

ASSEMBLY BILL

No. 222

Introduced by Assembly Member Cooley

February 4, 2013

An act to amend Section 1170 of the Penal Code, relating to punishment.

LEGISLATIVE COUNSEL'S DIGEST

AB 222, as introduced, Cooley. Crimes: enhancements: punishment: state prison.

Existing law generally requires that felonies punishable by imprisonment in a county jail be punished either by the term described in the underlying offense or by a term of 16 months, or 2 or 3 years if the term is not specified. Existing law requires an executed sentence for these felonies to be punished in state prison if the defendant has a prior or current felony conviction for a serious or violent felony, is required to register as a sex offender, or is convicted of a crime for which the white collar crime enhancement is imposed as part of the sentence.

Existing law imposes an additional term for a conviction of a violation of, or of a conspiracy to violate, specified provisions of law with respect to a substance containing heroin, cocaine base, cocaine, methamphetamine, amphetamine, or phencyclidine and its analogs, if the substance exceeds a specified weight. Existing law imposes a greater additional term under these provisions depending on the weight of the substance.

This bill would additionally require an executed sentence to be punished in state prison if the defendant is convicted of a crime for

which an enhancement is imposed pursuant to the above provision regarding those specified substances.

Vote: majority. Appropriation: no. Fiscal committee: yes.

State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 1170 of the Penal Code, as amended by
2 Section 2 of Chapter 828 of the Statutes of 2012, is amended to
3 read:

4 1170. (a) (1) The Legislature finds and declares that the
5 purpose of imprisonment for crime is punishment. This purpose
6 is best served by terms proportionate to the seriousness of the
7 offense with provision for uniformity in the sentences of offenders
8 committing the same offense under similar circumstances. The
9 Legislature further finds and declares that the elimination of
10 disparity and the provision of uniformity of sentences can best be
11 achieved by determinate sentences fixed by statute in proportion
12 to the seriousness of the offense as determined by the Legislature
13 to be imposed by the court with specified discretion.

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

26 (3) In any case in which the punishment prescribed by statute
27 for a person convicted of a public offense is a term of imprisonment
28 in the state prison of any specification of three time periods, the
29 court shall sentence the defendant to one of the terms of
30 imprisonment specified unless the convicted person is given any
31 other disposition provided by law, including a fine, jail, probation,
32 or the suspension of imposition or execution of sentence or is
33 sentenced pursuant to subdivision (b) of Section 1168 because he

1 or she had committed his or her crime prior to July 1, 1977. In
2 sentencing the convicted person, the court shall apply the
3 sentencing rules of the Judicial Council. The court, unless it
4 determines that there are circumstances in mitigation of the
5 punishment prescribed, shall also impose any other term that it is
6 required by law to impose as an additional term. Nothing in this
7 article shall affect any provision of law that imposes the death
8 penalty, that authorizes or restricts the granting of probation or
9 suspending the execution or imposition of sentence, or expressly
10 provides for imprisonment in the state prison for life, except as
11 provided in paragraph (2) of subdivision (d). In any case in which
12 the amount of preimprisonment credit under Section 2900.5 or any
13 other provision of law is equal to or exceeds any sentence imposed
14 pursuant to this chapter, the entire sentence shall be deemed to
15 have been served and the defendant shall not be actually delivered
16 to the custody of the secretary. The court shall advise the defendant
17 that he or she shall serve a period of parole and order the defendant
18 to report to the parole office closest to the defendant's last legal
19 residence, unless the in-custody credits equal the total sentence,
20 including both confinement time and the period of parole. The
21 sentence shall be deemed a separate prior prison term under Section
22 667.5, and a copy of the judgment and other necessary
23 documentation shall be forwarded to the secretary.

24 (b) When a judgment of imprisonment is to be imposed and the
25 statute specifies three possible terms, the court shall order
26 imposition of the middle term, unless there are circumstances in
27 aggravation or mitigation of the crime. At least four days prior to
28 the time set for imposition of judgment, either party or the victim,
29 or the family of the victim if the victim is deceased, may submit
30 a statement in aggravation or mitigation to dispute facts in the
31 record or the probation officer's report, or to present additional
32 facts. In determining whether there are circumstances that justify
33 imposition of the upper or lower term, the court may consider the
34 record in the case, the probation officer's report, other reports,
35 including reports received pursuant to Section 1203.03, and
36 statements in aggravation or mitigation submitted by the
37 prosecution, the defendant, or the victim, or the family of the victim
38 if the victim is deceased, and any further evidence introduced at
39 the sentencing hearing. The court shall set forth on the record the
40 facts and reasons for imposing the upper or lower term. The court

1 may not impose an upper term by using the fact of any
2 enhancement upon which sentence is imposed under any provision
3 of law. A term of imprisonment shall not be specified if imposition
4 of sentence is suspended.

