

RESOLUTION 09-01-2013

DIGEST

Criminal Law: Authorization for Trial Courts to Recall Sentences to County Jail

Amends Penal Code section 1170 to authorize a court to recall a criminal defendant's sentence to county jail and allows a local sheriff to recommend recall and commitment

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Penal Code section 1170 to authorize a court to recall a criminal defendant's sentence to county jail and allows a local sheriff to recommend recall and commitment. This resolution should be approved in principle because it will provide uniformity in sentencing and allow the trial court to retain jurisdiction to resentence a defendant regardless of whether it is to prison or county jail when justice so requires.

When the Criminal Justice Realignment Act of 2011 (Pen. Code, § 1170) was enacted, it created two classifications of felonies: those punishable in state prison and those punishable in county jail. Since realignment limited the number of felonies where a criminal defendant may be sent to state prison, more felons now serve their sentences in county jails. Generally, trial courts lose jurisdiction to resentence a defendant upon commencement of execution of his or her sentence unless there is a statutory exception. (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 455).

Penal Code section 1170, subdivision (d), currently provides that a court may recall the sentence of a defendant who has been sentenced to state prison, and resentence the defendant provided the new sentence, if any, is no greater than the initial sentence. This resolution would amend Penal Code section 1170, subdivision (d), to also permit the court and local sheriff (which would take custody of the prisoner) to recall the sentence of a defendant who has been sentenced to county jail and resentence the defendant as it does with state prison sentences. There is no reason to treat a sentence for a felony crime to state prison any different than a sentence for a felony crime to county jail.

This resolution is similar to AB 560 (Ammiano), which is currently before the Legislature but is in the Assembly Appropriations Suspension File due to cost and budgetary issues the bill would impose if passed.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Association recommends that legislation be sponsored to amend Penal Code section 1170 (d), to read as follows:

1 §1170

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

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

18 (3) In any case in which the punishment prescribed by statute for a person convicted of a
19 public offense is a term of imprisonment in the state prison of any specification of three time
20 periods, the court shall sentence the defendant to one of the terms of imprisonment specified
21 unless the convicted person is given any other disposition provided by law, including a fine, jail,
22 probation, or the suspension of imposition or execution of sentence or is sentenced pursuant to
23 subdivision (b) of Section 1168 because he or she had committed his or her crime prior to July 1,
24 1977. In sentencing the convicted person, the court shall apply the sentencing rules of the
25 Judicial Council. The court, unless it determines that there are circumstances in mitigation of the
26 punishment prescribed, shall also impose any other term that it is required by law to impose as an
27 additional term. Nothing in this article shall affect any provision of law that imposes the death
28 penalty, that authorizes or restricts the granting of probation or suspending the execution or
29 imposition of sentence, or expressly provides for imprisonment in the state prison for life, except
30 as provided in paragraph (2) of subdivision (d). In any case in which the amount of
31 preimprisonment credit under Section 2900.5 or any other provision of law is equal to or exceeds
32 any sentence imposed pursuant to this chapter, the entire sentence shall be deemed to have been
33 served and the defendant shall not be actually delivered to the custody of the secretary. The court
34 shall advise the defendant that he or she shall serve a period of parole and order the defendant to
35 report to the parole office closest to the defendant's last legal residence, unless the in-custody
36 credits equal the total sentence, including both confinement time and the period of parole. The
37 sentence shall be deemed a separate prior prison term under Section 667.5, and a copy of the
38 judgment and other necessary documentation shall be forwarded to the secretary.

39 (b) When a judgment of imprisonment is to be imposed and the statute specifies three
40 possible terms, the choice of the appropriate term shall rest within the sound discretion of the
41 court. At least four days prior to the time set for imposition of judgment, either party or the
42 victim, or the family of the victim if the victim is deceased, may submit a statement in
43 aggravation or mitigation. In determining the appropriate term, the court may consider the record
44 in the case, the probation officer's report, other reports, including reports received pursuant to
45 Section 1203.03, and statements in aggravation or mitigation submitted by the prosecution, the
46 defendant, or the victim, or the family of the victim if the victim is deceased, and any further

47 evidence introduced at the sentencing hearing. The court shall select the term which, in the
48 court's discretion, best serves the interests of justice. The court shall set forth on the record the
49 reasons for imposing the term selected and the court may not impose an upper term by using the
50 fact of any enhancement upon which sentence is imposed under any provision of law. A term of
51 imprisonment shall not be specified if imposition of sentence is suspended.

