

SUPREME COURT COPY

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SUPREME COURT
FILED

JUN 3 - 2011

Frederick K. Orlrish Clerk

~~Deputy~~

In the Supreme Court of the State of California

**THE PEOPLE OF THE STATE OF
CALIFORNIA,**

Plaintiff and Respondent,

v.

AMIR A. AHMED,

Defendant and Appellant.

Case No. S191020

Appellate District
Division Two, Case
No. RIF145548

Riverside County
Superior Court, Case
No. E049932

REQUEST FOR JUDICIAL NOTICE

Respondent respectfully moves this Court, under Evidence Code sections 452 and 459 and California Rules of Court, rule 8.252, to take judicial notice of some of the legislative history of California Penal Code section 1170.1. Specifically, respondent respectfully requests judicial notice of the Senate Committee Rules Committee, Analysis of Assembly Bill 721(1987-1988 Reg. Sess.) as amended September 5, 1997; Senate

Committee on Public Safety, Analysis of Senate Bill 721 (1997-1998 Reg. Sess) as introduced April 15, 2007; and Assembly Committee on Public Safety, Analysis of Senate Bill 721 (1997-1998 Reg. Sess.) as amended July 10, 1997. Copies of all three documents are appended to this motion.

The attached documents are the proper subject of judicial notice. (Evid. Code, § 452, subds. (a), (c); see *People v. Ledesma* (1997) 16 Cal.4th 90, 98, fn.4; *Hutnick v. US. Fidelity and Guaranty Co.* (1988) 47 Cal.3d 456, 465, fn. 7.) The documents are relevant to this Court's determination as to whether the Court of Appeal erred in applying Penal Code section 654 to bar imposition of a great bodily injury enhancement and a gun use enhancement notwithstanding Penal Code section 1170.1, subdivisions (f) and (g). Judicial notice is appropriate. (Evid. Code, § 459, subd. (a).)

These materials were not presented to the trial court or to the Court of Appeal. The matter to be noticed does not relate to proceedings occurring after the judgment that is the subject of this appeal.

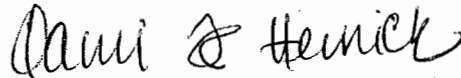
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For these reasons, respondent respectfully requests that this Court take judicial notice of the attached documents.

Dated: June 2, 2011

Respectfully submitted,

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ATTACHMENT 1

BILL ANALYSIS

SENATE RULES COMMITTEE SB 721
 Office of Senate Floor Analyses
 1020 N Street, Suite 524
 (916) 445-6614 Fax: (916) 327-4478

UNFINISHED BUSINESS

Bill No: SB 721
 Author: Lockyer (D)
 Amended: 9/5/97
 Vote: 21

SENATE PUBLIC SAFETY COMMITTEE : 5-1, 4/15/97
 AYES: Vasconcellos, Rainey, Kopp, McPherson, Schiff
 NOES: Watson
 NOT VOTING: Burton, Polanco

SENATE APPROPRIATIONS COMMITTEE : 9-1, 5/29/97
 AYES: Johnston, Alpert, Calderon, Johnson, Karmette,
 Kelley, Leslie, McPherson, Mountjoy
 NOES: Vasconcellos
 NOT VOTING: Burton, Dills, Lee

SENATE FLOOR : 31-2, 6/4/97
 AYES: Alpert, Brulte, Calderon, Dills, Greene, Hayden,
 Hughes, Hurtt, Johannessen, Johnson, Johnston, Karmette,
 Kelley, Knight, Kopp, Lee, Leslie, Lewis, Lockyer, Maddy,
 McPherson, Monteith, Mountjoy, O'Connell, Peace, Polanco,
 Rainey, Schiff, Solis, Thompson, Wright
 NOES: Burton, Watson
 NOT VOTING: Ayala, Costa, Craven, Haynes, Rosenthal, Sher,
 Vasconcellos

ASSEMBLY FLOOR : 77-0, 9/9/97

SUBJECT : Sentencing

SOURCE : California District Attorneys Association

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DIGEST : This bill would simplify California's consecutive sentencing scheme and remove several of the caps and limitations on imposing consecutive sentences.

Assembly Amendments :

1. Eliminate the rule that states if a defendant is convicted of kidnapping the same victim on at least two separate occasions, the consecutive sentence for the subordinate kidnapping(s) must be the middle term of the kidnapping(s) and one-third of any specified enhancements, and may exceed five years in prison.

2. Add double joining language.

ANALYSIS : Existing law provides for a consecutive sentencing scheme with four basic limitations, or "caps", on the various sentencing enhancements that may be applied. There are rules limiting the total time of imprisonment to twice the base term; limiting non-violent subordinate terms to five years; prohibiting adding enhancements on non-violent subordinate terms; and limiting enhancements for both weapons and injuries. There are various exceptions to those rules.

This bill would repeal those limitations. It would provide that life sentences may be imposed to run consecutively with any applicable sentencing enhancements. The bill specifies that if a life sentence is ordered to run consecutively to any determinate term of imprisonment, the determinate term of imprisonment shall be served first.

The bill would clarify that when the punishment prescribed by statute for a person convicted of a public offense is a term of imprisonment in the state prison, the court shall sentence the defendant to one of the terms of imprisonment unless the defendant is given some other disposition authorized by law, such as a fine, jail, or probation.

The bill would allow a court to impose either the upper or lower term of imprisonment, based on the consideration of

any fact or circumstance relevant to the case, whether or not the fact or circumstance constitutes an element of the offense, an enhancement to the offense, or involves a prior conviction.

