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# **New Laws for Prosecutors**

# New Laws for Prosecutors Webinar 2021



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## Link to CDAA's 2021 Legislative Digest

*For detailed information on these new laws see:*

- <https://www.cdaa.org/wp-content/uploads/2021-Leg-Digest.pdf>

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## Part 1: 2021 Legislative Overview



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## With honorable mention of Larry D. Morse II



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## 2021 Legislative Recap

- Recall Election
  - Governor Newsom won the Recall vote with roughly 62% of California voters voting No on the Recall, but several divisive bills were held this session so as not to weaken his position with voters.
- Budget Surplus
  - For the 2021-22 fiscal year, California received approximately \$26 billion in federal funds, and when combined with the \$75 billion state surplus, the Governor and Legislature had over \$100 billion of unanticipated revenues to fight over and spend.
- COVID Impact
  - 12 bill limit for each member
  - Usually, the Senate has a 40 bill limit and the Assembly has a 50 bill limit over a two-year period.

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## The Numbers: 2021

### Political Makeup

**Assembly:** 80 members; 59 Dems, 19 Reps, 1 Ind, 1 Vacancy

**Senate:** 40 members: 31 Dems, 9 Reps

### Bill Totals

- 2,421 bills introduced
- 836 bills made it to the Governor's desk
- 770 were signed
- 66 vetoed (or..7.9%)

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## Signed Legislation: Assembly v. Senate

### Assembly

- 66% of the signed bills were Assembly Bills
- 75% of the ABs signed were authored by Democrats
- **11.5% of the ABs signed were authored by Republicans**
- 13.5% of the ABs signed were committee bills or the Independent legislator

### Senate

- 34% of the signed bills were Senate Bills
- 76% of the SBs signed were authored by Democrats
- **8.5% of the SBs signed were authored by Republicans**
- 15.5% of the SBs signed were committee bills

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## Criminal Justice Bills in 2021

- Two illustrative examples of what we are dealing with in Sacramento:
  - SB 81 by Senator Skinner: Dismissal of Enhancements
  - AB 333 by Senator Kamlager: Gang Prosecutions

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## Looking Forward: Political Landscape

- Election year
- Redistricting
- Term Limits

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## Term Limits: Next Five Years

|                  |                |  |                        |                    |  |                     |                |
|------------------|----------------|--|------------------------|--------------------|--|---------------------|----------------|
|                  |                |  |                        |                    |  |                     |                |
|                  |                |  | Frank Rigione          |                    |  |                     |                |
|                  |                |  | Jim Paterson           |                    |  |                     |                |
|                  |                |  | Mark Waldron           |                    |  |                     |                |
|                  |                |  | Eduardo Garcia         |                    |  |                     |                |
|                  |                |  | Richard Blount         |                    |  |                     |                |
|                  |                |  | Ed Chao                |                    |  |                     |                |
|                  |                |  | Ken Ciolek             |                    |  |                     |                |
|                  |                |  | Tom Day                |                    |  |                     |                |
|                  |                |  | Jim Frazer             |                    |  | Chad Moyes          |                |
|                  |                |  | Cristina Garcia        |                    |  | James Gallagher     |                |
|                  |                |  | Lorena Gonzalez        |                    |  | Tom Lickley         |                |
|                  |                |  | Adam Gray              |                    |  | Dorot Mathis        |                |
|                  |                |  | Chris Holden           |                    |  | Jacqueline Arambula |                |
|                  |                |  | Rogelio Jones-Saavedra |                    |  | Azumi Burke         |                |
|                  |                |  | Mac Levens             |                    |  | David Chiu          |                |
|                  |                |  | Brian Maerschain       | Brian Daffe        |  | Jim Cooper          |                |
|                  |                |  | José Medina            | Scott Witt         |  | Mike Gipson         |                |
|                  |                |  | Kevin Muller           | Susan Eggman       |  | Jaqui Iwin          |                |
|                  |                |  | Adrin Nazarian         | Tom Atkins         |  | Evan Low            | Shannon Grove  |
|                  |                |  | Bill Quirk             | Steve Bradford     |  | Kevin McCarty       | Brian Jones    |
|                  |                |  | Anthony Rendon         | Bill Dodd          |  | Al Murakami         | Ben Allen      |
|                  |                |  | Freddie Rodriguez      | Beverly Glaser     |  | Patrick O'Donnell   | Anna Caballero |
|                  |                |  | Rudy Sanaa             | Anthony Portantino |  | Sharon Quirk-Silva  | Corrie Layva   |
|                  |                |  | Mark Stone             | Richard Roth       |  | Miguel Santiago     | Mike McGuire   |
|                  |                |  | Phil Ting              | Nancy Skinner      |  | Jim Wood            | Tom Unbeberg   |
| Assembly<br>2022 | Senate<br>2022 |  | Assembly<br>2024       | Senate<br>2024     |  | Assembly<br>2026    | Senate<br>2026 |

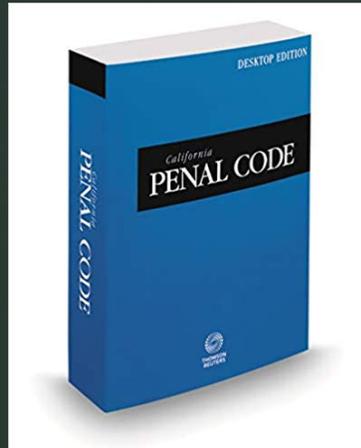
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## Looking Forward: Criminal Justice

- Committee on the Revision of the Penal Code
  - <http://www.clrc.ca.gov/CRPC.html>
- Criminal Justice Reform Legislation
- Trends in crime

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## Part 2: New Laws



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## AB 124: Overview

- For defendants who are youthful, experienced trauma and/or are victim of DV or human trafficking.
- Presumptive low term for all defendants under 26 and defendants who have experienced trauma
- New factors to consider for plea bargains
- New factors to consider for post-conviction re-sentencings
- Expanded vacatur relief and affirmative coercion defense

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## AB 124: Presumptive Low Term

- Amends PC 1170(b) to make the low term the presumptive term in cases where a court finds that any of the following was a “contributing factor” to the crime:
  - Psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence
  - Person is a youth, or was a youth at the time of the offense (“youth” is defined as under 26)
  - Prior to or at the time of the offense the defendant was a victim of intimate partner violence or human trafficking
- Any higher sentence may only be imposed if the low term is “contrary to the interests of justice”