5 (c) The court shall state the reasons for its sentence choice on
6 the record at the time of sentencing. The court shall also inform
7 the defendant that as part of the sentence after expiration of the
8 term he or she may be on parole for a period as provided in Section
9 3000.

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

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

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

38 (B) The defendant shall file the original petition with the
39 sentencing court. A copy of the petition shall be served on the
40 agency that prosecuted the case. The petition shall include the

1 defendant's statement that he or she was under 18 years of age at
2 the time of the crime and was sentenced to life in prison without
3 the possibility of parole, the defendant's statement describing his
4 or her remorse and work towards rehabilitation, and the defendant's
5 statement that one of the following is true:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

39 (H) If the sentence is not recalled, the defendant may submit
40 another petition for recall and resentencing to the sentencing court

1 when the defendant has been committed to the custody of the
2 department for at least 20 years. If recall and resentencing is not
3 granted under that petition, the defendant may file another petition
4 after having served 24 years. The final petition may be submitted,
5 and the response to that petition shall be determined, during the
6 25th year of the defendant's sentence.

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

12 (J) This subdivision shall have retroactive application.

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

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

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

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

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

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

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

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

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

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

39 (7) Any recommendation for recall submitted to the court by
40 the secretary or the Board of Parole Hearings shall include one or

1 more medical evaluations, a postrelease plan, and findings pursuant
2 to paragraph (2).

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

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

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

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

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

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

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

38 (3) Notwithstanding paragraphs (1) and (2), where the defendant
39 (A) has a prior or current felony conviction for a serious felony
40 described in subdivision (c) of Section 1192.7 or a prior or current

1 conviction for a violent felony described in subdivision (c) of
2 Section 667.5, (B) has a prior felony conviction in another
3 jurisdiction for an offense that has all the elements of a serious
4 felony described in subdivision (c) of Section 1192.7 or a violent
5 felony described in subdivision (c) of Section 667.5, (C) is required
6 to register as a sex offender pursuant to Chapter 5.5 (commencing
7 with Section 290) of Title 9 of Part 1, or (D) is convicted of a crime
8 and as part of the sentence an enhancement pursuant to Section
9 186.11 *of this code* or *Section 11370.4 of the Health and Safety*
10 *Code* is imposed, an executed sentence for a felony punishable
11 pursuant to this subdivision shall be served in state prison.

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

16 (5) The court, when imposing a sentence pursuant to paragraph
17 (1) or (2) of this subdivision, may commit the defendant to county
18 jail as follows:

19 (A) For a full term in custody as determined in accordance with
20 the applicable sentencing law.

21 (B) (i) For a term as determined in accordance with the
22 applicable sentencing law, but suspend execution of a concluding
23 portion of the term selected in the court's discretion, during which
24 time the defendant shall be supervised by the county probation
25 officer in accordance with the terms, conditions, and procedures
26 generally applicable to persons placed on probation, for the
27 remaining unserved portion of the sentence imposed by the court.
28 The period of supervision shall be mandatory, and may not be
29 earlier terminated except by court order. Any proceeding to revoke
30 or modify mandatory supervision under this subparagraph shall
31 be conducted pursuant to either subdivisions (a) and (b) of Section
32 1203.2 or Section 1203.3. During the period when the defendant
33 is under such supervision, unless in actual custody related to the
34 sentence imposed by the court, the defendant shall be entitled to
35 only actual time credit against the term of imprisonment imposed
36 by the court. Any time period which is suspended because a person
37 has absconded shall not be credited toward the period of
38 supervision.

39 (ii) The portion of a defendant's sentenced term during which
40 time he or she is supervised by the county probation officer

- 1 pursuant to this subparagraph shall be known as mandatory
- 2 supervision.
- 3 (6) The sentencing changes made by the act that added this
- 4 subdivision shall be applied prospectively to any person sentenced
- 5 on or after October 1, 2011.
- 6 (i) This section shall become operative on January 1, 2014.