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

55 (d) When a defendant subject to this section or subdivision (b) of Section 1168 has been
56 sentenced to be imprisoned in the state prison or the county jail and has been committed to the
57 custody of the secretary or the local sheriff, the court may, within 120 days of the date of
58 commitment on its own motion, or at any time upon the recommendation of the secretary or the
59 Board of Parole Hearings or the local sheriff, recall the sentence and commitment previously
60 ordered and resentence the defendant in the same manner as if he or she had not previously been
61 sentenced, provided the new sentence, if any, is no greater than the initial sentence. The court
62 resentencing under this subdivision shall apply the sentencing rules of the Judicial Council so as
63 to eliminate disparity of sentences and to promote uniformity of sentencing. Credit shall be given
64 for time served.

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

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

75 (B) The defendant shall file the original petition with the sentencing court. A copy of the
76 petition shall be served on the agency that prosecuted the case. The petition shall include the
77 defendant's statement that he or she was under 18 years of age at the time of the crime and was
78 sentenced to life in prison without the possibility of parole, the defendant's statement describing
79 his or her remorse and work towards rehabilitation, and the defendant's statement that one of the
80 following is true:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

129 (G) The court shall have the discretion to recall the sentence and commitment previously
130 ordered and to resentence the defendant in the same manner as if the defendant had not
131 previously been sentenced, provided that the new sentence, if any, is not greater than the
132 initial sentence. The discretion of the court shall be exercised in consideration of the criteria in
133 subparagraph (B). Victims, or victim family members if the victim is deceased, shall be notified
134 of the resentencing hearing and shall retain their rights to participate in the hearing.

135 (H) If the sentence is not recalled, the defendant may submit another petition for recall
136 and resentencing to the sentencing court when the defendant has been committed to the custody
137 of the department for at least 20 years. If recall and resentencing is not granted under that

138 petition, the defendant may file another petition after having served 24 years. The final petition
139 may be submitted, and the response to that petition shall be determined, during the 25th year of
140 the defendant's sentence.

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

145 (J) This subdivision shall have retroactive application.

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

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

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

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

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

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

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

167 (4) Any physician employed by the department who determines that a prisoner has six
168 months or less to live shall notify the chief medical officer of the prognosis. If the chief medical
169 officer concurs with the prognosis, he or she shall notify the warden. Within 48 hours of
170 receiving notification, the warden or the warden's representative shall notify the prisoner of the
171 recall and resentencing procedures, and shall arrange for the prisoner to designate a family
172 member or other outside agent to be notified as to the prisoner's medical condition and
173 prognosis, and as to the recall and resentencing procedures. If the inmate is deemed mentally
174 unfit, the warden or the warden's representative shall contact the inmate's emergency contact and
175 provide the information described in paragraph (2).

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

180 (6) Notwithstanding any other provisions of this section, the prisoner or his or her family
181 member or designee may independently request consideration for recall and resentencing by
182 contacting the chief medical officer at the prison or the secretary. Upon receipt of the request, the
183 chief medical officer and the warden or the warden's representative shall follow the procedures

184 described in paragraph (4). If the secretary determines that the prisoner satisfies the criteria set
185 forth in paragraph (2), the secretary or board may recommend to the court that the prisoner's
186 sentence be recalled. The secretary shall submit a recommendation for release within 30 days in
187 the case of inmates sentenced to determinate terms and, in the case of inmates sentenced to
188 indeterminate terms, the secretary shall make a recommendation to the Board of Parole Hearings
189 with respect to the inmates who have applied under this section. The board shall consider this
190 information and make an independent judgment pursuant to paragraph (2) and make findings
191 related thereto before rejecting the request or making a recommendation to the court. This action
192 shall be taken at the next lawfully noticed board meeting.