The bill would provide that when a defendant is convicted of two or more felonies, and a consecutive term of imprisonment is imposed, under specified provisions, the aggregate term of imprisonment shall be the sum of the

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principal term, the subordinate term, and any additional sentencing enhancement terms imposed for: (a) prior convictions; (b) prior prison terms; and (c) having committed an offense while released from custody on bail or on his or her own recognizance for another offense.

The bill would redefine "principal term," for purposes of imposing consecutive sentences, to mean the greatest term of imprisonment imposed by the court for any of the crimes the defendant has been convicted of committing, including any term for applicable specific enhancements.

The bill would redefine "subordinate term," for purposes of imposing consecutive sentences, to mean one-third of the middle term of imprisonment prescribed for each felony conviction for an offense that is not a violent felony for which a consecutive term of imprisonment is imposed. This bill expressly provides that the subordinate term shall also include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses. The bill provides that in no case shall the total of subordinate terms for these consecutive offenses that are not violent felonies shall not exceed five years. The bill provides that the total of the subordinate terms for consecutive "non violent" offenses that are all residential burglaries may exceed five years. The subordinate term for each consecutive felony which is a violent felony, shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for an offense that is a violent felony 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.

This bill is double joined with AB 29 (Villaraigosa).

The bill would change the consecutive sentencing scheme for multiple kidnapping offenses so that the full term of any specific enhancements applicable to each subordinate kidnapping offense is imposed. In addition, it would remove the applicability of this section to instances when the kidnapping offenses occurred to the same victim on separate occasions.

The bill would provide that the term for all applicable sentencing enhancements shall be imposed when a court imposes a subordinate prison sentence for multiple felonies committed while the defendant is confined in a state prison or has escaped from custody.

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The bill would provide that a court must impose all applicable sentence enhancements to any felony determinate sentence imposed. It would remove the cap on the number of years a defendant may receive for various applicable enhancements.

The bill would define "specific enhancement" for purposes of the above provisions to mean one of several enumerated sentencing enhancements, as specified.

The bill would mandate that the subordinate term for each consecutive offense committed by a defendant convicted of threatening a witness, as specified, shall consist of the full middle term, without limit on the aggregate number of years that may be imposed.

The bill would eliminate the prohibition against using one fact to both aggravate a sentence and to impose an enhancement.

The bill would also repeal provisions of the Penal Code that are repetitive in light of the above changes.

The purpose of this bill is to simplify California's consecutive sentencing scheme and remove several of the caps and limitations on imposing consecutive sentences.

FISCAL EFFECT : Appropriation: No Fiscal Com.: Yes
Local: No

SUPPORT : (Verified 9/9/97)

California District Attorneys Association (source)
 Judicial Council
 California Peace Officers Association
 California Police Chiefs Association
 City of Monrovia
 Monrovia City Council

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OPPOSITION : (Verified 9/9/97)

American Civil Liberties Union
 California Attorneys for Criminal Justice
 California Public Defenders Association

ARGUMENTS IN SUPPORT : According to the sponsor:

Everybody in the criminal justice system recognizes the need for realistic sentencing reform. This bill finally does something to address this need.

The fundamental purpose of this measure is to reform and simplify our basic determinate sentencing statutes without significantly altering the general sentencing scheme. This proposal will produce actual simplification and real sentencing reform with only a modest fiscal impact.

The proposed changes in this bill would correct some of the injustices in our present law, which would result in at least some sentences being increased. The bill would do away with certain "free" crimes and "free" enhancements. It would stop rewarding some defendants for their greater criminal ambition and criminal activity. Instead, it would allow such defendants to be more appropriately punished for the full range of their criminal conduct, in the discretion of the court.

But the primary goal of this bill is not about sentence increases. In fact, the number of increased terms under this proposal would not be great at all. Instead, the primary goal is simplification of our sentencing scheme through reform of our basic determinate sentencing statutes.

Because the primary goal is simplification, and because relatively few sentences will actually be affected, the costs associated with this bill will be fairly modest. However, the benefits of this bill will be substantial:

- Our sentencing scheme will be simpler and easier to understand.
- The application of our sentencing statutes will be more rational.
- Justice will be improved by ending certain "free" crimes.

ARGUMENTS IN OPPOSITION : According to California Attorneys for Criminal Justice:

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This bill will result in dramatically increased sentences for defendants charged with multiple counts or with various enhancements -- and the increase in sentences will fall disproportionately on non-violent offenders. This bill eliminates the limitations on total time which can be given for subordinate terms for multiple felony counts. Since these limits have already been eliminated for violent felonies and are increased for more serious felonies, this change will result in longer sentences for non-violent, non-serious offenders. Use of scarce and expensive prison space to house these offenders for longer sentences makes little sense. Similarly, eliminating the courts' discretion to strike enhancements will further serve to add to California's already overwhelming prison overcrowding problems by giving longer prison sentences to those who would otherwise be found by the courts not to deserve such sentences.

