SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair
2021 - 2022 Regular

Bill No:	AB 1847	**Hearing Date:**	June 21, 2022
Author:	Valladares		
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Urgency:	No	**Fiscal:**	Yes
Consultant:	SC		

Subject: ***Criminal procedure: victims' rights***

HISTORY

Source: Author

Prior Legislation: AB 1540 (Ting), Ch. 719, Stats. 2021
AB 2942 (Ting), Ch. 1001, Stats. 2018
AB 1156 (Brown), Ch. 378, Stats. 2015

Support: California District Attorneys Association; California Police Chiefs Association; City of Beverly Hills; Crime Victims United; Los Angeles County Professional Peace Officers Association; Peace Officers Research Association of California

Opposition: California Attorneys for Criminal Justice; Ella Baker Center for Human Rights; Initiate Justice; San Francisco Public Defender

Assembly Floor Vote: 72 - 2

PURPOSE

The purpose of this bill is to specify that a court is required to hold a hearing on resentencing if the victim wishes to be heard, and limits the amount of notice the victim and their family members must provide to attend a parole hearing to 15 days.

Existing law provides that when a defendant has been convicted of a felony offense and 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 CDCR or BPH 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, or the Attorney General (AG) if the Department of Justice (DOJ) originally prosecuted the case, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if they had not previously been sentenced, whether or not the defendant is still in custody, provided the new sentence, if any, is not greater than the initial sentence. (Pen. Code, § 1170.03, subd. (a)(1).)

Existing law states that the resentencing court shall apply the sentencing rules of the Judicial Council and apply any changes in law that reduce sentences or provide for judicial discretion so as to eliminate disparity of sentences and to promote uniformity of sentencing. (Pen. Code, § 1170.03, subd. (a)(2).)

Existing law provides that the resentencing court may, in the interest of justice regardless of whether the original sentence was imposed after a trial or plea agreement, do the following:

- Reduce a defendant's term of imprisonment by modifying the sentence; or,
- 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 the defendant to a reduced term of imprisonment, with the concurrence of both the defendant and the district attorney of the county in which the defendant was sentenced or the AG if DOJ originally prosecuted the case. (Pen. Code, § 1170.03, subd. (a)(3).)

Existing law states that the court may consider postconviction factors, including, but not limited to, the disciplinary record and record of rehabilitation of the defendant while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the defendant's risk for future violence, and evidence that reflects that circumstances have changed since the original sentencing so that continued incarceration is no longer in the interest of justice. (Pen. Code, § 1170.03, subd. (a)(4).)

Existing law requires the court to consider if the defendant has experienced psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence, if the defendant was a victim of intimate partner violence or human trafficking prior to or at the time of the commission of the offense, or if the defendant is a youth or was a youth, as defined, at the time of the commission of the offense, and whether those circumstances were a contributing factor in the commission of the offense. (*Ibid*.)

Existing law requires the court to state on the record the reasons for its decision to grant or deny recall and resentencing. (Pen. Code, § 1170.03, subd. (a)(6).)

Existing law provides that resentencing may be granted without a hearing upon stipulation by the parties. (Pen. Code, § 1170.03, subd. (a)(7).)

Existing law 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. If a hearing is held, the defendant may appear remotely and the court may conduct the hearing through the use of remote technology, unless counsel requests their physical presence in court. (Pen. Code, § 1170.03, subd. (a)(8).)

Existing law specifies that if 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 shall apply:

- 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.
- 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. (Pen. Code, § 1170.03, subd. (a).)

Existing law, known as Marsy's Law, states that in order to preserve a victims' right to due process and justice, the victim is, among other things, entitled to: reasonable notice of all public proceedings which the defendant and the prosecutor are entitled to be present at and of all parole or other post-conviction release proceedings, as well as to be present at these proceedings; be heard, upon request, at any proceeding, including sentencing, a post-conviction release decision, or any proceeding in which a right of the victim is at issue; and be informed of all parole procedures, to participate in the parole process, and to provide information to the parole authority to be considered before the person is paroled. (Cal. Const., art. I § 28(b)[7]-[8] & [15].)

This bill states that notwithstanding the ability of the court to grant resentencing without a hearing when stipulated to by the parties, if a victim of a crime wishes to be heard pursuant to Marsy's Law or pursuant to any other provision of law applicable to the hearing, the victim shall notify the prosecution of their request for a hearing within 15 days of being notified that resentencing is being sought and the court shall hold a hearing.