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## AB 124: New Factors for Plea Bargains

- Adds new PC 1016.7 to require prosecutors during plea negotiations to consider the following circumstances as factors that support a mitigated sentence if any was a contributing factor to the crime:
  - Psychological, physical, or childhood trauma, including abuse, neglect, exploitation, or sexual violence
  - Youthfulness (under 26)
  - Being a victim of intimate partner violence or human trafficking
- Also amends PC 1170(d) (1170.03) to add the same factors for the court to consider when a defendant’s sentence is recalled and defendant is resentenced

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## AB 124: Vacatur Relief

- Vacatur = arrest/conviction is declared “null and void”
- New PC 236.15 provides vacatur relief to victims of intimate partner violence and sexual violence
  - Committed crime as a *direct result* of their status as a victim of intimate partner violence or sexual violence
  - Excludes violent felonies
- Similar to PC 236.14 which provides vacatur relief for victims of human trafficking
  - Broadens the vacatur relief avenues involving human trafficking victims to include those convicted of serious felonies (PV 236.14)
  - Now only violent offenses are excluded

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## AB 124: Affirmative Coercion Defense

- Adds serious felonies to the coercion defense set forth in PC 236.23
  - “Affirmative” defense for those who were coerced to commit offense as a result of being human trafficking victim
  - Now only violent offenses are excluded
- New PC 236.24 provides an affirmative defense to a charged crime for petitioners who are coerced to commit the offense as a *direct result* of being victims of intimate partner violence or sexual violence
  - Only violent offenses are excluded
- Sets forth specific types of evidence that may be utilized by a defendant in pursuing such a defense

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## AB 333: Gang Prosecutions New PC 1109

- Mandatory bifurcation of gang enhancement upon request of defense
- PC 186.22(a) (actively participating in CSG) must be tried separately from all other counts
- Adds requirement that the offenses “*commonly benefitted a CSG*” AND the benefit must be “*more than reputational*”
- Removes some offenses from PC 186.22(e)(1)
- Eliminates current offense for use as predicate offense
- “Allegations must be proved by direct or circumstantial evidence”

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## AB 518: Changes to PC 654

- Makes a small yet significant change to PC 654
- Gives judges discretion to sentence on any count and stay other counts pursuant to 654, regardless of punishment
- Existing law requires an act that is punishable in different ways to be punished under the law that provides for the longest possible term of imprisonment
- Would authorize an act that is punishable in different ways to be punished under either of those provisions
- Now possible for judge to impose lesser punishment on a count and stay per 654 the count with the greater punishment

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## AB 518: Examples

- DUI defendant who is convicted of both murder (PC 187-2<sup>nd</sup>) and gross vehicular manslaughter while intoxicated (PC 191.5(a))
- Under existing law, must be sentenced on the count with the greatest punishment (i.e. murder) while the vehicular manslaughter count would be stayed pursuant to PC 654.
- Under AB 518, the judge would now have discretion to sentence on either count and stay the other count.
- Other examples:
  - Judge imposing sentence on a determinate count and staying per 654 the punishment on an indeterminate (life) count
  - Imposing sentence on a misdemeanor count and staying per 654 the punishment on a felony count.

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## AB 518: Continued

- Bill will impact charging/filing decisions
  - Analysis must be done when charging multiple offenses that may 654.
  - In many situations, it will not be advisable to charge otherwise viable offenses due to concern about AB 518's impact on sentencing.
- No probation
  - The prohibition in subsection (b) of PC 654 regarding the granting of probation if not eligible on any count, still remains
- There is no retroactivity provision in the bill
  - Will presumably apply to all active cases and all cases not final as of its effective date (1/1/22)

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## AB 1540: 1170(d) Re-Sentencing

- Amends PC 1170(d) re post-conviction re-sentencing
- Historically, 1170(d) allowed a court to re-sentence within 120 days of judgement or at anytime at request of CDCR for limited purpose (i.e., sentencing error)
- Legislative amendments expanded the scope of 1170(d)'s authority
  - Granted CDCR expansive powers & gave DA authority to petition
  - Retroactive application of post-judgement law changes
  - Early release based on exceptional conduct
  - Petitions to correct an alleged unjust sentence

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## AB 1540: Continued

- AB 1540 moves 1170(d)(1) to new section: PC 1170.03
  - Re-numbers 1170(d)(2) re juveniles sentenced to LWOP to 1170(d)(1)
- Includes a presumption in favor of re-sentencing
  - May only be overcome if a court finds the defendant is an unreasonable risk of danger to public safety (risk to commit a "super strikes")
  - Most violent offenses are excluded from the definition of a "super strike"
  - Thus, judge could find that inmate is an unreasonable risk to commit a multitude of other violent offenses but still be required to re-sentence
- Requires hearing, appointment of counsel and conference within 30 days
  - Court may no longer summarily deny
- May re-sentence to LIO or LRO, with DA concurrence
- Bill also expands re-sentencings to out-of-custody defendants

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## AB 3070: Peremptory Challenge Overhaul

- **Legislative intent:** to put into place an effective procedure for eliminating the unfair exclusion of potential jurors based on race, etc.
- Peremptory challenges are frequently used in criminal cases to exclude jurors from serving based on race, etc. and that exclusion has disproportionately harmed African-Americans, Latinos, and other people of color
- Existing procedure has failed to eliminate discrimination
- New law to be broadly construed

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## AB 3070: Details

- Eliminates the need for a *prima facie* showing
  - “upon objection...the party exercising the peremptory challenge shall state the reasons”
- Lower burden
  - Substantial likelihood that an objectively reasonable person would view race [etc.] as a factor in the use of the peremptory challenge
- **Objectively reasonable person** is aware that unconscious bias, in addition to purposeful discrimination, have resulted in the unfair exclusion of jurors
- Purposeful discrimination not required
- List of 16 reasons presumed to be invalid
  - Can only be overcome by clear and convincing evidence
- Effective 1/1/22 (for jury selection beginning on/after)

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## AB 3070: Impact on *Wheeler/Batson*

