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# SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair

2021 - 2022 Regular

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**Bill No:** AB 1540                      **Hearing Date:** July 6, 2021  
**Author:** Ting  
**Version:** June 22, 2021  
**Urgency:** No                                      **Fiscal:** Yes  
**Consultant:** SC

**Subject:** *Criminal procedure: resentencing*

## HISTORY

**Source:** Author

**Prior Legislation:** AB 2942 (Ting), Ch. 1001, Stats. 2018  
AB 1156 (Brown), Ch. 378, Stats. 2015

**Support:** A New Way of Life Re-Entry Project; Alliance for Boys and Men of Color; American Civil Liberties Union California Action; American Friends Service Committee; Anti-Recidivism Coalition; Asian Americans Advancing Justice – California; Asian Prisoner Support Committee; Bend the Arc: Jewish Action; California Catholic Conference; California Coalition for Women Prisoners; California Public Defenders Association; Californians for Safety and Justice; Californians United for A Responsible Budget; Communities United for Restorative Youth Justice (CURYJ); Dignity and Power Now; Dream Corps; Drug Policy Alliance; Ella Baker Center for Human Rights; Essie Justice Group; FAMM; Felony Murder Elimination Project; For the People; Fresno Barrios Unidos; Friends Committee on Legislation of California; Further the Work; Immigrant Legal Resource Center; Initiate Justice; Legal Services for Prisoners with Children; Los Angeles County District Attorney's Office; National Center for Youth Law; Prison Yoga Project; Prisoner Advocacy Network; Prosecutors Alliance of California; Re:store Justice; Root & Rebound; Rubicon Programs; San Francisco District Attorney's Office; San Francisco Public Defender's Office; San Mateo County Participatory Defense; Secure Justice; Showing up for Racial Justice (SURJ) Bay Area; SURJ San Diego; Silicon Valley De-bug; Special Circumstances Conviction Project; Smart Justice California; Starting Over; Success Stories Program; Survived & Punished; Transformative In-prison Workgroup; Transgender, Gendervariant, Intersex Justice Project; Urban Peace Movement; Uncommon Law; W. Haywood Burns Institute; We the People – San Diego; Western Center on Law and Poverty; White People 4 Black Lives; Young Women's Freedom Center;

**Opposition:** California District Attorneys Association (oppose unless amended)

**Assembly Floor Vote:** 53 - 20

## PURPOSE

***The purpose of this bill is to: 1) prohibit the court from denying a recall and resentencing motion without a hearing; 2) require the court to appoint counsel for the petitioner; 3) create a presumption favoring recall and resentencing when recall and resentencing is based on the recommendation of the Department of Corrections and Rehabilitation (CDCR), the Board of Parole Hearings (BPH) or local authorities; and 4) require the court to state on the record the reasons for its decision to grant or deny recall and resentencing.***

*Existing law* provides that when a defendant has been sentenced to be imprisoned, the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the secretary of the CDCR or the Board of Parole Hearings in the case of state prison inmates, the county correctional administrator in the case of county jail inmates, or the district attorney of the county in which the defendant was sentenced, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if they had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence. (Pen. Code, § 1170, subd. (d)(1).)

*This bill* recasts the above provision and makes clarifying changes.

*Existing law* states that the resentencing court may reduce a defendant's term of imprisonment and modify the judgment, including a judgment entered after a plea agreement, if it is in the interest of justice. The court may consider post-conviction factors, including, but not limited to, the inmate's disciplinary record and record of rehabilitation while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the inmate's risk for future violence, and evidence that reflects that circumstances have changed since the inmate's original sentencing so that the inmate's continued incarceration is no longer in the interest of justice. Credits shall be given for time served. (*Ibid.*)

*This bill* recasts the above provision and adds that the court may also vacate the defendant's conviction and impose judgment on any necessarily included lesser offense or lesser related offense, whether or not that offense was charged in the original pleading, and then resentence defendant to a reduced term of imprisonment, with the concurrence of both the defendant and the prosecutor.

*This bill* requires the court to state on the record the reasons for its decision to grant or deny recall and resentencing.

*This bill* states that resentencing shall not be denied, nor a stipulation rejected, without a hearing where the parties have an opportunity to address the basis for the intended denial or rejection.

*This bill* provides that if a hearing is held, the defendant may, at the request of counsel, appear remotely and the court may, at the request of the defendant's counsel, conduct the hearing through the use of remote technology.

*This bill* requires when a resentencing request is from the Secretary of CDCR, BPH, a county correctional administrator, a district attorney, or the Attorney General, all of the following:

- The court shall provide notice to the defendant and set a status conference within 30 days after the date that the court received the request. The court's order setting the conference shall also appoint counsel to represent the defendant; and,
- There shall be a presumption favoring recall and resentencing of the defendant, which may only be overcome if a court finds the defendant is an unreasonable risk of danger to public safety, as defined.

*This bill* replaces the term “inmate” with “defendant” throughout the section.

