicted of two or more violations of kidnapping, as defined in Section 207, involving separate victims, the subordinate term for each consecutive offense of kidnapping shall consist of the full middle term and shall include the full term imposed for specific enhancements applicable to those subordinate offenses.

(c) In the case of any person convicted of one or more felonies committed while the person is confined in the state prison or is subject to reimprisonment for escape from custody and the law either requires the terms to be served consecutively or the court imposes consecutive terms, the term of imprisonment for all the convictions that the person is required to serve consecutively shall commence from the time the person would otherwise have been released from prison. If the new offenses are consecutive with each other, the principal and subordinate terms shall be calculated as provided in subdivision (a). This subdivision shall be applicable in cases of convictions of more than one offense in the same or different proceedings.

(d) **(1)** When the court imposes a sentence for a felony pursuant to Section 1170 or subdivision (b) of Section 1168, the court shall also impose, in addition and consecutive to the offense of which the person has been convicted, the additional terms provided for any applicable enhancements. If an enhancement is punishable by one of three terms, the court shall, ~~impose the middle term unless there are circumstances in aggravation or mitigation, and state the reasons for its sentence choice, other than the middle term, on the record at the time of sentencing~~. in its sound discretion, order imposition of a sentence not to exceed the middle term, except as otherwise provided in paragraph (2).

(2) The court may impose a sentence exceeding the middle term only when there are circumstances in aggravation that justify the imposition of a term of imprisonment exceeding the middle term, and those facts have been stipulated to by the defendant, or have been found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial.

(3) The court shall also impose any other additional term that the court determines in its discretion or as required by law shall run consecutive to the term imposed under Section 1170 or subdivision (b) of Section 1168. In considering the imposition of the additional term, the court shall apply the sentencing rules of the Judicial Council.

(e) All enhancements shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact.

(f) When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. This subdivision shall not limit the imposition of any other enhancements applicable to that offense, including an enhancement for the infliction of great bodily injury.

(g) When two or more enhancements may be imposed for the infliction of great bodily injury on the same victim in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. This subdivision shall not limit the imposition of any other enhancements applicable to that offense, including an enhancement for being armed with or using a dangerous or deadly weapon or a firearm.

(h) For any violation of an offense specified in Section 667.6, the number of enhancements that may be imposed shall not be limited, regardless of whether the enhancements are pursuant to this section, Section 667.6, or some other provision of law. Each of the enhancements shall be a full and separately served term.

~~(i) This section shall become operative on January 1, 2022.~~