### ~~3 step process~~

- ~~1. Party objecting to challenge must make out *prima facie* case~~
- ~~2. If *prima facie* case shown, burden shifts and party must explain adequately the challenge~~
3. Court then makes decision

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## 16 Presumptions Presumed Invalid (1-5)

1. Expressing a distrust of or having a negative experience with law enforcement or the criminal legal system
2. Expressing a belief that law enforcement officers engage in racial profiling or that criminal laws have been enforced in a discriminatory manner.
3. Having a close relationship with people who have been stopped, arrested, or convicted of a crime.
4. A prospective juror's neighborhood
5. Having a child outside of marriage

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## **16 Presumptions** **Presumed Invalid (6-10)**

- 6. Receiving state benefits
- 7. Not being a native English speaker.
- 8. The ability to speak another language
- 9. Dress, attire, or personal appearance
- 10. Employment in a field that is disproportionately occupied by group members or that serves a population disproportionately comprised of group members

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## **16 Presumptions** **Presumed Invalid (11-13)**

- 11. Lack of employment or underemployment
- 12. Juror's apparent friendliness with another prospective juror of the same group
- 13. Any justification subject to comparative analysis

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## 16 Presumptions Presumed Invalid Unless Supported by Record & Relevant (14-16)

- 14. Juror was inattentive, or staring or failing to make eye contact.
- 15. Juror exhibited either a lack of rapport or problematic attitude, body language, or demeanor.
- 16. Juror provided unintelligent or confused answers.

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## AB 3070: Reference Guide

|  |   |
|--|---|
| <div style="border: 1px solid black; padding: 5px; margin-bottom: 5px;"> <p style="text-align: center;"><b>Wheeler/Batson &amp; AB 3070 Guide</b><br/>ADA Robert Mestman<br/>Orange County District Attorney's Office<br/>© 01.01.2022</p> </div> <div style="border: 1px solid black; padding: 5px; margin-bottom: 5px;"> <p style="text-align: center;"><b>Seminal Cases &amp; Important New Statute</b></p> <ul style="list-style-type: none"> <li>• <i>P v. Wheeler</i> (1978) 22 C3 258</li> <li>• <i>Batson v. Kentucky</i> (1986) 476 US 79</li> <li>• CCP § 231.7 (AB 3070)</li> </ul> </div> <div style="border: 1px solid black; padding: 5px; margin-bottom: 5px;"> <p style="text-align: center;"><b>New 3 Step Procedure</b></p> <ol style="list-style-type: none"> <li>1. Party objects. No <i>prima facie</i> showing required.</li> <li>2. Party exercising the peremptory challenge shall state the reasons the peremptory challenge has been exercised.             <ul style="list-style-type: none"> <li>• Offer permissible cognizable group neutral justification.</li> </ul> </li> <li>3. Court then makes decision.</li> </ol> </div> <div style="border: 1px solid black; padding: 5px; margin-bottom: 5px;"> <p style="text-align: center;"><b>Burden of Proof &amp; Definitions</b></p> <ul style="list-style-type: none"> <li>• If <b>substantial likelihood</b> that an <b>objectively reasonable person</b> would view race, etc. as a factor in use of challenge, then the objection shall be sustained.</li> <li>• A "substantial likelihood" means more than a mere possibility but less than a standard of more likely than not (i.e., less than preponderance of the evidence).</li> <li>• An "objectively reasonable person" is aware that unconscious bias, in addition to purposeful discrimination, have resulted in unfair exclusion of jurors.</li> <li>• "Unconscious bias" includes implicit and institutional biases.</li> <li>• Court need <u>not</u> find purposeful discrimination.<br/>[See CCP § 231.7(e)]</li> </ul> </div> <div style="border: 1px solid black; padding: 5px;"> <p style="text-align: center;"><b>Justifications (2<sup>nd</sup> Step)</b></p> <ul style="list-style-type: none"> <li>• Justification need not support cause challenge. (<i>P v. Thomas</i> (2011) 51 C4 449)</li> <li>• "Trivial" reason (if genuine) will suffice. (<i>P v. Arias</i> (1996) 13 C4 92, 136)</li> <li>• Reasons must be inherently plausible &amp; supported by record. (<i>P v. Silva</i> (2001) 25 C4 345, 386; CCP § 231.7(e)(3)(F))</li> <li>• Must state reasons for <u>each</u> challenge. (<i>P v. Cervantes</i> (1991) 223 CA3 323)</li> <li>• Could be combination of factors (change in jury dynamic, number of challenges left, etc.). (<i>P v. Lenix</i> (2008) 44 C4 602, 623; <i>P v. Reynolds</i> (2003) 31 C4 903, 918.)</li> </ul> </div> | <div style="border: 1px solid black; padding: 5px; margin-bottom: 5px;"> <p style="text-align: center;"><b>Factors in Court's Analysis (3rd Step)</b></p> <ul style="list-style-type: none"> <li>• Court considers totality of circumstances.</li> <li>• Consider only the reasons actually given and shall not speculate.</li> <li>• Whether defendant, victim and/or witnesses are member of the same perceived cognizable group as the challenged juror.</li> <li>• Whether race, etc. bear on the facts of the case to be tried.</li> <li>• Little, no or disparate questioning (differences in the way questions were phrased to different jurors).</li> <li>• Comparative analysis (see box below).</li> <li>• Whether a reason might be disproportionately associated with a race, etc.</li> <li>• Whether the reason was contrary to or unsupported by the record.</li> <li>• Historical evidence of discrimination (by individual prosecutor and/or office).</li> <li>• Credibility, demeanor of prosecutor. (<i>P v. Williams</i> (2013) 56 C4 630; <i>P v. Cox</i> (2010) 187 CA4 337, 343.)</li> <li>• Whether prosecution passed on panel with members of group. (<i>P v. Sanchez</i> (2016) 63 C4 411, 439; <i>P v. Gutierrez</i> (2017) 2 C5 1150, 1170.)</li> <li>• Statistical evidence (raw numbers, percentage of jurors excused, remaining, proportionality, etc.). (<i>P v. Garcia</i> (2011) 52 C4 706, 744)<br/>[See CCP § 231.7(e)]</li> </ul> </div> <div style="border: 1px solid black; padding: 5px; margin-bottom: 5px;"> <p style="text-align: center;"><b>Comparative Analysis</b></p> <ul style="list-style-type: none"> <li>• Side-by-side comparison of jurors who were struck vs. jurors serving.</li> <li>• If DA's proffered reason for striking juror applies just as well to an otherwise-similar juror; that is evidence tending to prove purposeful discrimination. (<i>Miller-Ely v. Dretke</i> (2005) 545 US 231, 241)</li> <li>• Is but one form of circumstantial evidence that is relevant, but not necessarily dispositive. (<i>P v. Lomax</i> (2010) 49 C4 530, 572)</li> </ul> </div> <div style="border: 1px solid black; padding: 5px;"> <p style="text-align: center;"><b>Challenges for Cause</b></p> <ul style="list-style-type: none"> <li>• CCP §§ 223 et. seq.; Rule of Court 4.201</li> <li>• Unlimited number (each side)</li> <li>• General disqualification: insufficient English, non-resident, felon on supervision, felon 290, etc.</li> <li>• Implied bias: blood relation to any party, involvement in prior case, interest in outcome, opinion/knowledge about case, bias towards party</li> <li>• Actual bias: state of mind preventing impartiality and prejudice</li> <li>• Court can control time limits on counsel but cannot establish an inflexible time limit policy; shall permit liberal &amp; probing examination</li> <li>• Cause challenges burden: substantial evidence</li> <li>• Abuse of discretion standard of review (<i>P v. Kaurish</i> (1990) 52 C3 648)</li> </ul> </div> |
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## SB 81: Enhancements

