

AMENDED IN SENATE MARCH 28, 2016

SENATE BILL

No. 1202

Introduced by Senator Leno

February 18, 2016

An act to amend Section 1170 ~~of~~ *of, and to add Section 1170.02 to,* the Penal Code, relating to sentencing.

LEGISLATIVE COUNSEL'S DIGEST

SB 1202, as amended, 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. *The bill would also prohibit a fact pled in the indictment, information, or accusatory pleading in aggravation of sentence from being used as an aggravating factor in sentencing unless that fact has been proven to the trier of fact or admitted by the defendant. The bill would also require the bifurcation*

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

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

1 remaining term of commitment and a release date that would allow
2 him or her adequate time to complete the program.

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

1 of the judgment and other necessary documentation shall be
2 forwarded to the secretary.

3 (b) When a judgment of imprisonment is to be imposed and the
4 statute specifies three possible terms, the court shall order
5 imposition of the middle term, unless there are circumstances in
6 aggravation or mitigation of the crime. At least four days prior to
7 the time set for imposition of judgment, either party or the victim,
8 or the family of the victim if the victim is deceased, may submit
9 a statement in aggravation or mitigation to dispute facts in the
10 record or the probation officer's report, or to present additional
11 facts. In determining whether there are circumstances that justify
12 imposition of the upper or lower term, the court may consider the
13 record in the case, the probation officer's report, other reports,
14 including reports received pursuant to Section 1203.03, and
15 statements in aggravation or mitigation submitted by the
16 prosecution, the defendant, or the victim, or the family of the victim
17 if the victim is deceased, and any further evidence introduced at
18 the sentencing hearing. The court shall set forth on the record the
19 facts and reasons for imposing the upper or lower term. The court
20 shall not impose an upper term by using the fact of any
21 enhancement upon which sentence is imposed under any provision
22 of law. Additionally, the court shall not impose an upper term
23 based on aggravating facts unless the facts were presented to, and
24 found to be true by, the factfinder. A term of imprisonment shall
25 not be specified if imposition of sentence is suspended.

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

33 (d) (1) When a defendant subject to this section or subdivision
34 (b) of Section 1168 has been sentenced to be imprisoned in the
35 state prison or county jail pursuant to subdivision (h) and has been
36 committed to the custody of the secretary or the county correctional
37 administrator, the court may, within 120 days of the date of
38 commitment on its own motion, or at any time upon the
39 recommendation of the secretary or the Board of Parole Hearings
40 in the case of state prison inmates, or the county correctional

1 administrator in the case of county jail inmates, recall the sentence
2 and commitment previously ordered and resentence the defendant
3 in the same manner as if he or she had not previously been
4 sentenced, provided the new sentence, if any, is no greater than
5 the initial sentence. The court resentencing under this subdivision
6 shall apply the sentencing rules of the Judicial Council so as to
7 eliminate disparity of sentences and to promote uniformity of
8 sentencing. Credit shall be given for time served.

9 (2) (A) (i) When a defendant who was under 18 years of age
10 at the time of the commission of the offense for which the
11 defendant was sentenced to imprisonment for life without the
12 possibility of parole has served at least 15 years of that sentence,
13 the defendant may submit to the sentencing court a petition for
14 recall and resentencing.

15 (ii) Notwithstanding clause (i), this paragraph shall not apply
16 to defendants sentenced to life without the possibility of parole
17 for an offense where the defendant tortured, as described in Section
18 206, his or her victim or the victim was a public safety official,
19 including any law enforcement personnel mentioned in Chapter
20 4.5 (commencing with Section 830) of Title 3, or any firefighter
21 as described in Section 245.1, as well as any other officer in any
22 segment of law enforcement who is employed by the federal
23 government, the state, or any of its political subdivisions.

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

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

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

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

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

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

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

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

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

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

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

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

35 (iv) Prior to the offense for which the sentence is being
36 considered for recall, the defendant had insufficient adult support
37 or supervision and had suffered from psychological or physical
38 trauma, or significant stress.

39 (v) The defendant suffers from cognitive limitations due to
40 mental illness, developmental disabilities, or other factors that did

1 not constitute a defense, but influenced the defendant's
2 involvement in the offense.

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

9 (vii) The defendant has maintained family ties or connections
10 with others through letter writing, calls, or visits, or has eliminated
11 contact with individuals outside of prison who are currently
12 involved with crime.