_ RJG:sl 9/9/97 Senate Floor Analyses
 SUPPORT/OPPOSITION: SEE ABOVE

**** END ****

ATTACHMENT 2

BILL ANALYSIS

SENATE COMMITTEE ON PUBLIC SAFETY
Senator John Vasconcellos, Chair
1997-98 Regular Session

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SB 721 (Lockyer)
As introduced
Hearing date: April 15, 1997
Penal Code
LK:js

SENTENCING

HISTORY

Source: California District Attorneys Association

Prior Legislation: AB 2010 (Goldsmith, 1996)--
Failed, Senate Criminal Procedure
SB 25 (Lockyer, 1990)-- Vetoed

Support: Unknown

Opposition: American Civil Liberties Union; California
Attorneys for Criminal Justice; California Public
Defenders Association

KEY ISSUES

SHOULD THE "TWICE THE BASE TERM" LIMITATION ON THE TOTAL TIME OF IMPRISONMENT
BE ELIMINATED?

SHOULD THE FIVE-YEAR LIMITATION ON NON-VIOLENT SUBORDINATE TERMS BE
ELIMINATED?

SHOULD THE PROHIBITION AGAINST ADDING ENHANCEMENTS ON NON-VIOLENT SUBORDINATE

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TERMS BE ELIMINATED?

(CONTINUED)

SHOULD THE LIMITATION ON ENHANCEMENTS FOR BOTH WEAPONS AND INJURIES BE
ELIMINATED?

SHOULD THE PROHIBITION AGAINST DUAL USE OF FACTS BE ELIMINATED?

SHOULD the ENHANCEMENTS FOR SUBORDINATE CONSECUTIVE KIDNAPPING COUNTS BE
CALCULATED AT the FULL MIDTERM RATHER THAN ONE-THIRD THE MIDTERM?

PURPOSE

Existing law provides for a consecutive sentencing scheme with four basic limitations, or "caps", on the various sentencing enhancements that may be applied. There are rules limiting the total time of imprisonment to twice the base term; limiting non-violent subordinate terms to five years; prohibiting adding enhancements on non-violent subordinate terms; and limiting enhancements for both weapons and injuries. There are various exceptions to those rules.

This bill would repeal those limitations. It would provide that life sentences may be imposed to run consecutively with any applicable sentencing enhancements. The bill specifies that if a life sentence is ordered to run consecutively to any determinate term of imprisonment, the determinate term of imprisonment shall be served first.

The bill would clarify that when the punishment prescribed by statute for a person convicted of a public offense is a

term of imprisonment in the state prison, the court shall sentence the defendant to one of the terms of imprisonment unless the defendant is given some other disposition

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authorized by law, such as a fine, jail, or probation.

The bill would allow a court to impose either the upper or lower term of imprisonment, based on the consideration of any fact or circumstance relevant to the case, whether or not the fact or circumstance constitutes an element of the offense, an enhancement to the offense, or involves a prior conviction.

The bill would provide that when a defendant is convicted of two or more felonies, and a consecutive term of imprisonment is imposed, under specified provisions, the aggregate term of imprisonment shall be the sum of the principal term, the subordinate term, and any additional sentencing enhancement terms imposed for: (a) prior convictions; (b) prior prison terms; and (c) having committed an offense while released from custody on bail or on his or her own recognizance for another offense.

The bill would redefine "principal term," for purposes of imposing consecutive sentences, to mean the greatest term of imprisonment imposed by the court for any of the crimes the defendant has been convicted of committing, including any term for applicable specific enhancements.

The bill would redefine "subordinate term," for purposes of imposing consecutive sentences, to mean one-third of the middle term of imprisonment prescribed for each felony conviction for which a consecutive term of imprisonment is imposed. This bill expressly provides that the subordinate term shall also include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses. In addition, it removes the five-year cap on subordinate terms imposed for "non-violent felonies."

The bill would change the consecutive sentencing scheme for multiple kidnapping offenses so that the full term of any specific enhancements applicable to each subordinate kidnapping offense is imposed. In addition, it would remove the applicability of this section to instances when

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the kidnapping offenses occurred to the same victim on separate occasions.

The bill would provide that the term for all applicable sentencing enhancements shall be imposed when a court imposes a subordinate prison sentence for multiple felonies committed while the defendant is confined in a state prison or has escaped from custody.

The bill would provide that a court must impose all applicable sentence enhancements to any felony determinate sentence imposed. It would remove the cap on the number of years a defendant may receive for various applicable enhancements.

The bill would define "specific enhancement" for purposes of the above provisions to mean one of several enumerated sentencing enhancements, as specified.

The bill would mandate that the subordinate term for each consecutive offense committed by a defendant convicted of threatening a witness, as specified, shall consist of the full middle term, without limit on the aggregate number of years that may be imposed.

The bill would eliminate the prohibition against using one fact to both aggravate a sentence and to impose an

enhancement.

The bill would also repeal provisions of the Penal Code that are repetitive in light of the above changes.

The purpose of this bill is to simplify California's consecutive sentencing scheme and remove several of the caps and limitations on imposing consecutive sentences.

COMMENTS

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1. Expressed Purpose of the Bill

According to the sponsor:

Everybody in the criminal justice system recognizes the need for realistic sentencing reform. SB 721 finally does something to address this need.

The fundamental purpose of this measure is to reform and simplify our basic determinate sentencing statutes without significantly altering the general sentencing scheme. This proposal will produce actual simplification and real sentencing reform with only a modest fiscal impact.

The proposed changes in this bill would correct some of the injustices in our present law, which would result in at least some sentences being increased. The bill would do away with certain of free crimes and of free enhancements. It would stop rewarding some defendants for their greater criminal ambition and criminal activity. Instead, it would allow such defendants to be more appropriately punished for the full range of their criminal conduct, in the discretion of the court.