- Will have wide ranging impact because it applies to all cases with enhancements, without exception
  - No exclusions for homicide, sex offenses, serious or violent crimes, etc.
- Creates a new subsection (c) of PC 1385
  - “the court shall dismiss an enhancement if it is in the furtherance of justice to do so”
- Lists several circumstances that the court “shall consider and afford great weight”
- “Proof of the presence of one or more of these circumstances weighs greatly in favor of dismissing the enhancement, unless the court finds that dismissal of the enhancement would endanger public safety.”
- “Endanger public safety” means there is a likelihood that the dismissal of the enhancement would result in physical injury or other serious danger to others

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## SB 81: Applicable Circumstances

- A. Application of the enhancement would result in a discriminatory racial impact [the Racial Justice Act].
- B. Multiple enhancements are alleged in a single case. In this instance, all enhancements beyond a single enhancement shall be dismissed.
- C. The application of an enhancement could result in a sentence of over 20 years. In this instance, the enhancement shall be dismissed.
- D. The current offense is connected to mental illness.
- E. The current offense is connected to prior victimization or childhood trauma.
- F. The current offense is not a violent felony as defined in subdivision (c) of Section 667.5.
- G. The defendant was a juvenile when they committed the current offense or any prior juvenile adjudication that triggers the enhancement or enhancements applied in this case.
- H. The enhancement is based on a prior conviction that is over five years old.
- I. Though a firearm was used in the current offense, it was inoperable or unloaded.

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## SB 81: Continued

- With regard to mental illness referenced in (D)
  - Antisocial personality disorder, borderline personality disorder, and pedophilia are excluded
  - Mental illness must have “substantially contributed to the defendant’s involvement in the commission of the offense.”
- With regard to prior victimization and childhood trauma referenced in (E)
  - Definitions are quite broad, though the defense must show that it “substantially contributed to the defendant’s involvement in the commission of the offense.”
- Though circumstances (B) and (C) contain language that the enhancement “shall be dismissed,” the legislative history of the bill makes it clear that these are not mandatory provisions and the court retains discretion under the new law

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## SB 81: Continued

- Original version contained a mandatory presumption in favor of dismissing enhancements, but was eventually amended to its current language (affording “great weight”)
- Not retroactive
  - Applies to sentencings occurring after the effective date (1/1/22)
- Bill raises many issues, including:
  - How a court is to determine whether a given circumstance is present, such as discriminatory racial impact
  - Or a defendant’s prior victimization or childhood trauma.
- Likely will result in a large increase in both pre-trial and post-trial litigation
- Bill skews the weighing process heavily towards defendants, but mandate applies only where the court finds that it is “furtherance of justice”
  - Ultimately the court still retains discretion

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## SB 81: Examples

- Res burg committed by a defendant with five prior prison commitments for res burg will have a “great weight” entitlement (current crime not violent)
- Robbery with a 12022.53(c) or (d) will have a “great weight” entitlement (sentence *could* be over 20 years with the enhancement)
- 245(a)(2) with a 12022.5 and four 12022.7 victims will have a “great weight” entitlement (multiple enhancements in a single case)

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## SB 483: Repeal & Resentencing PC 1171/1171.1

- Makes the HS 11370.2 & PC 667.5(b) priors legally invalid (except 11380 or sexually violent)
- Resentencing is *fully retroactive* to all those serving a sentence
- Directs CDCR and county admin to ID and report cases to sentencing courts
  - By 3/1/22: if served base term and enhancements and serving 11370.2/667.5(b)
  - By 7/1/22: all other cases
- Directs court to resentence all cases
  - By 10/1/22: if served base term and enhancements and serving 11370.1/667.5(b)
  - By 12/31/23: all other cases

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## SB 483: Continued

- Requires appointment of counsel
- Resentencing Procedures: more than just deleting the punishment for enhancement
  - Requires court to apply “any other changes in law that reduce sentences or provide judicial discretion...”
  - Authorizes court to consider post-conviction factors
  - Imposes same limitations as SB 567

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## SB 567: Aggravating Factors Proved in Bifurcated Trial – PC 1170/1170.1

- Requires bifurcated trial to prove BYRD aggravating factors use to impose upper term
  - For both substantive crimes and enhancements
  - Can be stipulated to by defense
- Evidence of aggravating circumstance does not have to be bifurcated if it is admissible to prove charge or enhancement
- Court can consider prior convictions as aggravating circumstances based on certified record of conviction
- No guidance as to any notice or pleading requirement for aggravating factors
- (See also **SB 81** and **AB 124** for changes in imposition of priors and low term)

