

**Introduced by Senator Leno**

February 18, 2016

---

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

**LEGISLATIVE COUNSEL'S DIGEST**

SB 1202, as introduced, Leno. Sentencing.

Existing law, until January 1, 2017, specifies, when a judgment of imprisonment is to be imposed and the statute specifies 3 possible terms, that the choice of the appropriate term shall rest within the sound discretion of the court. Existing law, on and after January 1, 2017, requires, in that situation, the court to order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime. Existing law also requires the court to set forth on the record the facts and reasons for imposing the upper or lower term and the reason for its sentencing choice. Existing law prohibits the court from imposing an upper term based upon the fact of any enhancement upon which sentence is imposed.

This bill would also prohibit the court from imposing an upper term based upon aggravating facts unless those facts are presented to, and found to be true by, the factfinder. The bill would require the court to specify on the record the specific facts in aggravation, if any, the court relied upon to impose an upper term. By increasing the duties of local prosecutors with regards to presenting and proving aggravating facts, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: yes.

*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 378 of the Statutes of 2015, 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, to ensure*  
10 *proportionality in sentencing, upper terms should be reserved for*  
11 *individual cases in which aggravating facts exist and have been*  
12 *proven to be true.* The Legislature further finds and declares that  
13 the elimination of disparity and the provision of uniformity of  
14 sentences can best be achieved by determinate sentences fixed by  
15 statute in proportion to the seriousness of the offense as determined  
16 by the Legislature to be imposed by the court with specified  
17 discretion.

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

30 (3) In any case in which the punishment prescribed by statute  
31 for a person convicted of a public offense is a term of imprisonment  
32 in the state prison, or a term pursuant to subdivision (h), of any  
33 specification of three time periods, the court shall sentence the

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

36 (b) When a judgment of imprisonment is to be imposed and the  
37 statute specifies three possible terms, the court shall order  
38 imposition of the middle term, unless there are circumstances in  
39 aggravation or mitigation of the crime. At least four days prior to  
40 the time set for imposition of judgment, either party or the victim,

1 or the family of the victim if the victim is deceased, may submit  
2 a statement in aggravation or mitigation to dispute facts in the  
3 record or the probation officer's report, or to present additional  
4 facts. In determining whether there are circumstances that justify  
5 imposition of the upper or lower term, the court may consider the  
6 record in the case, the probation officer's report, other reports,  
7 including reports received pursuant to Section 1203.03, and  
8 statements in aggravation or mitigation submitted by the  
9 prosecution, the defendant, or the victim, or the family of the victim  
10 if the victim is deceased, and any further evidence introduced at  
11 the sentencing hearing. The court shall set forth on the record the  
12 facts and reasons for imposing the upper or lower term. The court  
13 ~~may~~ shall not impose an upper term by using the fact of any  
14 enhancement upon which sentence is imposed under any provision  
15 of law. *Additionally, the court shall not impose an upper term*  
16 *based on aggravating facts unless the facts were presented to, and*  
17 *found to be true by, the factfinder.* A term of imprisonment shall  
18 not be specified if imposition of sentence is suspended.

19 (c) The court shall state the reasons for its sentence choice on  
20 the record at the time of ~~sentencing~~ *sentencing, including the*  
21 *specific facts in aggravation, if any, the court relied upon to impose*  
22 *an upper term.* The court shall also inform the defendant that as  
23 part of the sentence after expiration of the term he or she may be  
24 on parole for a period as provided in Section 3000 or 3000.08 or  
25 postrelease community supervision for a period as provided in  
26 Section 3451.

27 (d) (1) When a defendant subject to this section or subdivision  
28 (b) of Section 1168 has been sentenced to be imprisoned in the  
29 state prison or county jail pursuant to subdivision (h) and has been  
30 committed to the custody of the secretary or the county correctional  
31 administrator, the court may, within 120 days of the date of  
32 commitment on its own motion, or at any time upon the  
33 recommendation of the secretary or the Board of Parole Hearings  
34 in the case of state prison inmates, or the county correctional  
35 administrator in the case of county jail inmates, recall the sentence  
36 and commitment previously ordered and resentence the defendant  
37 in the same manner as if he or she had not previously been  
38 sentenced, provided the new sentence, if any, is no greater than  
39 the initial sentence. The court resentencing under this subdivision  
40 shall apply the sentencing rules of the Judicial Council so as to

1 eliminate disparity of sentences and to promote uniformity of  
2 sentencing. Credit shall be given for time served.

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

9 (ii) Notwithstanding clause (i), this paragraph shall not apply  
10 to defendants sentenced to life without *the possibility of* parole for  
11 an offense where the defendant tortured, as described in Section  
12 206, his or her victim or the victim was a public safety official,  
13 including any law enforcement personnel mentioned in Chapter  
14 4.5 (commencing with Section 830) of Title 3, or any firefighter  
15 as described in Section 245.1, as well as any other officer in any  
16 segment of law enforcement who is employed by the federal  
17 government, the state, or any of its political subdivisions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

37 (vi) The defendant has performed acts that tend to indicate  
38 rehabilitation or the potential for rehabilitation, including, but not  
39 limited to, availing himself or herself of rehabilitative, educational,  
40 or vocational programs, if those programs have been available at

1 his or her classification level and facility, using self-study for  
2 self-improvement, or showing evidence of remorse.

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

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

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

19 (H) If the sentence is not recalled, the defendant may submit  
20 another petition for recall and resentencing to the sentencing court  
21 when the defendant has been committed to the custody of the  
22 department for at least 20 years. If recall and resentencing is not  
23 granted under that petition, the defendant may file another petition  
24 after having served 24 years. The final petition may be submitted,  
25 and the response to that petition shall be determined, during the  
26 25th year of the defendant's sentence.

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

32 (J) This subdivision shall have retroactive application.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 recall and resentencing consideration, and that recall and  
2 resentencing procedures shall be initiated upon that prognosis.

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

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

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

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

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

25 (3) Notwithstanding paragraphs (1) and (2), where the defendant  
26 (A) has a prior or current felony conviction for a serious felony  
27 described in subdivision (c) of Section 1192.7 or a prior or current  
28 conviction for a violent felony described in subdivision (c) of  
29 Section 667.5, (B) has a prior felony conviction in another  
30 jurisdiction for an offense that has all the elements of a serious  
31 felony described in subdivision (c) of Section 1192.7 or a violent  
32 felony described in subdivision (c) of Section 667.5, (C) is required  
33 to register as a sex offender pursuant to Chapter 5.5 (commencing  
34 with Section 290) of Title 9 of Part 1, or (D) is convicted of a crime  
35 and as part of the sentence an enhancement pursuant to Section  
36 186.11 is imposed, an executed sentence for a felony punishable  
37 pursuant to this subdivision shall be served in state prison.

38 (4) Nothing in this subdivision shall be construed to prevent  
39 other dispositions authorized by law, including pretrial diversion,

1 deferred entry of judgment, or an order granting probation pursuant  
2 to Section 1203.1.

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

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

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

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

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

36 SEC. 2. No reimbursement is required by this act pursuant to  
37 Section 6 of Article XIII B of the California Constitution because  
38 the only costs that may be incurred by a local agency or school  
39 district will be incurred because this act creates a new crime or  
40 infraction, eliminates a crime or infraction, or changes the penalty

- 1 for a crime or infraction, within the meaning of Section 17556 of
- 2 the Government Code, or changes the definition of a crime within
- 3 the meaning of Section 6 of Article XIII B of the California
- 4 Constitution.

O