Existing law states that the victim or next of kin if the victim has died is entitled to be notified, upon request, of any parole eligibility hearing and of the right to appear, either personally or by other means specified, to reasonably express their views, and to have their statements considered. (Pen. Code, § 679.02, subd. (a)(5).)

Existing law requires, upon request to CDCR and verification of the identity of the requester, notice of any hearing to review or consider the parole suitability for any inmate in a state prison to be given by BPH at least 90 days before the hearing to any victim of any crime committed by the inmate, or to the next of kin of the victim if the victim has died. The requesting party shall keep the board apprised of his or her current contact information in order to receive the notice. (Pen. Code, § 3043, subd. (a)(1).)

Existing law requires, no later than 30 days before the date selected for the hearing, any person, other than the victim, entitled to attend the hearing shall inform BPH of their intention to attend the hearing and the name and identifying information of any other person entitled to attend the hearing who will accompany them. (Pen. Code, § 3043, subd. (a)(2).)

Existing law states that no later than 14 days before the hearing, BPH must notify every person entitled to attend the hearing confirming the date, time, and place of the hearing. (Pen. Code, § 3043, subd. (a)(3).)

This bill limits the amount of notice that CDCR may require from a victim, victim's next of kin, member of the victim's family, victim's representative, counsel representing any of these persons, or victim support persons to no more than 15 days.

COMMENTS

1. Need for this Bill

According to the author of this bill:

> Recently enacted emergency regulations adopted by the California Department of Corrections require crime victims to provide 15 days' notice and next of kin and immediate family members of crime victims to provide 30 days' notice if they

wish to participate in parole hearings. (15 C.C.R. § 2057(b)-(c).) This requirement became operative on September 27, 2021 as an emergency regulation. This applies regardless of whether they will participate in person or remotely. This requirement can be difficult for crime victims, but is especially onerous for their next of kin and family members. Prosecutors may need more time to locate these individuals and many could find it difficult for them to schedule that far in advance (https://calcoastnews.com/2021/08/parole-policy-harmful-to-victims-of-violent-crime/). Some may not even receive notice of the hearing with sufficient time to respond. While the Department needs some time to perform background checks for individuals who will enter prison grounds, it is unreasonable to require a different standard for victims' families and next of kin than crime victims and the same standard for in-person appearances and those providing remote testimony.

To address this, AB 1847 provides that the Board of Parole Hearings cannot require more than 15 days' minimum notice that a victim, victim's next of kin, member of the victim's family, victim's representative, counsel representing any of these persons, or victim support persons, of their intention to attend a parole suitability hearing.

AB 1540 (Ting) of 2021, which authorized judges, in certain, to grant a petition for recall and resentencing of inmates. The bill also included a provision that permits a judge to dispense with an in-court hearing on a petition for resentencing if the prosecutor petitions for resentencing of an inmate and the prosecution and defense agree to dispense with an in-court hearing. Unfortunately, this provision eliminates the ability of a crime victim, or the victim's family, to testify in opposition to the petition at an in-court hearing. (Penal Code § 1170.03(a)(7): "Resentencing may be granted without a hearing upon stipulation by the parties.")

To ensure that crime victims can, pursuant to Marsy's Law, be heard upon request at any proceeding and participate in the parole process, AB 1847 provides that a court is required to hold a hearing on a petition of resentencing if a victim wishes to be heard and the victim notifies the district attorney at least 15 days after being notified by the district attorney that resentencing is being sought.

2. Marsy's Law

On November 4, 2008, voters approved Proposition 9, which amended the California Constitution to provide a victim's Bill of Rights. This is known as Mary's Law. (Cal. Const., art. I § 28(b).) In order to preserve a victims' right to due process and justice, the victim is, among other things, entitled to: reasonable notice of all public proceedings which the defendant and the prosecutor are entitled to be present at and of all parole or other post-conviction release proceedings, as well as to be present at these proceedings; be heard, upon request, at any proceeding, including sentencing, a post-conviction release decision, or any proceeding in which a right of the victim is at issue; and be informed of all parole procedures, to participate in the parole process, and to provide information to the parole authority to be considered before the person is paroled. (Cal. Const., art. I § 28(b)[7]-[8] & [15].)

