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## SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair  
2021 - 2022 Regular

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**Bill No:** SB 1209                      **Hearing Date:** April 19, 2022  
**Author:** Eggman  
**Version:** March 15, 2022  
**Urgency:** No                                      **Fiscal:** Yes  
**Consultant:** SC

**Subject:** *Sentencing: members of military: trauma*

### HISTORY

**Source:** Author

**Prior Legislation:** SB 763 (Min), held in Sen. Appropriations, 2021  
AB 581 (Levine), held in Sen. Appropriations, 2019  
AB 865 (Levine), Ch. 523, Stats. 2018  
AB 665 (Levine), held in Sen. Appropriations., 2017  
AB 2098 (Levine), Ch. 163, Stats. 2014

**Support:** ACLU California Action; California Attorneys for Criminal Justice; California Public Defenders Association; California Women Law Center; Initiate Justice

**Opposition:** None known

### PURPOSE

*The purpose of this bill is to allow a defendant that meets the criteria to petition for recall and resentencing under existing provisions of law authorizing such relief for military-related trauma to file the petition who otherwise could not apply because of the existing law's requirement that the defendant must have been sentenced prior to January 1, 2015 or because the defendant was sentenced to an indeterminate sentence.*

*Existing law* provides that, under the determinate sentencing law, when a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term rests within the sound discretion of the court. (Pen. Code, § 1170, subd. (b).)

*Existing law* provides that, in exercising discretion to select one of the three authorized prison terms as specified, "the sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision. The relevant circumstances may be obtained from the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any evidence introduced at the sentencing hearing." (Cal. Rules of Court, Rule 4.420(b).)

*Existing law* enumerates circumstances in aggravation, relating both to the crime and to the defendant, as specified. (Cal. Rules of Court, Rule 4.421.)

*Existing law* enumerates circumstances in mitigation, relating both to the crime and to the defendant, as specified. (Cal. Rules of Court, Rule 4.423.)

*Existing law* allows the court, within 120 days of the sentence, on its own motion, or at any time upon the recommendation of the secretary or the Board of Parole Hearings in the case of state prison inmates, or the county correctional administrator in the case of county jail inmates, to recall the sentence previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence. (Pen. Code, § 1170, subd. (d)(1).)

*Existing law* provides that, effective January 1, 2015, if the court concludes that a defendant convicted of a felony offense, is, or was, a member of the military who may be suffering from sexual trauma, traumatic brain injury (TBI), post-traumatic stress disorder (PTSD), substance abuse, or psychological problems as a result of that service, the court must consider the circumstance as a factor in mitigation when imposing one of three possible terms under section 1170, subdivision (b), of the determinate sentencing law. This does not preclude the court from considering similar trauma, injury, substance abuse, or psychological problems due to other cases in mitigation. (Pen. Code, § 1170.91, subd. (a).)

*Existing law* states that a person who is currently serving a sentence for a felony conviction, whether by trial or plea, who is, or was, a member of the United States military and who may be suffering from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of his or her military service may petition for a recall of sentence, before the trial court that entered the judgment of conviction in his or her case, to request resentencing if the following conditions are met:

- The circumstance of suffering from the service-related trauma was not considered as a factor in mitigation at the time of sentencing; and,
- The person was sentenced prior to January 1, 2015. This section shall apply retroactively, whether or not the case was final as of January 1, 2015. (Pen. Code, § 1170.91, subd. (b).)

*This bill* deletes the requirement that the person had been sentenced prior to January 1, 2015 and instead authorizes a defendant to file the petition for recall of a sentence and resentencing without regard to when the defendant was sentenced.

*This bill* provides that this relief is available whether or not there was argument or evidence made or presented about the defendant's condition during arraignment or any pretrial proceedings, at trial, or at sentencing.

*This bill* specifies that if the court is satisfied that the person meets the resentencing criteria, the court may resentence the person in either of the following manners:

- By modifying the defendant's sentence to reduce the term of imprisonment; or,
- By vacating the conviction and imposing judgment on any necessarily included lesser offense or lesser related offenses, whether or not those offenses were charged in the original pleading, and then resentencing the defendant to a reduced term of imprisonment with the concurrence of both the defendant and the prosecutor.

