
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair

2021 - 2022 Regular

Bill No: SB 763 **Hearing Date:** April 20, 2021
Author: Min
Version: February 19, 2021
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Sentencing: members of military: trauma*

HISTORY

Source: Author

Prior Legislation: AB 581 (Levine), held in Sen. Approps., 2019
AB 865 (Levine), Ch. 523, Stats. 2018
AB 665 (Levine), held in Sen. Approps., 2017
AB 2098 (Levine), Ch. 163, Stats. 2014

Support: American Civil Liberties Union of California; American Legion-Department of California; California Association of County Veterans Service Officers; California Coalition for Women Prisoners; California Public Defenders Association; California State Commanders Veterans Council; Ella Baker Center for Human Rights; Riverside County Public Defender Office; Prison Law Office; San Francisco Public Defender

Opposition: California District Attorneys Association

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.

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 condition 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 about the defendant's condition at the time of trial.

COMMENTS

1. Need for This Bill

According to the author:

AB 865 (Levine, 2018) passed allowing the courts to consider mental health trauma related to a veteran or service member's service in a petition for sentencing or resentencing prior to January 1, 2015. Veterans and military members that were sentenced after that date do not have the same protections, failing to ensure equal treatment of all veterans and military members with service-related mental health issues.

In a recent concurring statement in *The People v. Valliant*, State Supreme Court Justice Goodwin Liu calls for renewed legislative attention on this issue. Justice Liu points to the current science that recognizes PTSD can take time to fully manifest—particularly for veterans—and notes that tremendous backlogs at the US Department of Veterans Affairs are often a barrier to veterans establishing a service-connected condition or disability. Justice Liu adds, “a strict time requirement in these circumstances can lead to arbitrary and inequitable results.”

More than three-quarters of incarcerated veterans were honorably discharged, according to a 2018 report by the California Association of Veteran Service Agencies (CAVSA). Additionally, incarcerated veterans are twice as likely as nonveterans to report having a mental health professional tell them that they had PTSD. More generally, about half of incarcerated veterans have been told that they have a mental disorder or illness by a mental health professional. Of those diagnosed, over 60% has been in combat.

Research suggests that there is a connection between military service and problems with the law, explained by “traumatic experiences during military service, mental health, or substance use disorder conditions related to military service,” according to the Health and Justice Journal.

SB 763 will ensure the state is not harshly sentencing veterans and military members who adversely suffer from service-related mental illness, which often plays a factor in the felony offense committed.

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 some of the supporters 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. Recent Case Law: *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.)

Defendant Alexander Irwin Valliant 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 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.)

4. Argument in Support

According to California Coalition for Women Prisoners:

Currently, only veterans and military members sentenced prior to January 1, 2015 are allowed to have mental health trauma and illness related to military service considered in a petition for resentencing. SB 763 is needed to ensure that all applicable military service members and veterans receive the same protections and equal treatment with regard to service-related mental health issues.

More than three-quarters of incarcerated veterans were honorably discharged, according to a 2018 report by the California Association of Veteran services Agencies (CAVSA). Additionally, incarcerated veterans are twice as likely as nonveterans to report having a mental health professional tell them that they had PTSD. More generally, about half of incarcerated veterans have been told that they have a mental disorder or illness by a mental health professional. Of those diagnosed, over 60% had been in combat. (Fn. omitted.)

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