*This bill* contains findings and declarations related to the inefficacy of lengthy sentences and to provide Legislative intent that resentencing petitions submitted by law enforcement agencies should be entitled to the court's consideration.

## COMMENTS

### 1. Need for This Bill

According to the author of this bill:

AB 1540 seeks to ensure due process and equitable application in these types of resentencing cases. It will clarify the intent of the legislature when it amended the statute in 2018; honor the significant time, thought, and effort that law enforcement agencies put into referrals; and provide additional guidance for judges regarding resentencing.

The changes contained in AB 1540 come from lawyers, advocates, and formerly incarcerated people and their loved ones who have direct experience with the Penal Code § 1170(d)(1) process. They are also consistent with the recommendations of the California Committee on the Revision of the Penal Code's first report issued February 2021.

This bill clarifies existing law, that when a sentence is recalled or reopened for any reason, in resentencing the defendant trial courts must apply 'any changes in law that reduce sentences or provide for judicial discretion.'" At least one Court of Appeal has incorrectly held to the contrary.' *People v. Federico* (2020) 50 Cal.App.5th 318 review granted August 26, 2020."

### 2. Committee on Revision of the Penal Code

On January 1, 2020, the Committee on the Revision of the Penal Code (“Committee”) was established within the Law Review Commission to study the Penal Code and recommend statutory reforms. (SB 94, Ch. 25, Stats. 2019; Gov. Code, § 8280.) The Committee's objectives are as follows:

- 1) Simplify and rationalize the substance of criminal law;
- 2) Simplify and rationalize criminal procedures;

- 3) Establish alternatives to incarceration that will aid in the rehabilitation of offenders; and,
- 4) Improve the system of parole and probation.

(Gov. Code, § 8290.5, subd. (a).) In making recommendations to achieve these objectives, the Committee may recommend adjustments to the length of sentence terms. (Gov. Code, § 8290.5, subd. (b).) The Committee is required to prepare an annual report that describes its work in the prior calendar year and its expected work for the subsequent calendar year. (Gov. Code, § 8293, subd. (b).)

After holding meetings over the course of a year and hearing from multitudes of witnesses, including Governor Newsom, former Governor Brown, Attorney General Becerra, and other stakeholders involved in the criminal justice system such as law enforcement groups, public defenders, victims' advocates, and formerly incarcerated individuals, on February 9, 2021, the Committee released its first annual report describing the Committee's work and recommendations. The Committee members unanimously recommended ten reforms to the Penal Code. (See <[clrc.ca.gov/CRPC/About/History.html](http://clrc.ca.gov/CRPC/About/History.html)> [as of June 27, 2021].)

One of the Committee's recommendations is to establish a judicial process for existing recall and resentencing laws:

The administrations of Governor Newsom and former Governor Brown and the Legislature have expanded the use of "second look" sentencing by authorizing courts to revisit sentences of selected incarcerated people when recommended by law enforcement authorities. This practice should be clarified and expanded. The Committee therefore recommends the following:

- Establish judicial procedures for evaluating resentencing requests. In all cases, require notice, initial conference within 60 days, and written reasons for court decisions. For all cases initiated by law enforcement, require appointment of counsel.
- Establish that resentencing is presumed if law enforcement officials recommend resentencing because a sentence is unjust or because of a person's exceptional rehabilitative achievement while incarcerated.
- Expand "second look" sentencing opportunities by allowing any person who has served more than 15 years to request a reconsideration of sentence by establishing that "continued incarceration is no longer in the interest of justice."

*(Annual Report and Recommendations 2020, Committee on Revision of the Penal Code, p 65.)* Background information provided in the Committee's report indicate that there is a lack of structure in the resentencing process which results in denials of petitions without any sort of hearing or explanation of why the petition was denied.

The law has existed for decades but was given new life in 2018 when then Governor Brown allocated resources to CDCR to identify incarcerated people who demonstrated records of rehabilitation and deserved a reevaluation of their sentence in court. The law was then expanded to allow prosecutors to make similar resentencing requests. Prosecutors and CDCR do not make requests for resentencing lightly. CDCR has an extensive set of regulations guiding the

process. Hillary Blout, Executive Director of For the People, described to the Committee the resource-intensive procedures that some prosecutors are beginning to use to review old cases. Although the requests for resentencing are made by law enforcement authorities, the ultimate decision to recall a person's sentence and reduce their punishment remains with the courts.

Despite these expansions to the resentencing statute, current law has failed to protect many important interests at stake. For example, because the Penal Code does not provide any rules, many trial courts provide virtually no process while considering these requests, including denying resentencing requests without providing notice to the parties, appointing counsel, or giving parties an opportunity to be heard. The law does not require a court to give any specific reason for denying a resentencing request. (*Id.* at pp. 65-66, fn. omitted.)

This bill would codify several of the Committee's recommendations on resentencing. Specifically, this bill requires a hearing to be held on a resentencing petition, unless otherwise stipulated by the parties, requires appointment of counsel for the defendant, requires the court to state on the record the reasons for its decision to grant or deny the petition. When the request is made by one of the specified law enforcement entities, the bill requires the court to notify the defendant, set a status conference within 30 days of receipt of the request and creates a presumption in favor of recall and resentencing which can only be overcome by a finding that the defendant is an "unreasonable risk of danger to public safety." This standard is defined to mean that there is an unreasonable risk that the defendant would commit a new violent felony as specified.