*This bill* expands resentencing to persons sentenced to indeterminate sentences.

*This bill* specifies that special considerations of military service-related trauma in sentencing and resentencing do not apply to a person who has a prior conviction for an offense requiring sex offender registration or for a “super-strike” offense.

## COMMENTS

### 1. Need for This Bill

According to the author of this bill:

In 2014, AB 2098 added Penal Code section 1170.91, which allowed the court to consider a US military member’s trauma, PTSD, TBI, substance abuse, and mental illness, as a result of their military service, as a mitigating factor in sentencing. NAMI reports that nearly 1 in 4 active duty members showed signs of a mental health condition, according to a 2014 study in JAMA Psychiatry. The US Department of Veteran’s Affairs explains some symptoms of PTSD which “include reliving the event; avoiding of situations that remind those who have undergone trauma of the event; experiencing negative changes in beliefs and feelings; and feeling keyed up, also called hyperarousal.”

This growing acknowledgement and understanding of the impact that military service can have on mental health has led the state to be proactive when it comes to consideration of this trauma and how it effects later decisions and actions. After AB 2098 allowed for service-related trauma to be considered in sentencing, it became clear that there were service members who had already been sentenced without this consideration. AB 865 allowed for incarcerated veterans to seek resentencing with these new mitigating factors considered in their cases, decided before AB 2098 went into effect.

Unfortunately, there are still veterans that are left out of this important relief. The retroactivity added by AB 865 has created challenges for some service-members who are diagnosed after initial sentencing. In 2021, CA Supreme Court Justice Goodwin Liu called out this retroactivity in writing: “by requiring that the original sentencing occur prior to January 1, 2015, for an individual to be eligible for resentencing — irrespective of when it was determined that the trauma, mental health, or substance abuse conditions were a result of military service — section 1170.91, subdivision (b) fails to ensure equal treatment of all veterans.”

Appeals have also demonstrated that this resentencing does not apply to cases in which a person pleaded guilty with an agreement on a stipulated sentence.

This bill would eliminate the stipulation that only cases decided prior to 2015 be eligible for resentencing to address the retroactivity issue and the bill would also make those with indeterminate sentences or those who accepted plea agreements eligible for resentencing.

## 2. Legislative History of Penal Code Section 1170.91

Current Penal Code Section 1170.91 was enacted by AB 2098 (Levine), Chapter 163, Statutes of 2014. That section requires the court, starting January 1, 2015, to consider a defendant's status as a veteran suffering from PTSD, TBI, and other forms mental illness as a result of military service as a factor in favor of granting probation and as a mitigating factor when choosing between the lower, middle, or upper term.

Subsequently, AB 865 (Levine), Chapter 523, Statutes of 2018, made Penal Code Section 1170.91 retroactive by authorizing a court to resentence any person who was sentenced for a felony conviction prior to January 1, 2015, and who is, or was, a member of the United States military and who may be suffering from specified mental health problems including PTSD, TBI, and sexual trauma as a result of their military service. The effect of those two laws is to require the court to consider service-related trauma as a mitigating circumstance for anyone who is sentenced on or after January 1, 2015, and anyone who did not receive the benefit of that requirement because they were sentenced prior to the time when that law went into effect can petition to have their sentence recalled and be resentenced by the judge.

The requirement that the defendant had been sentenced prior to January 1, 2015 was based on the rationale that a person who was sentenced on or after January 1, 2015 would have benefitted from the change in law enacted by AB 2098 in 2014 because the court would have been required to consider service-related trauma as a factor in mitigation. This bill removes the date of sentencing requirement and instead provides that the person can file a petition for recall and resentencing regardless of when the person was sentenced. Existing law requires that the service-related trauma was not considered as a factor in mitigation at the time of sentencing. This bill states that that this relief is available whether or not there was argument or evidence about the defendant's condition at the time of trial.

According to the proponents of this bill, even though Penal Section 1170.91 was in effect starting January 1, 2015, some defendants may not have benefitted from the change in law either because some were unaware of the change or because evidence of the service-related trauma was not available or was unknown at the time of sentencing.

