

AMENDED IN SENATE MAY 31, 2016

AMENDED IN SENATE MARCH 28, 2016

**SENATE BILL**

**No. 1202**

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**Introduced by Senator Leno**

February 18, 2016

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An act to amend Section 1170 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~~ *pleaded* 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~~ *pleaded* 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

1 successful return to the community to an inmate with a short  
2 remaining term of commitment and a release date that would allow  
3 him or her adequate time to complete the program.

4 (3) In any case in which the punishment prescribed by statute  
5 for a person convicted of a public offense is a term of imprisonment  
6 in the state prison, or a term pursuant to subdivision (h), of any  
7 specification of three time periods, the court shall sentence the  
8 defendant to one of the terms of imprisonment specified unless  
9 the convicted person is given any other disposition provided by  
10 law, including a fine, jail, probation, or the suspension of  
11 imposition or execution of sentence or is sentenced pursuant to  
12 subdivision (b) of Section 1168 because he or she had committed  
13 his or her crime prior to July 1, 1977. In sentencing the convicted  
14 person, the court shall apply the sentencing rules of the Judicial  
15 Council. The court, unless it determines that there are  
16 circumstances in mitigation of the punishment prescribed, shall  
17 also impose any other term that it is required by law to impose as  
18 an additional term. Nothing in this article shall affect any provision  
19 of law that imposes the death penalty, that authorizes or restricts  
20 the granting of probation or suspending the execution or imposition  
21 of sentence, or expressly provides for imprisonment in the state  
22 prison for life, except as provided in paragraph (2) of subdivision  
23 (d). In any case in which the amount of preimprisonment credit  
24 under Section 2900.5 or any other provision of law is equal to or  
25 exceeds any sentence imposed pursuant to this chapter, except for  
26 a remaining portion of mandatory supervision imposed pursuant  
27 to subparagraph (B) of paragraph (5) of subdivision (h), the entire  
28 sentence shall be deemed to have been served, except for the  
29 remaining period of mandatory supervision, and the defendant  
30 shall not be actually delivered to the custody of the secretary or  
31 the county correctional administrator. The court shall advise the  
32 defendant that he or she shall serve an applicable period of parole,  
33 postrelease community supervision, or mandatory supervision and  
34 order the defendant to report to the parole or probation office  
35 closest to the defendant's last legal residence, unless the in-custody  
36 credits equal the total sentence, including both confinement time  
37 and the period of parole, postrelease community supervision, or  
38 mandatory supervision. The sentence shall be deemed a separate  
39 prior prison term or a sentence of imprisonment in a county jail  
40 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~~ *pleaded* in the indictment, information,  
4 or accusatory pleading in aggravation of a sentence cannot be used  
5 as 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 *pleaded* as provided may be proven to the court to the same extent  
9 as they were permitted to be proven to the court prior to January  
10 1, 2017.

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

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