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

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

25 (H) If the sentence is not recalled, the defendant may submit
26 another petition for recall and resentencing to the sentencing court
27 when the defendant has been committed to the custody of the
28 department for at least 20 years. If recall and resentencing is not
29 granted under that petition, the defendant may file another petition
30 after having served 24 years. The final petition may be submitted,
31 and the response to that petition shall be determined, during the
32 25th year of the defendant's sentence.

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

38 (J) This subdivision shall have retroactive application.

39 (e) (1) Notwithstanding any other law and consistent with
40 paragraph (1) of subdivision (a), if the secretary or the Board of

1 Parole Hearings or both determine that a prisoner satisfies the
2 criteria set forth in paragraph (2), the secretary or the board may
3 recommend to the court that the prisoner's sentence be recalled.

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

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

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

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

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

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

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

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

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

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

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

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

1 to the prisoner. After discharge, any additional records shall be
2 sent to the prisoner's forwarding address.

3 (10) The secretary shall issue a directive to medical and
4 correctional staff employed by the department that details the
5 guidelines and procedures for initiating a recall and resentencing
6 procedure. The directive shall clearly state that any prisoner who
7 is given a prognosis of six months or less to live is eligible for
8 recall and resentencing consideration, and that recall and
9 resentencing procedures shall be initiated upon that prognosis.

10 (11) The provisions of this subdivision shall be available to an
11 inmate who is sentenced to a county jail pursuant to subdivision
12 (h). For purposes of those inmates, "secretary" or "warden" shall
13 mean the county correctional administrator and "chief medical
14 officer" shall mean a physician designated by the county
15 correctional administrator for this purpose.

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

22 (g) A sentence to state prison for a determinate term for which
23 only one term is specified, is a sentence to state prison under this
24 section.

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

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

32 (3) Notwithstanding paragraphs (1) and (2), where the defendant
33 (A) has a prior or current felony conviction for a serious felony
34 described in subdivision (c) of Section 1192.7 or a prior or current
35 conviction for a violent felony described in subdivision (c) of
36 Section 667.5, (B) has a prior felony conviction in another
37 jurisdiction for an offense that has all the elements of a serious
38 felony described in subdivision (c) of Section 1192.7 or a violent
39 felony described in subdivision (c) of Section 667.5, (C) is required
40 to register as a sex offender pursuant to Chapter 5.5 (commencing

1 with Section 290) of Title 9 of Part 1, or (D) is convicted of a crime
2 and as part of the sentence an enhancement pursuant to Section
3 186.11 is imposed, an executed sentence for a felony punishable
4 pursuant to this subdivision shall be served in state prison.

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

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

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

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

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

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

2 *SEC. 2. Section 1170.02 is added to the Penal Code, to read:*

3 *1170.02. (a) A fact pled in the indictment, information, or*
4 *accusatory pleading in aggravation of sentence cannot be used as*
5 *an aggravating factor in sentencing unless that fact has been*
6 *proven to the trier of fact or admitted by the defendant, except*
7 *that, in the case of jury trial, prior convictions that have been pled*
8 *as provided may be proven to the court to the same extent as they*
9 *were permitted to be proven to the court prior to January 1, 2017.*

10 *(b) Whether to the jury or to the court, where permitted for prior*
11 *convictions or if a jury is waived, the trial of all facts pled in*
12 *aggravation of sentence shall be bifurcated. During the first phase,*
13 *the jury shall not be informed of a fact alleged in aggravation of*
14 *the sentence unless that fact is otherwise admissible and relevant*
15 *to the merits of the criminal charge or enhancement and not*
16 *excluded pursuant to Section 352 of the Evidence Code. The jury*
17 *shall not be informed that a fact is alleged in aggravation of the*
18 *sentence until the beginning of the second phase of the trial.*

19 ~~SEC. 2.~~

20 *SEC. 3. No reimbursement is required by this act pursuant to*
21 *Section 6 of Article XIII B of the California Constitution because*
22 *the only costs that may be incurred by a local agency or school*
23 *district will be incurred because this act creates a new crime or*
24 *infraction, eliminates a crime or infraction, or changes the penalty*
25 *for a crime or infraction, within the meaning of Section 17556 of*
26 *the Government Code, or changes the definition of a crime within*
27 *the meaning of Section 6 of Article XIII B of the California*
28 *Constitution.*