## 3. Removal of Sentencing Date: *People v. Valliant*

A recent case illustrates the application of Penal Code section 1170.91 and how a defendant who belatedly discovers their service-related trauma after sentencing is precluded from its resentencing provisions. (*People v. Valliant* (2020) 55 Cal. App. 5th 903.)

The defendant was charged with multiple felonies and after an unsuccessful effort to transfer the case to the Veterans Treatment Court, he agreed to plead guilty to one felony in exchange for the dismissal of the remaining charges. The defendant was sentenced in March 2015 to 12 years in prison. The defendant suspected that he suffered from PTSD at the time he entered his guilty plea and was sentenced but the Department of Veterans Affairs did not verify his PTSD stemming from his military service until 2017. In April 2019, defendant filed a petition for resentencing asserting that he was entitled to relief because his PTSD and substance abuse, both related to his military service, were not considered as a factor in mitigation when the court sentenced him for his earlier crimes. The trial court denied his petition because he was sentenced after January 1, 2015. (*Id.* at p. 906.)

The defendant appealed arguing that the resentencing authority in Penal Code section 1170.91 applies to all veterans and that to deny him relief deprives him of equal protection under the law. The appellate court disagreed on both points. The court, relying on rules of statutory construction, held:

We are obligated to avoid statutory constructions which render other provisions of the statute superfluous. (*People v. Arias* (2008) 45 Cal.4th 169, 180 [85 Cal. Rptr. 3d 1, 195 P.3d 103] [“a construction that renders a word surplusage should be avoided”].) The fact that Valliant's proposed interpretation of the second sentence of subdivision (b)(1)(B) would render the first sentence surplusage, plus the fact such an interpretation is inconsistent with the actual words used, causes us to conclude it is unreasonable.

(*Id.* at p. 909.)

On the issue of equal protection, the court found that the defendant, who belatedly discovered his military-related trauma after sentencing, is not similarly situated to those who were sentenced prior to the original version of Penal Code section 1170.91 which went into effect on January 1, 2015.

Veterans who were sentenced before the original version of section 1170.91 went into effect on January 1, 2015, did not have an incentive to investigate the existence of military-related trauma or substance abuse because the law did not require those issues to be treated as mitigating factors in sentencing. However, once the statute went into effect, veterans were on notice that any military-related trauma or substance abuse would have to be treated as mitigation. Thus, these issues needed to be investigated prior to sentencing; sentencing should be delayed if necessary, to ensure they had a full and fair opportunity to present evidence on the point. Adding subdivision (b)(1)(B) to the statute gave veterans sentenced before January 1, 2015, the same incentive and opportunity to investigate and present the issue as the original version of the statute had given veterans sentenced after that date. Such a scheme is not unfair or unequal.”

(*Id.* at p. 910.) The court, however, wondered if the Legislature intended or foresaw the application of the law in this way, and invited the Legislature to revisit the issue and provide statutory relief if it believes it appropriate to do so. (*Id.* at p. 912.)

This bill removes the requirement that persons must have been sentenced prior to January 1, 2015 in order to be eligible for resentencing, and clarifies that this relief is available if this trauma was not considered as a factor in mitigation at the time of sentencing, whether or not there was argument or evidence made or presented about the defendant's condition during arraignment or any pretrial proceedings, at trial, or at sentencing.

#### **4. Current Law Applies to Determinate Sentences**

The existing resentencing law that this bill seeks to amend applies to persons who were sentenced to a determinate term. In pertinent part, the existing law specifies:

If the court concludes that a defendant convicted of a felony offense is, or was, a member of the United States military who may be suffering from sexual trauma,

traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of his or her military service, the court shall consider the circumstance as a factor in mitigation when imposing *a term under subdivision (b) of Section 1170*. (Pen. Code, §1170.91, subd. (a), emphasis added.)

Subdivision (b) of Penal Code section 1170 applies to sentences imposed when the statute specifies three possible terms, known as the lower, middle, or upper term. Prior to the passage of SB 567 (Bradford), Chapter 731, Statutes of 2021, the determinate sentencing law gave judges discretion to apply any of the three specified terms. After SB 567 was enacted, the determinate sentencing law requires the court to impose a term of imprisonment not exceeding the middle term unless there are circumstances in aggravation that have been stipulated to by the defendant, or have been found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial.