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## Impact of Multiple Bills

- AB 124 to be best understood and dealt with in combination with SB 567 and SB 81 because often we'll really be dealing with all 3 together
- Example:
  - 245(b) with 12022.5(a) gun use and GBI committed by a 24 year-old.
  - Can't just argue upper term because we need to prove an aggravating factor (SB 567)
  - There are 2 enhancements charged, so great weight in favor of dismissal of at least one (SB 81)
  - Def will get a presumptive low term on the 245 and the gun use (AB 124)

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## SB 775: PC 1170.95 Extended to Attempted Murder and Manslaughter

- Extends PC 1170.95 relief to Attempted Murder and Manslaughter
- Requires appointment of counsel upon request if indicated in the petition
- Eliminates ability of court to determine whether *prima facie* showing exists until after appointment of counsel and filing of briefs by both sides
- Requires court to provide a statement of reasons if an OSC is declined

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## SB 775: Continued

- Hearing requirements:
  - Prosecution must prove petitioner is guilty BYRD
  - Admission of evidence is governed by the Evidence Code or if previously admitted
  - A finding that there is substantial evidence to support a conviction is **not sufficient** to prove BYRD ineligibility
- Allows person convicted of murder, attempted murder, or manslaughter whose conviction is not final to challenge on direct appeal the validity of the conviction under SB 1473 and SB 775
- Reduces the parole term for resentencing from 3 years to 2 years

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## AB 1138 and AB 287: Civil penalties for unlicensed cannabis activity

- *AB 1138  
Business & Professions Code Section 26038  
and  
AB 287  
Code of Civil Procedure Section 338*

Statute of limitations for bringing B&P 26038 civil actions against unlicensed cannabis activity: extended from one to three years.

- Adds penalties for those who aid and abet unlicensed commercial cannabis activity and provides that only the Attorney General, a city attorney, or a county counsel may bring an action against an aider/abettor. District Attorneys are not mentioned.
- District attorneys are removed from the list of entities (Attorney General, city attorney, county counsel) that may receive reimbursement for their costs from the penalty collected against an *actual* perpetrator.

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## AB 1138 & AB 287: Continued

- Issue: It is not clear whether the amendment actually prohibits a district attorney from bringing a civil action against an actual perpetrator, or, whether a district attorney may bring the action but not be able to recover costs. The legislative history states a concern that district attorneys could use the threat of “high civil penalties to coerce low-level actors into pleading guilty to questionable criminal charges.” Unlike for aiding/abetting which provides that only the Attorney General, city attorney, or county counsel may bring an action, there is no similar paragraph specifically prohibiting a district attorney from bringing an action against an actual perpetrator.

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## AB 1452: Pilot program to pay low-income jurors

- *New Code of Civil Procedure Section 240*

Authorizes San Francisco to conduct a pilot program of up to two years to pay low-income jurors \$100 per day in criminal cases, if their household income for the past 12 months is less than 80 percent of the San Francisco Bay Area median income and if they meet one of these additional criteria:

- 1.) The trial juror’s employer does not compensate for jury service;
- 2.) The trial juror is self-employed; or
- 3.) The trial juror is not employed.

The purpose of the pilot program is to analyze and determine whether paying low-income trial jurors “promotes a more economically and racially diverse trial jury panel that more accurately reflects the demographics of the community.”

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## SB 241: Remote proceedings in civil cases authorized, including trials

- *New Code of Civil Procedure Section 367.75*

Authorizes courts in *civil cases* to conduct proceedings through the use of remote technology, including trials.

Prohibits a court from requiring a party to appear remotely.

47

## AB 341: Social media is included in the definition of evidence of a victim's sexual conduct

- *Evidence Code Section 782*

Provides that "evidence of sexual conduct" includes "those portions of a social media account about the complaining witness, including any text, image, video, or picture, which depict sexual content, sexual history, nudity or partial nudity, intimate sexual activity, communications about sex, sexual fantasies, and other information that appeals to a prurient interest, unless it is related to the alleged offense."

The purpose of this bill is to require a written motion, an offer of proof, and a hearing outside the presence of the jury in a sexual assault case, about the admissibility of information in a victim's social media account, just as a motion, offer of proof, and hearing are already required if the defendant seeks to introduce evidence of the victim's sexual conduct.

48

## AB 939: Evidence about how a sexual assault victim is dressed at the time of the crime is prohibited on the issue of consent

- *Evidence Code Section 1103*

The Denim Day Act of 2021.

Prohibits a court from admitting evidence of the manner in which a specified sexual assault victim was dressed at the time of the crime, on the issue of consent, *regardless of whether the evidence is relevant and admissible in the interest of justice.*

Previously, paragraph (2) of subdivision (c) of this section permitted evidence of a victim's manner of dress to be admitted if the court determined that the evidence was relevant and admissible in the interest of justice.

Continues to provide that "manner of dress" does not include the condition of the victim's clothing before, during, or after the commission of the offense.

49

## SB 374: Reproductive coercion is added as a basis for a domestic violence restraining order

- *Family Code section 6320*

- Expands the type of conduct that may be the subject of an ex parte domestic violence restraining order, to include reproductive coercion. Existing language in this section provides that coercive control qualifies as conduct that disturbs the peace of the other party and that disturbing the peace of another is one of the types of conduct a court may enjoin in an ex parte order. Reproductive coercion is added as a fifth example of what constitutes coercive control.

- Defines reproductive coercion as control over the reproductive autonomy of another person through force, threat of force, or intimidation, which may include, but is not limited to, unreasonably pressuring the other party to become pregnant, deliberately interfering with contraception use or access to reproductive health information, or using coercive tactics to control, or to attempt to control, pregnancy outcomes.

50

## AB 473 & AB 474: The California Public Records Act is reorganized and renumbered, effective January 1, 2023

- *Government Code Sections 6250 through 6276.48 are now in new Sections 7920.000 through 7931.000*

Provisions pertaining to law enforcement records and crime victims are in new Gov't Code Sections 7923.600 – 7923.755 (Articles 1 through 4 in Chapter 1 of Part 5 of New Division 10).

The provisions of Government Code Section 6254(f) (specifying law enforcement records that are, and are not, subject to disclosure) are spread out in new Sections 7923.600 through 7923.625.

