

AMENDED IN SENATE APRIL 1, 2013

SENATE BILL

No. 225

Introduced by Senator Emmerson
(Coauthors: Senators Fuller, Huff, and Walters)
(Coauthors: Assembly Members Donnelly, Beth Gaines, and
Maienschein)

February 11, 2013

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

LEGISLATIVE COUNSEL'S DIGEST

SB 225, as amended, Emmerson. Imprisonment: sentences punishable in state prison.

Under existing law, certain specified felonies are punished by imprisonment in a county jail for 16 months, or 2 or 3 years or, where the term is specified, for the term described in the underlying offense. Notwithstanding these provisions, existing law requires that a sentence be served in state prison where the defendant has a prior or current conviction for a serious or violent felony, has a prior felony conviction in another jurisdiction that has all of the elements of a serious or violent felony, is required to register as a sex offender, or has an aggravated white collar crime enhancement imposed as part of the sentence.

This bill would additionally require a sentence to be served in state prison when the defendant is convicted of a felony *or felonies* otherwise punishable in a county jail and is sentenced to *an aggregate term of* more than 3 years.

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

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

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

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

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

(3) In any case in which the punishment prescribed by statute for a person convicted of a public offense is a term of imprisonment in the state prison of any specification of three time periods, the court shall sentence the defendant to one of the terms of imprisonment specified unless the convicted person is given any other disposition provided by law, including a fine, jail, probation, or the suspension of imposition or execution of sentence or is sentenced pursuant to subdivision (b) of Section 1168 because he or she had committed his or her crime prior to July 1, 1977. In sentencing the convicted person, the court shall apply the sentencing rules of the Judicial Council. The court, unless it determines that there are circumstances in mitigation of the punishment prescribed, shall also impose any other term that it is

required by law to impose as an additional term. Nothing in this article shall affect any provision of law that imposes the death penalty, that authorizes or restricts the granting of probation or suspending the execution or imposition of sentence, or expressly provides for imprisonment in the state prison for life, except as provided in paragraph (2) of subdivision (d). In any case in which the amount of preimprisonment credit under Section 2900.5 or any other provision of law is equal to or exceeds any sentence imposed pursuant to this chapter, the entire sentence shall be deemed to have been served and the defendant shall not be actually delivered to the custody of the secretary. The court shall advise the defendant that he or she shall serve a period of parole and order the defendant to report to the parole office closest to the defendant's last legal residence, unless the in-custody credits equal the total sentence, including both confinement time and the period of parole. The sentence shall be deemed a separate prior prison term under Section 667.5, and a copy of the judgment and other necessary documentation shall be forwarded to the secretary.

(b) When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime. At least four days prior to the time set for imposition of judgment, either party or the victim, or the family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation to dispute facts in the record or the probation officer's report, or to present additional facts. In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer's report, other reports, including reports received pursuant to Section 1203.03, and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall set forth on the record the facts and reasons for imposing the upper or lower term. The court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law. A term of imprisonment shall not be specified if imposition of sentence is suspended.

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

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

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

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

34 (B) The defendant shall file the original petition with the
35 sentencing court. A copy of the petition shall be served on the
36 agency that prosecuted the case. The petition shall include the
37 defendant's statement that he or she was under 18 years of age at
38 the time of the crime and was sentenced to life in prison without
39 the possibility of parole, the defendant's statement describing his

1 or her remorse and work towards rehabilitation, and the defendant's
2 statement that one of the following is true:

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

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

9 (iii) The defendant committed the offense with at least one adult
10 codefendant.

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

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

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

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

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

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

39 (ii) The defendant does not have juvenile felony adjudications
40 for assault or other felony crimes with a significant potential for

1 personal harm to victims prior to the offense for which the sentence
2 is being considered for recall.

3 (iii) The defendant committed the offense with at least one adult
4 codefendant.

5 (iv) Prior to the offense for which the sentence is being
6 considered for recall, the defendant had insufficient adult support
7 or supervision and had suffered from psychological or physical
8 trauma, or significant stress.

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

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

19 (vii) The defendant has maintained family ties or connections
20 with others through letter writing, calls, or visits, or has eliminated
21 contact with individuals outside of prison who are currently
22 involved with crime.

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

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

35 (H) If the sentence is not recalled, the defendant may submit
36 another petition for recall and resentencing to the sentencing court
37 when the defendant has been committed to the custody of the
38 department for at least 20 years. If recall and resentencing is not
39 granted under that petition, the defendant may file another petition
40 after having served 24 years. The final petition may be submitted,

1 and the response to that petition shall be determined, during the
2 25th year of the defendant's sentence.

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

8 (J) This subdivision shall have retroactive application.

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

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

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

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

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

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

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

37 (4) Any physician employed by the department who determines
38 that a prisoner has six months or less to live shall notify the chief
39 medical officer of the prognosis. If the chief medical officer
40 concurs with the prognosis, he or she shall notify the warden.

1 Within 48 hours of receiving notification, the warden or the
2 warden's representative shall notify the prisoner of the recall and
3 resentencing procedures, and shall arrange for the prisoner to
4 designate a family member or other outside agent to be notified
5 as to the prisoner's medical condition and prognosis, and as to the
6 recall and resentencing procedures. If the inmate is deemed
7 mentally unfit, the warden or the warden's representative shall
8 contact the inmate's emergency contact and provide the information
9 described in paragraph (2).

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

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

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

39 (8) If possible, the matter shall be heard before the same judge
40 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 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 recall and resentencing consideration, and that recall and resentencing procedures shall be initiated upon that prognosis.

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

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

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

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

(3) Notwithstanding paragraphs (1) and (2), where the defendant (A) has a prior or current felony conviction for a serious felony described in subdivision (c) of Section 1192.7 or a prior or current conviction for a violent felony described in subdivision (c) of Section 667.5, (B) has a prior felony conviction in another jurisdiction for an offense that has all the elements of a serious felony described in subdivision (c) of Section 1192.7 or a violent

felony described in subdivision (c) of Section 667.5, (C) is required to register as a sex offender pursuant to Chapter 5.5 (commencing with Section 290) of Title 9 of Part 1, (D) is convicted of a crime and as part of the sentence an enhancement pursuant to Section 186.11 is imposed, or (E) is convicted of a felony *or felonies* punishable pursuant to this subdivision and is sentenced to *an aggregate term of* more than three years, an executed sentence for a felony punishable pursuant to this subdivision shall be served in state prison.

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

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

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

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

(ii) The portion of a defendant's sentenced term during which time he or she is supervised by the county probation officer pursuant to this subparagraph shall be known as mandatory supervision.

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