A non-exhaustive list of circumstances in aggravation and mitigation for purposes of sentencing is provided in the California Rules of Court. The rules provide that in exercising discretion to select one of the three authorized prison terms referred to in section 1170(b), "the sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision. The relevant circumstances may be obtained from the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any evidence introduced at the sentencing hearing." (California Rules of Court, Rule 4.420(b).) The court shall set forth on the record the facts and reasons for choosing the sentence imposed. (Pen. Code, § 1170, subd. (b)(5).)

Specifically, the rules enumerate circumstances in aggravation related to the crime which may include any of the following:

- 1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness;
- 2) The defendant was armed with or used a weapon at the time of the commission of the crime;
- 3) The victim was particularly vulnerable;
- 4) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission;
- 5) The defendant induced a minor to commit or assist in the commission of the crime;
- 6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process;
- 7) The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed;

- 8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism;
- 9) The crime involved an attempted or actual taking or damage of great monetary value;
- 10) The crime involved a large quantity of contraband; and
- 11) The defendant took advantage of a position of trust or confidence to commit the offense.
- 12) The crime constitutes a hate crime.

(Cal. Rules of Court, Rule 4.421(a).)

There are also enumerated circumstances in aggravation related to the defendant which may include any of the following:

- 1) The defendant has engaged in violent conduct that indicates a serious danger to society;
- 2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness;
- 3) The defendant has served a prior term in prison or county jail under section 1170(h);
- 4) The defendant was on probation, mandatory supervision, post release community supervision, or parole when the crime was committed; and
- 5) The defendant's prior performance on probation, mandatory supervision, post release community supervision, or parole was unsatisfactory.

(Cal. Rules of Court, Rule 4.421(b).)

Similarly, the rules enumerate circumstances in aggravation related to the crime which may include any of the following:

- 1) The defendant was a passive participant or played a minor role in the crime;
- 2) The victim was an initiator of, willing participant in, or aggressor or provoker of the incident;
- 3) The crime was committed because of an unusual circumstance, such as great provocation, that is unlikely to recur;
- 4) The defendant participated in the crime under circumstances of coercion or duress, or the criminal conduct was partially excusable for some other reason not amounting to a defense;

- 5) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime;
- 6) The defendant exercised caution to avoid harm to persons or damage to property, or the amounts of money or property taken were deliberately small, or no harm was done or threatened against the victim;
- 7) The defendant believed that he or she had a claim or right to the property taken, or for other reasons mistakenly believed that the conduct was legal;
- 8) The defendant was motivated by a desire to provide necessities for his or her family or self; and
- 9) The defendant suffered from repeated or continuous physical, sexual, or psychological abuse inflicted by the victim of the crime, and the victim of the crime, who inflicted the abuse, was the defendant's spouse, intimate cohabitant, or parent of the defendant's child; and the abuse does not amount to a defense.

(Cal. Rules of Court, Rule 4.423(a).)

There are also enumerated circumstances in mitigation related to the defendant which may include any of the following:

- 1) The defendant has no prior record, or has an insignificant record of criminal conduct, considering the recency and frequency of prior crimes;
- 2) The defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime;
- 3) The defendant voluntarily acknowledged wrongdoing before arrest or at an early stage of the criminal process;
- 4) The defendant is ineligible for probation and but for that ineligibility would have been granted probation;
- 5) The defendant made restitution to the victim; and
- 6) The defendant's prior performance on probation, mandatory supervision, post release community supervision, or parole was satisfactory.

(Cal. Rules of Court, Rule 4.423(b).)

In addition to those circumstances enumerated in the rules, the court may consider “[a]ny other factors statutorily declared to be circumstances in mitigation or which reasonably relate to the defendant or the circumstances under which the crime was committed.” (Cal. Rules of Court, Rule 4.423(c).)



This bill deletes the existing resentencing law’s application to determinate terms thus expanding the law to additionally apply to life sentences. However, the bill specifically excludes persons who are required to register as a sex offender and those who have a prior conviction of a “super-strike” from benefiting from the law. “Super-strike” offenses are listed in Penal Code section 667, subd. (e)(2)(c)(iv) which include sexually violent offenses, homicide offenses including attempted homicide, assault with a machine gun on a peace officer or firefighter, possession of a weapon of mass destruction, or any serious or violent felony offense punishable by life imprisonment or death.