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

196 (8) If possible, the matter shall be heard before the same judge of the court who
197 sentenced the prisoner.

198 (9) If the court grants the recall and resentencing application, the prisoner shall be
199 released by the department within 48 hours of receipt of the court's order, unless a longer time
200 period is agreed to by the inmate. At the time of release, the warden or the warden's
201 representative shall ensure that the prisoner has each of the following in his or her possession: a
202 discharge medical summary, full medical records, state identification, parole medications, and all
203 property belonging to the prisoner. After discharge, any additional records shall be sent to the
204 prisoner's forwarding address.

205 (10) The secretary shall issue a directive to medical and correctional staff employed by
206 the department that details the guidelines and procedures for initiating a recall and resentencing
207 procedure. The directive shall clearly state that any prisoner who is given a prognosis of six
208 months or less to live is eligible for recall and resentencing consideration, and that recall and
209 resentencing procedures shall be initiated upon that prognosis.

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

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

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

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

222 (3) Notwithstanding paragraphs (1) and (2), where the defendant (A) has a prior or
223 current felony conviction for a serious felony described in subdivision (c) of Section 1192.7 or a
224 prior or current conviction for a violent felony described in subdivision (c) of Section 667.5, (B)
225 has a prior felony conviction in another jurisdiction for an offense that has all the elements of a
226 serious felony described in subdivision (c) of Section 1192.7 or a violent felony described in
227 subdivision (c) of Section 667.5, (C) is required to register as a sex offender pursuant to Chapter
228 5.5 (commencing with Section 290) of Title 9 of Part 1, or (D) is convicted of a crime and as part

229 of the sentence an enhancement pursuant to Section 186.11 is imposed, an executed sentence for
230 a felony punishable pursuant to this subdivision shall be served in state prison.

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

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

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

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

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

253 (6) The sentencing changes made by the act that added this subdivision shall be applied
254 prospectively to any person sentenced on or after October 1, 2011.

255 (i) This section shall remain in effect only until January 1, 2014, and as of that date is
256 repealed, unless a later enacted statute, that is enacted before that date, deletes or extends that
257 date.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Monterey County Bar Association

STATEMENT OF REASONS

The Problem: Currently, no statute states how trial courts may recall less serious Penal Code section 1170 (h) sentences to county jail for later correction, clarification, modification, or termination, as currently exists for more serious sentences to state prison under Penal Code section 1170 (a-c). With little difference between these sentences other than the location of incarceration – prison as compared to county jail, treating the ability to recall these two types of sentences differently would otherwise raise state and federal constitutional equal protection problems, and leave the judiciary completely powerless to remedy all Penal Code section 1170 (h) sentences for any legitimate reason post judgment. (Penal Code § 1203.2 (a) [trial court jurisdiction on probation terms]; Penal Code section 1237.1 [trial court jurisdiction on credit issues]; People v. Little (1993) 19 Cal.App.4th 449, 452-53 [credit corrects by trial court motion

before raising the issue on appeal]; *People v. Karaman* (1992) 4 Cal.4th 335, 345-46, fn. 11 [unauthorized sentences by trial court motion before raising the issue on appeal].)

This Solution: Where the Legislature's rush to solve California's prison population through AB109 has left many executive and judicial functions inadequately defined regarding section 1170 (h) sentence, clarity in section 1170 (d)(1) will eliminate arbitrary results for all trial courts across California and give expressed guidance to all trial courts on how best to exercise its constitutional and statutory authority to effectuate post judgment section 1170 (h) (county jail) sentences, as it already can with post judgment section 1170 (a-c) (state prison) sentences.

LEGISLATIVE HISTORY

Not known

IMPACT STATEMENT

The proposed resolution does not affect any other law, statute or rule.

AUTHOR AND/OR PERMANENT CONTACT: Donald Landis, Monterey County Public Defender's Office, 111 W. Alisal, Salinas, Ca 93901; (310) 710-7232; atao@me.com.

RESPONSIBLE FLOOR DELEGATE: Donald Landis