But the primary goal of this bill is not about sentence increases. In fact, the number of increased terms under this proposal would not be great at all. Instead, the primary goal is simplification of our sentencing scheme through reform of our basic determinate sentencing statutes.

Because the primary goal is simplification, and because relatively few sentences will actually be

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affected, the costs associated with this bill will be fairly modest. However, the benefits of this bill will be substantial:

Our sentencing scheme will be simpler and easier to understand.

The application of our sentencing statutes will be more rational.

Justice will be improved by ending certain of free crimes.

The four main targets of this bill are as follows:

First, the bill eliminates the consecutive

sentence enhancement limitation [no enhancements on certain subordinate terms]. This limitation, as presently amended, almost never applies. Moreover, the few times that it does apply, it rewards a criminalos greater achievement with a ofreco enhancement. This remaining application must be eliminated.

Second, the bill eliminates the double enhancement limitation [no double enhancement for both weapon and injury for certain felonies]. This limitation impacts a few crimes when the defendant both uses a weapon and inflicts great bodily injury. The original impact was so unjust that the limitation has been almost amended out of existence. The last remnants of this terrible policy mistake must be eliminated.

Third, the bill eliminates the infamous twice base lid [total term cannot exceed twice the base term in certain cases]. This was probably the worst single feature of the original DSL. Substantial amendments, both legislative and

judicial, have greatly ameliorated the problem. But this lid still produces constant confusion, has unintended consequences, and rewards ambitious defendants with ofreco crimes. It must be eliminated.

Fourth, the bill eliminates the five-year lid [subordinate term cannot exceed five years for certain felonies] and its progeny. Because of many amendments, this lid has very little actual application; most deputy district attorneys never see it applied in an actual case. But in those rare cases when it does not apply, it rewards defendants with ofreco crimes. It, too, must be eliminated.

In short, because of the numerous exceptions and exclusions that have been enacted, none of these limitations and lids have any substantial impact on actual sentences. By far their greatest impact is to make our sentencing law complex and difficult to understand. Eliminating these rules, which now apply in so few cases, will not result in any great increase in the sentences imposed, and thus will have a very limited fiscal impact.

The bill also makes several other changes and improvements in the sentencing law. These other changes include the following three reforms.

First, the bill eliminates the prohibition on so-called odual useo under PC 1170(b). This rule seldom has any impact on the term imposed by the trial judge, but it has resulted in numerous reversals by the appellate courts for technical sentencing error. This burdensome continuing cost can and should be eliminated.

Second, the bill eliminates a confusing,

redundant provision on the courtos ability to strike some enhancements under PC 1170.1(h). Usually defendants should be punished for enhancements which have been pled or proved. However, the court would still retain the discretion and authority to strike almost all enhancements (including every one listed in PC

1170.1(h)) under the general provision of PC 1385(a).

Third, the bill replaces the numerous lengthy, confusing, and error-filled lists of various enhancements in the sentencing statutes with simple generic references. This substantially simplifies and improves the sentencing scheme at virtually no cost.

The time has come to take the first step to simplify and improve our basic determinate sentencing statutes. This bill will produce significant benefits at a relatively modest cost. It deserves the support of every member of the Legislature.

2. Limiting Sentence Enhancements :

Existing law provides that consecutive sentences for "non-violent" felonies are computed as one-third of the middle term with no enhancements (Penal Code Section 1170.1(a)), absent the following exceptions:

- a. Additional terms of imprisonment may be imposed for prior convictions, prior prison terms, or for crimes committed while on bail or while the defendant is released on his or her recognizance.
- b. Enhancements may be added to indeterminate sentences.

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c. Sentence enhancements for the following circumstances may be applied:

- (1) Use of a firearm (Penal Code Sections 12022.5 and 12022.55);
- (2) Infliction of injury (Penal Code Sections 12022.7 and 12022.9); or,
- (3) Weapons, injury, and abduction in the commission of specified sex crimes. (Penal Code Sections 12022.3, 12022.8, and 667.8.)

This bill will eliminate this sentencing rule and its many exceptions, allowing for imposition of any specific (conduct-based) enhancements, at the discretion of the court. The sponsor argues that a person subject to an enhancement should be penalized by imposition of the enhancement when the court finds it appropriate.

3. The "Double Enhancement Limitation" :

Only one sentencing enhancement may be imposed under existing law when both a weapon and an injury are involved. (Penal Code Section 1170.1(e)) This "rule" does not apply to the following:

- a. The completed or attempted crimes of robbery, burglary, kidnapping, and carjacking;
- b. Completed or attempted sex crimes, including: rape, spousal rape, sodomy, oral copulation, penetration by foreign object, sexual battery, and forcible child molestation;
- c. Attempted murder, murder, and manslaughter; or
- d. Assault with a deadly weapon (other than a firearm).

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This bill would eliminate the "double enhancement" limitation and its many exceptions.

It has been pointed out that repeal of this "one and one" rule could potentially result in a higher penalty for attempted voluntary manslaughter than for completed voluntary manslaughter, in which great bodily injury is inherent in the crime. The sponsor argues that that problem is inherent in existing law, not in this bill. See People v. Lewis (1993) 21 Cal.App.4th 243.

4. The "Twice Base Lid"

Existing law limits the total determinate sentence that may be imposed to a term that is no more than twice the base term. (Penal Code Section 1170.1(g)) Statutory and judicial exceptions to the "twice base" lid are numerous. (See Penal Code Sections 1170.1(g), 1170.95; People v. Prather (1990) 50 Cal.3d 428; People v. Pieters, (1991) 52 Cal.3d 894)

This bill would eliminate the "twice base lid" and its many exceptions.