51

## SB 73: Probation eligibility for drug crimes is expanded

- *Health & Safety Code Section 11370*  
*Penal Code Section 1203.07*  
*Penal Code Section 1203.073*

Amends both H&S 11370 and P.C. 1203.07 to eliminate crimes that trigger probation ineligibility, and to convert both sections from mandatory probation ineligibility to presumptive probation ineligibility only.

Repeals P.C. 1203.073 in its entirety (which had provided for presumptive probation ineligibility in a number of drug cases.)

52

## AB 1171: PC 262 Spousal Rape is repealed and incorporated into PC 261 Rape

- *Penal Code Section 261*  
*Penal Code Section 262*  
*Makes conforming amendments to numerous other sections*

The various types of rape in P.C. 261(a)(2) through P.C. 261(a)(7) now apply regardless of whether the perpetrator and victim are spouses.

The exception is P.C. 261(a)(1), the crime of raping a person who is incapable of giving legal consent because of a mental disorder or developmental or physical disability. P.C. 261(a)(1) does not apply where the perpetrator and victim are spouses, but it does provide that nothing in P.C. 261(a)(1) precludes the prosecution of a spouse who commits the act from being prosecuted under any other paragraph in P.C. 261(a), or under any other law.

- With the incorporation of P.C. 262 into P.C. 261, provisions that previously applied only to P.C. 261 will now also apply to the rape of a spouse. One example is the mandatory probation ineligibility provisions in P.C. 1203.065(a) for P.C. 261(a)(2), P.C. 261(a)(3), P.C. 261(a)(4), and P.C. 261(a)(6).

53

## AB 1247: The SOL for a Felony PC 502 offense (computer crimes) is extended

- *New Penal Code Section 801.7*

Extends the statute of limitations for prosecuting a felony P.C. 502 offense (computer crimes) *from* within three years after the commission of the offense, *to* within three years after the discovery of the offense or within three years after the offense could reasonably have been discovered, but no more than six years after the commission of the offense.

[With this expanded statute of limitations, computer crimes such as hacking and cyberattacks that are not discovered until long after they are committed, may still be filed in criminal court, as long as charges are filed within six years of the date of commission.]

Provides that this new section applies to crimes committed on or after January 1, 2022 and to crimes for which the statute of limitations had not run as of January 1, 2022.

54

## SB 23:

### The SOL for the PC 647(j)(4) misdemeanor crime of revenge porn is extended

- *Penal Code Section 803*

Extends the statute of limitations for filing a violation of P.C. 647(j)(4) (commonly referred to as “revenge porn”) *from* one year, *to* within one year of the date of discovery but no more than four years after the date the image was distributed.

[P.C. 647(j))4) is the misdemeanor crime of intentionally distributing an image of the intimate body part of another person or an image of the person engaging in a sex act, under circumstances in which the persons agreed or understood the image would remain private, and the person distributing the image knows or should know that distribution will cause serious emotional distress, and the person depicted suffers that distress.]

55

## AB 127: An employee of a public prosecutor’s office is authorized to make a declaration of probable cause to obtain an arrest warrant

- *Penal Code Section 817*

Authorizes an employee of a public prosecutor’s office (*e.g.*, a deputy district attorney or deputy city attorney) to make a declaration of probable cause to a magistrate if the defendant is a peace officer, in order to obtain a warrant of probable cause for arrest. Previously, P.C. 817 was worded only in terms of a declaration of probable cause being made by a peace officer.

[P.C. 817 was enacted in 1995 and codified the California Supreme Court’s decision in *People v. Bittaker* (1989) 48 Cal.3d 1046, which upheld, under the doctrine set forth in *People v. Ramey* (1976) 16 Cal.3d 263, the legality of issuing an arrest warrant upon a declaration of probable cause, before formal charges are filed.]

- [According to the legislative history of this bill, an obstacle to the prosecution of police officers is the unwillingness of law enforcement officers to assist in the prosecution of one of their own and this can lead to law enforcement officers refusing to provide the necessary information to support an arrest warrant.]

56

▸ **AB 700: Courts may proceed with a hearing, preliminary hearing, or trial when an in-custody defendant refuses transportation to court**

- *Penal Code Section 977*  
*Penal Code Section 1043*  
*Penal Code Section 1043.5*

Requires the court to make specified findings by clear and convincing evidence, such as the defendant is refusing without good cause to appear in court and has been informed of the right to be personally present.

Requires the court to make the findings each day of the defendant's absence.

57

▸ **AB 1318:  
The sunset date on the deferred entry of judgment pilot program for young adults is extended**

- *Penal Code Section 1000.7*

Extends the sunset date, from January 1, 2022 to January 1, 2024, to continue for two more years the operation of this Deferred Entry of Judgment pilot program for young adult offenders. Continues to apply to these six counties: Alameda, Butte, Napa, Nevada, Santa Clara, and Ventura.

58

AB 419:  
The type of victim/witness information that defense attorneys are prohibited from disclosing is expanded, and the crime of willfully violating this section is deleted

- *Penal Code Section 1054.2*

Expands the type of information that defense attorneys are prohibited from disclosing about victims and witnesses beyond addresses and telephone numbers, to “personal identifying information.”

- Provides that personal identifying information has the same definition as that in P.C. 530.55 (e.g., address, telephone number, date of birth, driver’s license number, social security number, bank account number, mother’s maiden name, passport number, credit card number), but does *not* include name, place of employment, or an equivalent form of identification.
- Eliminates the misdemeanor crime of an attorney, an employee of an attorney, or person appointed by the court, committing a willful violation of this section. There is no longer any criminal penalty for violating P.C. 1054.2 and there is no explanation given in the legislative history of the bill as to why it was eliminated.

59

AB 145:  
Establishes a three-year county resentencing pilot program to resentence state prison and county jail inmates pursuant to p.c. 1170(d)(1) (which was expanded and moved to new p.c. 1170.03 by ab 1540)

- *New Penal Code Section 1170.01*

Runs from September 1, 2021 to September 1, 2024.

- Involves nine counties (Contra Costa, Humboldt, Los Angeles, Merced, Riverside, San Diego, San Francisco, Santa Clara, Yolo).

AB 128 appropriates money to the district attorneys and public defenders in these counties and permits district attorneys to contract with community-based organizations.