## 5. Stipulated Sentences

This bill expands the military service-related resentencing law to include sentences where the plea agreement was for a specified term of years. In a recent case, the court of appeal reviewed the issue of whether the resentencing law applies to stipulated sentences. (*People v. Brooks* (2020) 58 Cal.App.5th 1099.) In *Brooks*, the defendant argued that the resentencing law authorizes resentencing for sentences applied “whether by trial or plea” and that a stipulated term of years is a plea agreement under the meaning of the statute. The court rejected this interpretation and instead agreed with the Attorney General’s office that resentencing on a stipulated term of years would unlawfully modify the terms of the plea agreement while otherwise leaving the agreement intact. The court reasoned:

“Where the plea is accepted by the prosecuting attorney in open court and is approved by the court, ... *the court may not proceed as to the plea other than as specified in the plea.*” (§ 1192.5, italics added.) When a court accepts a plea bargain, the court must impose a sentence within the limits of that bargain. (*People v. Segura* (2008) 44 Cal.4th 921, 931 [80 Cal. Rptr. 3d 715, 188 P.3d 649]; see *People v. Cunningham* (1996) 49 Cal.App.4th 1044, 1047 [57 Cal. Rptr. 2d 179].) Thus, a court may not modify the terms of a plea agreement while otherwise leaving the agreement intact, “nor may the court effectively withdraw its approval by later modifying the terms of the agreement it had approved.” (*Segura, supra*, at pp. 931–932.) “““Should the court consider the plea bargain to be unacceptable, its remedy is to reject it, not to violate it, directly or indirectly.””” (*Stamps, supra*, 9 Cal.5th at p. 701, quoting *People v. Cunningham, supra*, 49 Cal.App.4th at p. 1047; accord, *People v. Woods* (2017) 12 Cal.App.5th 623, 631 [242 Cal. Rptr. 3d 280] [“the court was required to withdraw its approval of the plea bargain in its entirety; it was not free to enforce some portions of it but not others”].) It follows that unless the Legislature intended otherwise, a retroactive resentencing statute incorporates long-standing law that “a court cannot unilaterally modify an agreed-upon term by striking portions of it ... .” (*Stamps, supra*, 9 Cal.5th at p. 701.)

(*People v. Brooks, supra*, 58 Cal.App.5th at pp. 1106-1107.) While the court also stated that the plain meaning of the statute indicates that the Legislature had not intended to allow resentencing for plea agreements to a stipulated term of years, the basis of the court’s decision was not merely interpretation of the statute. The court also relied on long-standing principles of law to determine that since the court does not have discretion to change the term of years in a stipulated sentence, there is not another range of years from which the court is free to choose as an alternate term of years.

This bill extends the current recall and resentencing law to persons who plead to a stipulated sentence by removing the requirement that the person was sentenced under Penal Code section 1170, subdivision (b) which specifies the statutory terms from which the court may choose from. It is unclear whether courts will interpret the law to require the entire agreement to be voided in order to resentence the petitioner.

#### **6. Author's Amendments to be Adopted in Committee**

The author intends to amend this bill in committee to address a drafting error in the bill. The amendments ensure that the exclusions for persons who are required to register as a sex offender or who have a prior conviction for a super strike applies to both the resentencing provisions as well as new sentences.

#### **7. Argument in Support**

According to the California Attorneys for Criminal Justice:

In 2014, AB 2098 added Penal Code section 1170.91 which allows a court to consider sexual trauma, traumatic brain injury (TBI), posttraumatic stress disorder (PTSD), substance abuse, or mental health problems as a result of military service as a mitigating factor in the sentencing of a current or former member of the United States military.

Unfortunately, there are still veterans that are left out of this important relief and appeals have also demonstrated that this resentencing does not apply to cases in which a person pleaded guilty with an agreement on a stipulated sentence. SB 1209 would help fix these issues by making those with indeterminate sentences or those who accepted plea agreements eligible for resentencing.

**-- END --**