Since consecutive sentences subject to the "twice base" lid are computed at one-third the midterm, it would take 6 consecutive sentences in the 16 month, 2 year, or 3 years category to exceed the current statutory maximum the court may impose: twice the maximum, or 6 years. The sponsor contends that few sentences would incorporate 6 consecutive non-violent felony convictions and that judicial discretion will prevent any possible abuse by removal of this limitation.

5. The "Five-Year Lid"

Existing law limits the total subordinate terms for consecutive "non-violent" offenses to five years. (Penal Code Section 1170.1(a)) Exceptions to the five-year lid

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includes all indeterminate sentencing crimes (such as murder), all violent felonies, forcible sex crimes, kidnapping, prison and prison escapee crimes, witness intimidation, residential burglary, residential robbery, residential arson, and robbery with a deadly weapon.

This bill would eliminate this lid on the total subordinate terms for consecutive "non-violent" offenses and its many exceptions.

Since consecutive sentences subject to the five year limitation are computed at one-third the midterm, it would take 9 consecutive sentences in the 16 month, 2 year, or 3 years category to exceed the current statutory maximum the court may impose (absent the twice base lid discussed in Comment 4, above): the maximum plus 5 years, or 8 years. The sponsor contends that few sentences would be eligible to exceed the limitation and that judicial discretion will prevent any possible abuse by removal of this limitation.

The bill would also remove all other artificial time limitations on terms, such as the ten year limitation on residential burglaries (Penal Code Section 1170.95) and the 15 year limitation on multiple counts of threatening witnesses (Penal Code Section 1170.13).

6. Dual Use of Facts

Penal Code Section 1170(b) prohibits the court from imposing an upper (aggravated) term by using the same fact that is also used as an enhancement to the crime.

This bill would instead authorize the court to use a fact for both an aggravated term and an enhancement to the term.

The sponsor contends that it is relatively easy for a knowledgeable judge to avoid this sentencing pitfall by aggravating an offense by one fact and using another fact for the enhancement, and that this limitation tends to waste much appellate time due to appeals for sentencing

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error because the judge did not properly state on the record the reasons for both aggravation and enhancement. The sponsor argues that elimination of the dual use prohibition would avoid many technical sentencing errors, while changing very few sentences.

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In opposing this provision, however, California Attorneys for Criminal Justice argues:

Our existing sentencing structure was set up to allow a judge different options for imposing a more severe sentence where there is a factor allowing enhancement. The judge may choose to give the high term for the underlying sentence, or the enhancement, depending on the circumstances of the offense and which option would result in a higher sentence. The existing sentences and enhancements were not set with the idea that a single fact could lead both to an enhancement and a high-term sentence. This will increase sentences far beyond the Legislature's intentions, and amounts to punishing defendants twice for the same behavior.

IS ELIMINATION OF THE "DUAL USE OF FACTS" PROHIBITION INHERENTLY UNFAIR?

7. Enhancements for Subordinate Kidnapping Convictions

Existing law provides that consecutively imposed subordinate terms for kidnapping are to be calculated at their full term rather than at one-third the midterm. Enhancements for those subordinate terms, however, are calculated at one-third their term.

This bill would impose those subordinate enhancements at their full term.

The sponsor contends that this penalty is almost never imposed and that the change would be consistent with the provisions of Penal Code Section 1170.15, relating to witness intimidation.

Opponents contend that the existing penalty is sufficient and that a penalty should not be raised merely because it is higher for an unrelated crime in a different code

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section.

IS THERE EVIDENCE THAT THE TERM FOR AN ENHANCEMENT TO A SUBORDINATE CONSECUTIVE KIDNAPPING COUNT SHOULD BE THE FULL MIDDLE TERM RATHER THAN THE GENERAL ONE-THIRD OF THE MIDTERM?

8. Aggregate Effect of These Changes

This bill would eliminate the above limitations on California's consecutive sentencing scheme. As noted above, the application of these limitations has already been eviscerated by the many exceptions that now apply to each provision. Therefore, the sponsor contends that the practical effect of this measure on consecutive sentences imposed should be minimal in relation to the reduction in the number of criminal appeals that can be expected as a result of simplifying what is now irresponsible.

Since each of these changes would result in an increase in prison population, it has appeared proper to reserve this approach to be used in conjunction with other justice system reform initiatives, such as SB 760 (Lockyer) or AB 126 (Rainey) of the 1995-1996 session. For that reason, AB 2010 (Goldsmith) was held by the Criminal Procedure Committee last year. However, there has not been legislative accord on structural reform of the justice system to date.

SHOULD THESE PROVISIONS PROGRESS ON THEIR OWN RATHER THAN AS A PART OF A COMPREHENSIVE CRIMINAL JUSTICE SYSTEM REFORM, WHICH MIGHT NOT HAPPEN THIS SESSION?

As noted above, the rules that are proposed to be eliminated already have numerous exceptions. Generally, the defendants to whom the rules still apply are the less serious offenders. However, the sponsor points out that the effects of most of these changes, such as the elimination of the 5-year and twice-the-base-term limitations, are subject to judicial discretion and would

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only be used in cases deemed appropriate by the court.