### **3. Jurisdiction and Existing Recall and Resentencing Provisions**

As a general matter, a court typically loses jurisdiction over a sentence when the sentence begins. (*Dix v. Superior Court* (1991) 53 Cal. 3d 442, 455.) Once the defendant has been committed on a sentence pronounced by the court, the court no longer has the legal authority to increase, reduce, or otherwise alter the defendant's sentence. (*Id.*)

However, the Legislature has created limited statutory exceptions allowing a court to recall a sentence and resentence the defendant. (*Id.*; Pen. Code, § 1170, subd. (d).) Specifically, within 120 days of commitment, the court has the ability to resentence the defendant as if it had never imposed sentence to begin with. (Pen. Code, § 1170, subd. (d)(1).) In addition, the Director of CDCR, and BPH, the county correctional administrator, or the district attorney, can make a recommendation for resentencing at any time. (*Id.*) The statute that provides this authority does not provide any additional procedural guidelines of how a court should proceed, such as whether a hearing is required or whether the defendant should be appointed counsel.

This bill directs the court on how to proceed on recall and resentencing motions. A hearing is required to be set to determine whether the person should be resentenced, unless otherwise stipulated to by the parties, defendant shall be appointed counsel, and the court's decision to grant or deny the petition shall be stated on the record. When resentencing is recommended by one of the specified law enforcement entities statutorily authorized to do so, the court shall provide notice to the defendant, set a status conference within 30 days of receiving the petition and appoint counsel. A presumption in favor of resentencing applies to petitions submitted by law enforcement entities unless overcome by an unreasonable risk to public safety.

#### 4. Argument in Support

According to Ella Baker Center for Human Rights:

Penal Code section 1170(d)(1) has existed for decades, but was given a renewed focus in 2018 when two bills passed that granted district attorneys the ability to make these referrals and provided CDCR with funds to make recommendations. Since then, CDCR has made close to 2,000 recommendations and an increasing number of district attorneys are making use of the process. However, this increase in referrals has revealed several procedural issues that AB 1540 (Ting) seeks to address.

For example, right now large numbers of referrals are being ignored or denied by the courts without any input from either side. This is in part because Penal Code § 1170(d)(1) doesn't provide guidance on how the courts should handle these types of recommendations. Incarcerated individuals also often don't have access to lawyers, and, in many cases, have no idea they have been recommended.

AB 1540 (Ting) seeks to address these issues so that Penal Code § 1170(d)(1) can be fully and fairly applied. It will do this by ensuring that an incarcerated person receives notice of their referral; establishing court deadlines and the right to counsel; providing a presumption in favor of resentencing for all law enforcement referrals; and clarifying that a judge can reduce a charge to a lesser-included or lesser-related offense. AB 1540 (Ting) will also give the Attorney General's office the power to recommend a person for resentencing when they prosecuted the case and make Penal Code § 1170(d)(1) its own Penal Code section to clarify the law.

#### 5. Argument in Opposition

California District Attorneys Association, who is opposed unless amended, writes:

First, in order to protect the rights of victims of crime, the proposed Penal Code section 1170.03 should expressly state that in any resentencing case, victims are entitled to the notifications and opportunity to be heard afforded to them under Marsy's Law, California Constitution article I, § 28, section (b). This is particularly important in resentencing cases that originate from the DA's office; where the office that convicted their offender is now seeking to reduce the penalties, the law should ensure victims be made aware and can address the court.

Second, in instances where CDCR is asking the court to recall a sentence, the law should require CDCR to facilitate that resentencing by providing records. Currently, CDCR sends a letter to the court recommending the court resentence a person, and then either the DA or appointed defense attorney attempts to obtain the person's central file from the prison where they are located so the court can evaluate whether the person's continued incarceration is in the interest of justice. Some prison facilities are charging money for the records or otherwise creating undue burdens in obtaining them. A revised resentencing law should mandate that CDCR should supply the necessary records when it makes its

request. For example, a subsection could state: “In cases where CDCR or BPH is recommending resentencing, they should provide a copy of the person’s central prison file at the time of the application to the court.”

Finally, and most troubling, CDAA cannot support the final section of your proposed legislation creating a “presumption favoring recall and resentencing of the defendant, which may only be overcome if a court finds the defendant is an unreasonable risk of danger to public safety, as defined in subdivision (c) of section 1170.18.” The referenced subsection defines “unreasonable risk of danger to public safety” to mean an unreasonable risk that a person will commit a new violent felony as defined in Penal Code section 667(e)(2)(c)(iv). These offenses are known as “superstrikes,” a narrow list of the most atrocious crimes, such as homicide, assault on a peace officer with a machine gun, sexual assault of a child under the age of 14, and possession of a weapon of mass destruction. This is an unreasonably high burden.

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