Requires each participating district attorney to develop and implement a written policy that outlines the factors and criteria that will be used to identify, investigate, and recommend a convicted defendant for recall and resentencing. Permits the district attorney to consider input from a public defender’s office and from a contracted community-based organization.

60

## AB 1228: Release of probation violators on their own recognizance pending a formal violation hearing

- *Penal Code Section 1203.2*
- *New Penal Code Section 1203.25*

Creates a presumption for the own recognizance release of a probation violator before a formal violation hearing.

Prohibits a court from denying release for a person on probation for a misdemeanor, unless the probationer fails to comply with an order of the court, including an order to appear in court.

- Prohibits a court from denying release for a person on probation for a felony unless the court finds by clear and convincing evidence that there are no means reasonably available to provide reasonable protection of the public and reasonable assurance of the probationer's future appearance in court.

Requires a court to make a finding of danger to the public by clear and convincing evidence, in order to be able to impose conditions of release such as electronic monitoring or reporting by telephone to a probation officer.

61

## AB 1281: The dismissal of a conviction does not release the defendant from the terms and conditions of an unexpired criminal protective order

- *Penal Code Sections 1203.4, 1203.4a, 1203.4b, and 1203.425*

Adds that the dismissal of a conviction does *not* release the defendant from the terms and conditions of any unexpired criminal protective order that was issued pursuant to P.C. 136.2(i)(1) (a restraining order for up to ten years in favor of the victim of a specified domestic violence, sex, or gang crime); P.C. 273.5(j) (a restraining order for up to ten years in a domestic violence case); P.C. 368(l) (a restraining order for up to ten years in an elder abuse, elder fraud, or elder false imprisonment case), or P.C. 646.9(k) (a restraining order for up to ten years in a stalking case).

[The purpose of this bill is to eliminate the uncertainty about whether a restraining order remains effective for the term set by the court, despite the dismissal/expungement of the conviction on which it is based.]

62

## AB 177: Interest on victim restitution

- *Penal Code Section 1214.5*

Repeals this section that had permitted a judge, when ordering more than \$50 in victim restitution as a condition of probation, to order the defendant to pay ten percent interest.

*However*, P.C. 1202.4(f)(3)(G) *continues* to list 10 percent interest as an item to be included in a victim restitution order. P.C. 1202.4(f)(3) requires that a restitution order “shall be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant’s criminal conduct, including, but not limited, to, all of the following: . . .

(G) Interest, at the rate of 10 percent per annum, that accrues as of the date of sentencing or loss, as determined by the court.”

63

## SB 317: Procedures for misdemeanor defendants found mentally incompetent to stand trial

- *Penal Code Section 1370.01*

Repeals P.C. 1370.01 in its entirety, and adds a new and much shorter version.

Provides that if a defendant is found mentally incompetent, the trial, judgment, or hearing must be suspended and the court may do either of the following:

- 1.) Conduct a mental disorder diversion hearing pursuant to P.C. 1001.36; or
- 2.) Dismiss the charges pursuant to P.C. 1385.

Limits mental disorder diversion for mentally incompetent misdemeanants to one year. (P.C. 1001.36 has a two-year limit.)

Sets forth detailed procedures for handling mentally incompetent misdemeanants, including requiring the dismissal of a probation violation when a defendant on misdemeanor probation is found to be mentally incompetent.

64

▸ **AB 1259: Motion to vacate a conviction based on adverse immigration consequences, even if the defendant was convicted at trial**

- *Penal Code Section 1473.7*
- Previously, a defendant could move to vacate a conviction or sentence on the ground that it was legally invalid “due to prejudicial error damaging the moving party’s ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere.” Now, a defendant can move to vacate a conviction or sentence on adverse immigration grounds, even if the defendant did not plead guilty or no contest, and instead took the case to trial.

65

▸ **SB 317: Expands conduct credits to time spent in state hospitals and mental health treatment facilities**

- *Penal Code Section 4019*
- Amends paragraph (8) of subdivision (a) to add state hospitals and mental health treatment facilities to those places (county jail treatment facilities) where a defendant earns conduct credits of four days for every two days spent in custody, when the defendant is confined in or committed to such a place while undergoing competency proceedings.

66

## SB 827: Legalizes Nunchakus

- Eliminates nunchaku (a martial arts weapon consisting of two sticks joined by a chain or cord) from the list of prohibited weapons and makes conforming amendments to several other Penal Code sections.
- [The legislative history of the bill explains the history of the ban on nunchakus and the Legislature's reasons for legalization: In the 1970s, California banned nunchakus following the rise in popularity of Kung Fu and Bruce Lee movies, and a concern about nunchakus being used by criminals. In 2018, New York's law prohibiting the possession of nunchakus was struck down on Second Amendment grounds. (The Second Amendment protects the right of the people to keep and bear "arms," which includes more than firearms.) Nunchakus are a form of self-defense in various martial arts, including karate, taekwondo, aikido, and Eskrima. The Committee on the Revision of the Penal Code claims that "many" California cases involving nunchakus are prosecuted based only on possession and that these cases often involve a minor.]

67

## SB 538: GVROs

- *Penal Code Sections 18121 – 18123*

Permits a party or witness to appear remotely at the hearing on a petition for a gun violence restraining order. Requires the superior court of each county to develop local rules and instructions for remote appearances and to post them on its internet website.

Requires courts, by July 1, 2023, to permit the electronic filing of petitions for gun violence restraining orders, during and after normal business hours.

68

## SB 383: Juvenile informal supervision is expanded

- *Welfare & Institutions Code Section 654.3*

Expands eligibility for informal supervision pursuant to W&I 654 and W&I 654.2 in these ways:

- 1.) Eliminates the drug offenses that previously were disqualifiers for informal supervision (sale or possession for sale of a controlled substance; H&S 11350 or H&S 11377 committed at a school); and
- 2.) Eliminates the disqualifier of committing a felony offense at age 14 or older.

69

## SB 383: Juvenile deferred entry of judgment suitability to be decided by the receiving county

- *Welfare & Institutions Code Sections 790 and 791*

Provides that if a minor is eligible for deferred entry of judgment (DEJ), and resides in a different county to which the case will be transferred, the court may adjudicate the case without determining suitability for deferred entry of judgment in order to enable the minor's county of residence (the receiving county) to make that determination.