9. Opposition

According to California Attorneys for Criminal Justice:

SB 721 will result in dramatically increased sentences for defendants charged with multiple counts or with various enhancements -- and the increase in sentences will fall disproportionately on non-violent offenders. SB 721 eliminates the limitations on total time which can be given for subordinate terms for multiple felony counts. Since these limits have already been eliminated for violent felonies and are increased for more serious felonies, this change will result in longer sentences for non-violent, non-serious offenders. Use of scarce and expensive prison space to house these offenders for longer sentences makes little sense. Similarly, eliminating the courts' discretion to strike enhancements will further

serve to add to California's already overwhelming prison overcrowding problems by giving longer prison sentences to those who would otherwise be found by the courts not to deserve such sentences.

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10. Proposed Amendments

The sponsor proposes two amendments to the bill:

On page 11, line 32, change "the" to "that" to make the language parallel with the following subdivision.

On page 12, line 22, after "273.4", add "290" to incorporate the additional enhancement added to Penal Code Section 290 last year.

ATTACHMENT 3

BILL ANALYSIS

SB 721
Page 1Date of Hearing: July 15, 1997
Counsel: Michael A. KatzASSEMBLY COMMITTEE ON PUBLIC SAFETY
Robert M. Hertzberg, Chair

SB 721 (Lockyer) - As Amended: July 10, 1997

SUMMARY : Eliminates and/or increases certain maximum sentences for defendants who are convicted of more than one felony. Specifically, this bill :

- 1) Eliminates the rule that states if a defendant is sentenced consecutively for at least two subordinate felonies (none of which is violent), the total prison sentence may not exceed twice the base term selected by the court for the principal offense (except in certain circumstances).
- 2) Eliminates the rule that states if a defendant is charged with at least two enhancements for infliction of great bodily injury (GBI) and/or use of a specified weapon, the court may only sentence the defendant to the greatest of those enhancements (except in specified circumstances).
- 3) Provides that if a defendant is charged with at least two enhancements for infliction of GBI, the court may only sentence the defendant to the greatest of those enhancements.
- 4) Provides that if a defendant is charged with at least two enhancements for use of a weapon, the court may only sentence the defendant to the greatest of those enhancements.
- 5) Provides that if a defendant is sentenced consecutively for a subordinate, violent felony, the judge must sentence him or her to one-third of the term imposed for any applicable enhancement that the prosecutor charges and proves (in addition to the felony).
- 6) Provides that if a defendant is sentenced consecutively for at least two kidnappings (involving separate victims), the judge must sentence him or her to the full term imposed for any applicable enhancement to the kidnapping(s) that the prosecutor charges and proves.
- 7) Eliminates the rule that states if a defendant is convicted of kidnapping the same victim on at least two separate occasions, the consecutive sentence for the subordinate kidnapping(s) must be the middle term of the kidnapping(s) and one-third of any specified enhancements (and may exceed five years in prison).
- 8) Eliminates the portion of the main sentencing statute that lists the specific enhancements a judge may strike in his or her discretion.
- 9) Eliminates the rule that states if a defendant is sentenced

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SB 721
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to a consecutive, subordinate term for threatening a witness with GBI or death in certain circumstances, the total term for all the subordinate offenses may not exceed 15 years in prison.

- 10) Provides that if a defendant is sentenced for a felony and is also sentenced to a consecutive, subordinate term for threatening or dissuading a witness in certain circumstances regarding the first felony (or commits a felony violation of Penal Code Section 653f in addition to the first felony), the total term for all subordinate offenses may exceed five years in prison.
- 11) Eliminates the rule that states that the total consecutive subordinate term for conviction of more than one residential burglary may not exceed 10 years in prison.
- 12) Eliminates the rule that states that the total consecutive subordinate term for conviction of more than one residential robbery may not exceed 10 years in prison.
- 13) Eliminates the rule that states that the total consecutive subordinate term for conviction of more than one residential arson may not exceed 10 years in prison.
- 14) Eliminates the rule that states that the total consecutive subordinate term for conviction of more than one robbery with use of a deadly weapon other than a firearm may not exceed 10 years in prison.

EXISTING LAW :

- 1) States that if a defendant is sentenced consecutively for at least two subordinate felonies (none of which is violent), the total prison sentence may not exceed twice the base term selected by the court for the principal offense (except in certain circumstances). (Penal Code Section 1170.1(g).)
- 2) States that if a defendant is charged with at least two enhancements for infliction of GBI and/or use of a specified weapon, the court may only sentence the defendant to the greatest of those enhancements (except in specified circumstances). (Penal Code Section 1170.1(e).)
- 3) Provides that if a defendant is sentenced consecutively for a subordinate, violent felony, the judge must sentence him or her to one-third of the term imposed for any specified enhancement (in addition to the felony). (Penal Code Section 1170.1(a).)
- 4) Provides that if a defendant is sentenced consecutively for at least two kidnappings (involving separate victims, or the same victim on at least two separate occasions), the judge must sentence him or her to the full middle term for each kidnapping and one-third the term imposed for any specified enhancement to the kidnapping(s). (Penal Code Section 1170.1(b).)