This bill requires a court to hold a hearing on resentencing if the victim wishes to be heard pursuant to Marsy's Law or any other applicable laws and has notified the prosecution of their

request for a hearing within 15 days of being notified that resentencing is being sought. This bill also states that CDCR and BPH may not require more than 15 days' notice by a victim of a crime, victim's next of kin, member of the victim's family, victim's representative, counsel representing any of these person, or victim support persons that they intend to attend the hearing.

3. Recall and Resentencing Law

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. Specifically, within 120 days of commitment for a felony conviction, the court has the ability to resentence the defendant as if it had never imposed sentence, provided the new sentence is no greater than the original sentence. In addition, CDCR, BPH, the county correctional administrator, the district attorney, or the Attorney General can make a recommendation for resentencing at any time. (Pen. Code, § 1170.03, subd. (a).)

The recall and resentencing law was originally part of Penal Code section 1170 but was recently recast into a separate code section, Penal Code section 1170.03, and amended to include specified procedures for recall and resentencing such as when a hearing is required, that defendant is entitled to appointment of counsel, and requiring the court to state on the record the reasons for its decision to grant or deny recall and resentencing. (AB 1540 (Ting), Chapter 719, Statutes of 2021.)

The recall and resentencing process set forth in Penal Code section 1170.03 requires a hearing to be set to determine whether the person should be resentenced, unless otherwise stipulated to by the parties, and requires the court's decision to grant or deny the petition to be stated on the record. When resentencing is recommended by one of the specified law enforcement entities statutorily authorized to do so, the court must 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.

This bill requires, notwithstanding the provision in Penal Code section 1170.03 that authorizes the parties to stipulate to having resentencing granted without a hearing, the court to hold a hearing if a victim of a crime wishes to be heard pursuant to Marsy's Law, or pursuant to any other provision of law applicable to the hearing, and the victim has notified the prosecution of their request for a hearing within 15 days of being notified that resentencing is being sought.

As raised by some of the opponents of this bill, Marsy's Law does not authorize victims to require a hearing when neither the prosecution, defense, or court determines one to be necessary; rather the law states that the victim shall have the *opportunity to be heard* at any proceeding "involving a post–arrest release decision, plea, sentencing, post–conviction release decision, or any proceeding in which a right of the victim is at issue." (Cal. Const., art. I § 28(b)[8], *italics added*.) This may be satisfied by allowing a victim to submit a statement or attend and provide a statement in person during relevant proceedings when they occur.

4. CDCR Regulations on Parole Hearings

In response to the COVID-19 global pandemic and the resulting State of Emergency proclaimed by Governor Newsom on March 4, 2020, the Governor ordered BPH to develop a process for conducting parole hearings by videoconference. Absent the Executive Order, the law had required BPH to conduct all hearings in person at the institution where the incarcerated person is housed and incarcerated persons had a right to be present at their parole hearing, which courts have interpreted to mean they had a right to physically appear in person. (CDCR, Fact Sheet – Proposed Regulations to Conduct Parole Hearings by Videoconference (Aug. 2021) <https://www.cdcr.ca.gov/bph/wp-content/uploads/sites/161/2021/08/Fact-Sheet-Videoconference-Regs-8-16-2021.pdf> [as of June 9, 2022].)

The regulations provide that victims and victims' next of kin who have registered with CDCR's Office of Victim and Survivor Rights and Services to receive notice of parole hearings will continue to receive notice at least 90 days before the parole hearing as required by Penal Code section 3043(a)(1). Notices will identify whether the hearing is scheduled to be conducted in person or by videoconference. (*Ibid*.)

The regulations state that if BPH determines that an in-person hearing is necessary for the hearing officers to establish effective communication with the inmate, then the inmate, the inmate's attorney, and the interpreter shall be physically present with the inmate during the hearing, unless one of the specified exceptions applies. (Cal. Code Regs., tit. 15, § 2057, subd. (b).) The regulations require at least 15 days' notice prior to the hearing of the intent to attend by any victim, victim's counsel, victim's designated representative, and victim's support person; at least 30 days' notice prior to the hearing for any victim's next of kin, their counsel, designated representative, and support person; and at least 30 days' notice prior to the hearing of any victim's family member, their counsel, and support person. (Cal. Code Regs., tit. 15, § 2057, subd. (b)&(c).)