70

## AB 624: Juvenile transfer orders are subject to immediate appellate review

- *New Welfare & Institutions Code Section 801*

Provides that an order transferring a minor from juvenile court to criminal (adult) court is subject to “immediate appellate review” if a notice of appeal is filed within 30 days of the transfer order. Provides that an appeal of a transfer order cannot be heard on appeal from the judgment of conviction.

Requires the court, upon request of the minor, to stay the criminal court proceedings until a final determination of the transfer appeal.

Provides that the appeal shall have precedence and must be determined as soon as practicable after the notice of appeal is filed.

- [The legislative history of the bill notes that W&I Section 800 does not provide for the right to appeal a transfer order and that in the case of *People v. Wong* (1976) 18 Cal.3d 698,714, the California Supreme Court ruled that a challenge to an order certifying a minor to adult court must be by way of extraordinary writ in collateral proceedings brought before trial begins.]

71

## SB 92: Secure Youth Treatment Facilities

- *New Welfare & Institutions Code Sections 875, 875.5 and 876*

Creates new Article 23.5 in Chapter 2 of Part 1 of Division 2 of the Welfare & Institutions Code, entitled “Secure Youth Treatment Facilities.”

Permits a court to order a juvenile age 14 or older who has been adjudicated a ward of the court for a W&I 707(b) offense to be committed to a secure youth treatment facility, if the W&I 707(b) offense is the most recent offense for which the juvenile has been adjudicated, and if the court has made a finding on the record that a less restrictive, alternative disposition for the ward is not suitable.

- Requires the court to set a baseline term of confinement and a maximum term of confinement.

Prohibits a juvenile ward from being held in secure confinement beyond age 23, or two years from the date of the commitment, whichever occurs later. But if a ward would have faced a sentence of seven years or more in adult court, he or she may be held until age 25, or two years from the date of commitment, whichever occurs later.

72

## SB 92: Continued

- *Definition of secure treatment facility:*  
A facility operated or used by the county of commitment to provide programming, treatment, and education for wards. Permits stand-alone facilities and permits the use of a portion of an existing county juvenile facility, including a juvenile hall or probation camp. Permits a county to operate its own facility or to contract with another county to use its facility. Also permits a county to establish a regional secure youth treatment facility for one or more counties to use on a contract payment basis.

*New W&I 875.5* sets forth the intent of the Legislature that W&I 1800 – 1803 (Extended Detention of Dangerous Persons) apply to wards who are committed to secure facilities and who are physically dangerous to the public, pending the development of a more specific process. Also sets forth the intent of the Legislature to enact legislation that would, effective July 1, 2022, extend the detention of physically dangerous wards.

73

## New Felonies

- *A.) Elections Code Section 18541*  
*SB 35*  
Expands the list of felony crimes prohibiting dissuading another person from voting, by adding these crimes:
  - 1.) Obstructing ingress, egress, or parking, within 100 feet of a polling place, elections official's office, election satellite location, or curbside voting area.
  - 2.) Soliciting a vote, speaking to a voter about marking the voter's ballot, or disseminating visible or audible electioneering information, with the intent of dissuading another person from voting and within the immediate vicinity of a voter in line to cast a ballot or drop off a ballot.

Continues to provide that a violation is punishable in the state prison or by up to 12 months in jail.

74

## New Felonies: Continued

- B.) *Elections Code Section 18568*  
*SB 35*

Adds the new felony crime of displaying a container for the purpose of collecting ballots, with the intent to deceive a voter into casting a ballot in an unofficial ballot box. Provides that evidence of the intent to deceive may include using the word “official” on the container, or otherwise fashioning the container in a way that is likely to deceive a voter into believing that the container is an official collection box that has been approved by an election official.

75

## New Felonies: Continued

- C.) *Penal Code Section 487m*  
*AB 1003*

Creates the new felony crime of “intentional theft of wages” in an amount greater than \$950 from one employee, or \$2,350 in the aggregate from two or more employees, by an employer in any consecutive 12-month period.

- D.) *Water Code Section 13499.2*  
*SB 776*

Creates the new felony crime of knowingly making or causing to be made a false statement, material representation, or false certification in any submittal to the State Water Resources Control Board relating to an agreement for financial assistance.

Punishable by 16 months, two years, or three years in state prison or up to one year in county jail, and/or by a fine of up to \$10,000.

76

## New Misdemeanors

- A.) *Elections Code Section 18370*  
SB 35

Expands the list of misdemeanor election crimes to include these:

- 1.) Soliciting a vote, circulating a petition, or electioneering within 100 feet of an outdoor site, including a curbside voting area, at which a voter may cast or drop off a ballot.
- 2.) Soliciting a vote, speaking to a voter about marking the voter's ballot, or disseminating visible or audible electioneering information, to a person on election day or at any time the voter is casting a ballot, within the immediate vicinity of a voter in line to cast a ballot or drop off a ballot.

77

## New Misdemeanors: Continued

- B.) *Fish & Game Code Section 2024*  
AB 223

Creates two new misdemeanor crimes in order to combat dudleya poaching:

- 1.) Uprooting, removing, harvesting, or cutting dudleya from land owned by the state or a local government, or from private property without written permission from the landowner.
- 2.) Selling, offering for sale, possessing with the intent to sell, transporting or exporting for sale, or purchasing dudleya that was unlawfully uprooted, removed, harvested, or cut.

Defines "dudleya" as a succulent plant belonging to the genus *Dudleya* and commonly referred to as "live-forevers," that is native to California and grows in natural habitats. Provides that dudleya poaching has increased dramatically because it has become popular in many Southeast Asian countries, where a single plant can sell for up to \$1,000.

78

## New Misdemeanors: Continued

- C.) *Penal Code Section 594.39*  
*SB 742*

Creates the new misdemeanor crime of knowingly approaching within 30 feet of a person while that person is within 100 feet of the entrance or exit to a vaccination site and is seeking to enter or exit the site, or any occupied motor vehicle seeking entry or exit to a vaccination site, for the purpose of obstructing, injuring, harassing, intimidating, or interfering with that person or vehicle occupant. Punishable by up to six months in jail and/or by a fine of up to \$1,000.

[There are concerns about the constitutionality of this bill, and lawsuits have already been filed on First Amendment grounds.]

79

The end.

80