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- 5) Lists the specific enhancements a judge may strike in his or her discretion. (Penal Code Section 1170.1(h).)
- 6) States that if a judge sentences the defendant to a consecutive, subordinate term for non-violent felonies only, the total subordinate term may not exceed 5 years in prison. (Penal Code Section 1170.1(a).)
- 7) States that the five-year limitation in Existing Law #6 does not apply to residential burglary, residential robbery, or residential arson convictions. Nor does the five-year limitation apply to a conviction for robbery with a deadly weapon other than a firearm. However, a subordinate, consecutive term for these convictions may not exceed 10 years. (Penal Code Section 1170.95.)
- 8) States that the five-year limitation in Existing Law #6 does not apply to kidnapping convictions. (Penal Code Section 1170.1(b).)
- 9) States that if a defendant is sentenced to a consecutive subordinate term for threatening a witness with GBI or death in certain circumstances, he or she must be sentenced in a specified manner, but the total term for all the subordinate offenses may not exceed 15 years in prison. (Penal Code Section 1170.13.)
- 10) Provides that GBI if a defendant is sentenced for a felony and is also sentenced to a consecutive, subordinate term for threatening or dissuading a witness in certain circumstances regarding the first felony (or commits a felony violation of Penal Code Section 653f in addition to the first felony), the defendant must be sentenced in a specified manner. (Penal Code Section 1170.15.)

COMMENTS :

- 1) Author's Statement . According to the author, "This bill would repeal some of the limitations that now apply to criminals being sentenced to consecutive prison terms for multiple crimes, and would clarify existing sentencing. Over time, the Legislature has imposed many new sentences, and then added caps and exceptions. Many successful criminal appeals are based on mistakes made by the trial courts because the laws are so complicated. This bill simplifies the law to remedy that problem. It also eliminates the problem of habitual criminals getting away with free crimes because of the caps on consecutive terms. For them, it means longer sentences."
- 2) California Sentencing Law: An Overview .
 - a) Nothing Less Than Mind-numbing . Judges have denounced California's sentencing law almost since its inception. "As a sentencing judge wends his way through the labyrinthine procedures...he must wonder, as he utters some of its more esoteric incantations, if, perchance, the Legislature had not exhumed some long departed Byzantine scholar to create its

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seemingly endless and convoluted complexities. Indeed, in some ways it resembles the best offerings of those who author bureaucratic memoranda, income tax forms, insurance policies or instructions for the assembly of packaged toys." (Community Release Board v. Superior Court (1979) 91 Cal.App.3d 814, 815, fn. 1.)

As one trial judge remarked in frustration, "I regard it as one of the principal credits in my professional career that I had nothing to do with designing the determinate sentencing law." People v. Reyes (1989) 212 Cal.App.3d 852, 858-859.

b) Basic Principles . When a defendant is sentenced for more than one felony conviction and any enhancements, the judge determines whether the sentences are concurrent or consecutive to each other. (Penal Code Section 669.)

Every felony carries three potential prison terms: a low term, middle term, or upper term. (In addition, a judge may sentence a felon to jail instead of prison, unless the Legislature directs otherwise.) If the aggravating factors outweigh the mitigating factors, the judge must choose the upper term. If the mitigating factors outweigh the aggravating ones, the judge must choose the lower term. In all other cases, the judge must choose the middle term. (Penal Code Section 1170.)

The "principal term" is the greatest term imposed by the court for any of the felonies (including any enhancements for that one felony). The other felony sentences (and any enhancements for those felonies) are "subordinate terms." The total (or "aggregate term") is the combination of the principal term, the subordinate term, and any extra sentence based on prior convictions. (Penal Code Section 1170.1(a).)

Certain felonies are called "violent felonies" and are listed in Penal Code Section 667.5(c). If a felony is not violent and the judge chooses to sentence the defendant for it as a consecutive, subordinate term, the judge must impose one-third the middle term and must not sentence on any enhancements for that non-violent felony. (Penal Code Section 1170.1(a).) The total sentence for all non-violent, consecutive, subordinate terms may not exceed five years in prison, unless there are specific exceptions. (Ibid .)

Moreover, if the defendant is only sentenced for non-violent felonies, the aggregate term of imprisonment may not exceed twice the "base term" (i.e., the upper, middle, or lower term) for the principle offense, unless there is a specific exception. (Penal Code Section 1170.1(g).) (This limit, often referred to as "double the base term," is eliminated by the bill.)

If the trial judge sentences the defendant for a consecutive, subordinate, violent felony, the sentence on that felony must be one-third the middle term plus one-third of any enhancements that were charged, proven, and specifically listed in Penal Code

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Section 1170.1(a). If the enhancements are not listed there, the judge may not use them as part of the subordinate term. This bill uses a broad, generic definition of "enhancement", to allow a judge to impose one-third of any applicable enhancement for a violent, consecutive, subordinate felony, if the prosecutor charged and proved it.

3) Retains Judge's Power to Strike Enhancements . Current law contains a list of specific enhancements a judge may strike. (Penal Code Section 1170.1(h).) In addition, Penal Code Section 1385 gives the judge the discretion to strike any enhancement, unless the Legislature directs otherwise. (See J Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) Authority to Strike Enhancements, Section 1496, p. 1779, and cases cited therein.)

This bill eliminates the specific list of enhancements judges may strike pursuant to Penal Code Section 1170.1(h), based on the theory that judges retain the power under Penal Code Section 1385.

In People v. Thomas (1992) 4 Cal.4th 206, 209-213, the California Supreme Court rejected the argument that the trial judge had the discretion (based on Penal Code Section 1385) to strike the enhancement for use of a firearm. The Legislature had just recently deleted that enhancement from the list in Penal Code Section 1170.1(h). The Court concluded that the Legislature intended to deprive the judge of the power to strike this particular enhancement.