This bill prohibits CDCR and BPH from requiring any more than 15 days' notice by a victim, victim's next of kin, member of the victim's family, victim's representative, counsel representing any of these persons, or victim support persons, of their intention to attend the hearing. As discussed above, CDCR's regulations require at minimum 15 days' notice from a victim of their intent to attend a parole hearing, and at minimum 30 days' notice from a victim's next of kin or victim's family member.

The proponents of this bill argue that 30 days' notice is cumbersome because people may have a difficult time scheduling their availability in advance. They acknowledge that some notice is necessary as CDCR has to perform background checks of individuals as well as other administrative functions prior to allowing someone access to the hearing, but that 30 days is too long. Thus, the bill states that for victims, next of kin, and victim family, and their counsel and support persons, CDCR and BPH may not require more than 15 days' notice of their intent to attend a hearing.

5. Arguments in Support

According to Peace Officers Research Association of California:

> AB 1847 will reduce the amount of time that crime victims must give to the Department of Corrections and Rehabilitation if they wish to participate in parole hearings. This bill will also ensure that crime victims may provide testimony at a resentencing hearing and gives them and their attorneys the same right to

participate, in-person, at parole hearing as currently exists for an inmate's counsel.

PORAC believes this bill enacts multiple necessary safeguards for crime victims who wish to participate in parole hearings. By reducing the amount of time that crime victims are required to provide notice of intent to participate to 15 days, AB 1847 provides better opportunities for victims to exercise their existing rights.

AB 1847 also ensures that the same standard is upheld for both the inmate and victims regarding representation. It is more than reasonable to request that if an inmate's counsel is permitted to appear in person, the same right should be provided to the victim.

6. Arguments in Opposition

According to California Attorneys for Criminal Justice:

In *Dix* [*Dix v. Superior Court* (1991) 53 Cal.3d 442], the California Supreme Court held that, "[t]he prosecutor ordinarily has sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek." (*Dix*, 53 Cal.3d at 451.) Further, "exclusive prosecutorial discretion must also extend to the conduct of a criminal action once commenced." (*Id*., at 452.) (Emphasis in original.) These prosecutorial decisions go beyond safety and redress for an individual victim:" they involve "the complex considerations necessary for the effective and efficient administration of law enforcement." (Id., at 452.) As the Dix Court succinctly, stated, "[t]here is no place in this scheme for intervention by a victim pursuing personal concerns about the case." (Id.). Importantly, "the prosecutor's own discretion is not subject to judicial control at the behest of person's other than the accused," (Dix, 53 Cal.3d at 451.)

The passage of Marsy's Law, in 2008, did not overrule or change the California Supreme Court's holding in *Dix*, that the public prosecutor retains "exclusive discretion in the conduct of criminal cases." (*Crump v. Appellate Division of the Superior Court* (2019) 37 Cal.App.5th 222, 230.) In Crump, The Court observed that the California Supreme Court precedent of *Dix* was, "well established at the time Marsy's Law was approved by the voters, including *Dix's* holding that, "'recognition of citizen standing to intervene in criminal prosecutions' would 'undermine the People's status as exclusive party plaintiff in criminal actions, interfere with the prosecutor's broad discretion in criminal matters, and disrupt the orderly administration of justice." (*Crump*, 37 Cal.App.5th at 236, quoting, *Dix*, 37 Cal.App.5th at 453-454.) The Court concluded, "[n]othing in Marsy's Law makes the victim a party to the case." (*Id*.)

This bill seeks to upend those settled principles by permitting the victim to override the elected prosecutor's decision that a hearing is not necessary or desirable. Such an erosion of the prosecutorial role is unnecessary because the victim already has the right to request that the prosecutor not stipulate to the resentencing and that a hearing being held.

CACJ also opposes the provision of AB 1847, which exempts victims and their families from the requirement that they provide 30 days' notice of their intention to appear at a parole hearing. A parole hearing is a significant legal proceeding with profound consequences for the incarcerated person seeking parole. Appointed parole attorneys, whose pay is currently capped at $900 per case, must expend significant time to prepare for such hearings. The 30 days requirement provides reasonable notice to the incarcerated person seeking parole and his or her attorney of the evidence to be presented at a parole hearing.

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