But in Thomas there was no specific evidence of legislative

intent. That is not true with respect to this bill. Mr. Charles Nickel, a Deputy District Attorney from San Diego who is working with the author of the bill, has told Committee staff that it is his intention to retain judicial discretion to strike the enhancements currently listed in Penal Code Section 1170.1(h) by allowing judges to use their powers under Penal Code Section 1385.

- 4) More Enhancements To Punish Defendants Who Inflict GBI and Use a Weapon . Under current law, if a defendant is charged with at least two enhancements for inflicting GBI and/or using a specified weapon, the judge may only sentence him or her on the greatest of those enhancements except in specified circumstances.

This bill increases the punishment for defendants charged with these multiple enhancements. This bill allows a judge to impose the greatest enhancement (that is charged and proven) for use of a weapon, as well as the greatest enhancement (that is charged and proven) for infliction of GBI.

- 5) Kidnapping: Increased Punishment for Some, Lesser Punishment for Others . Under current law, if a defendant is convicted of at least two counts of kidnapping involving separate victims and the judge sentences the defendant on those counts as subordinate, consecutive terms, the judge must sentence him or her to the full middle term for each kidnapping, plus one-third the middle term

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for each enhancement to the kidnapping.

This bill slightly increases the punishment. Under this bill, a judge must sentence the defendant to the full middle term for the kidnapping and a full term for each enhancement to the kidnapping. However, if the defendant kidnaps only one victim, but does it more than once, this bill slightly decreases the punishment.

Under current law, if a defendant is convicted of at least two counts of kidnapping the same victim on separate occasions and the judge sentences him or her on those counts as subordinate, consecutive terms, the defendant is punished as if he kidnaped two separate victims on just one occasion. (Penal Code Section 1170(b).)

Under this bill, a defendant who kidnaps the same victim twice would be subject to the general limitations for a non-violent felony (unless the kidnapping, based on the facts, was a violent felony as defined in Penal Code Section 667.5(c)).

- 6) Increased Punishment for Residential Robbers, Residential Burglars, Residential Arsonists . Under current law, a judge may not impose more than five years for all non-violent, consecutive, and subordinate felonies combined, unless there is a specified exception. There are several exceptions however.

In particular, a person who commits more than one residential robbery and who is punished for those crimes as consecutive, subordinate terms, may receive a maximum of 10 years. (Penal Code Section 1170.95.) This same rule applies to the person who commits more than one residential burglary or more than one residential arson. (Ibid .)

This bill increase the punishment even higher by removing the 10-year maximum for these defendants.

- 7) Threatening a Witness: Increased Punishment . Under current law, if a defendant is sentenced to a consecutive, subordinate term for threatening a witness with death or GBI in certain circumstances, the maximum sentence for all the subordinate offenses is 15 years. (Penal Code Section 1170.13.) This bill removes that 15-year limit.

Under current law, if a defendant is sentenced for a felony and is also sentenced to a consecutive, subordinate term for threatening a witness in certain circumstances regarding the initial felony, he or she is still subject to the rule that a judge may not impose more than five years for all non-violent, subordinate felonies. (Penal Code Sections 1170.15 and 1170.1(a).) This bill removes that five-year limit for people who commit those crimes.

- 8) Net Effect of This Bill . Although this bill still leaves

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California with a complicated sentencing scheme, it is significantly less complex than current law. This bill removes the "double the base term" limitation. Because "double the base term" spawned a whole host of verbose exceptions, the bill eliminates the exceptions as well.

This bill also uses generic enhancement references to replace laundry lists in two or three statutes, and generally removes clutter by making stylistic (non-substantive) changes in the Penal Code.

In addition, the bill increases punishment for many dangerous offenders: residential robbers, residential burglars, residential arsonists, defendants who threaten witnesses, and some kidnapers. Although these defendants are some of the most dangerous non-violent felons, what about the least dangerous (such as petty thieves with prior convictions)? How will they fare under this bill?

Since non-violent felons are no longer subject to "double the base term," the bill also increases their punishment. But non-violent felons are still protected by the rule in existing law that consecutive, subordinate terms for non-violent felonies may not exceed five years.

Prosecutors and the defense bar disagree on whether the increased punishment will affect a great number of people, and whether the increased punishment is justified.

9) Prior Legislation . AB 2010 (Goldsmith), of the 1995-96 Legislative Session, failed passage in the Senate Criminal Procedure Committee.

REGISTERED SUPPORT/OPPOSITION :

Support

California District Attorneys Association (Sponsor)
Judicial Council of California
California Peace Officers' Association
California Police Chiefs Association
City of Monrovia

Opposition

California Public Defenders Association
American Civil Liberties Union
California Attorneys for Criminal Justice

Analysis prepared by : Michael A. Katz / apubs / (916) 445-3268

DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **People v. Amir Ahmed**

No.: **S191020**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On June 2, 2011, I served the attached **REQUEST FOR JUDICIAL NOTICE** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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P.O. Box 57768
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Counsel for Appellant Amir A. Ahmed
(2 Copies)

The Honorable Paul E. Zellerbach
District Attorney
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3960 Orange Street
Riverside, CA 92501

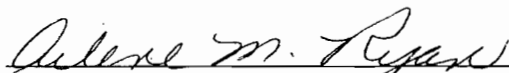
The Honorable Sharon J. Waters
Judge
Riverside County Superior Court
Riverside Court
4050 Main Street
Department 10
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California Court of Appeal
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and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on June 2, 2011 to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 2, 2011, at San Diego, California.

Arlene M. Ryan
Declarant


Signature