

RESOLUTION 04-12-2015

DIGEST

Criminal: Recall of Felony County Jail Sentences, Recall Recommendation by District Attorney
Amends Penal Code section 1170 to allow courts to recall prison sentences served in county jail and to allow district attorneys to recommend recall of any felony sentences.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 1170 to read as follows:

§1170

- 1 (a) (1) The Legislature finds and declares that the purpose of imprisonment for crime is
2 punishment. This purpose is best served by terms proportionate to the seriousness of the offense
3 with provision for uniformity in the sentences of offenders committing the same offense under
4 similar circumstances. The Legislature further finds and declares that the elimination of disparity
5 and the provision of uniformity of sentences can best be achieved by determinate sentences fixed
6 by statute in proportion to the seriousness of the offense as determined by the Legislature to be
7 imposed by the court with specified discretion.
- 8 (2) Notwithstanding paragraph (1), the Legislature further finds and declares that
9 programs should be available for inmates, including, but not limited to, educational programs,
10 that are designed to prepare nonviolent felony offenders for successful reentry into the
11 community. The Legislature encourages the development of policies and programs designed to
12 educate and rehabilitate nonviolent felony offenders. In implementing this section, the
13 Department of Corrections and Rehabilitation is encouraged to give priority enrollment in
14 programs to promote successful return to the community to an inmate with a short remaining
15 term of commitment and a release date that would allow him or her adequate time to complete
16 the program.
- 17 (3) In any case in which the punishment prescribed by statute for a person convicted of a
18 public offense is a term of imprisonment in the state prison of any specification of three time
19 periods, the court shall sentence the defendant to one of the terms of imprisonment specified
20 unless the convicted person is given any other disposition provided by law, including a fine, jail,
21 probation, or the suspension of imposition or execution of sentence or is sentenced pursuant to
22 subdivision (b) of Section 1168 because he or she had committed his or her crime prior to July 1,
23 1977. In sentencing the convicted person, the court shall apply the sentencing rules of the
24 Judicial Council. The court, unless it determines that there are circumstances in mitigation of the
25 punishment prescribed, shall also impose any other term that it is required by law to impose as an
26 additional term. Nothing in this article shall affect any provision of law that imposes the death
27 penalty, that authorizes or restricts the granting of probation or suspending the execution or
28 imposition of sentence, or expressly provides for imprisonment in the state prison for life, except
29 as provided in paragraph (2) of subdivision (d). In any case in which the amount of
30 preimprisonment credit under Section 2900.5 or any other provision of law is equal to or exceeds
31 any sentence imposed pursuant to this chapter, the entire sentence shall be deemed to have been
32 served and the defendant shall not be actually delivered to the custody of the secretary. The court
33 shall advise the defendant that he or she shall serve a period of parole and order the defendant to

34 report to the parole office closest to the defendant's last legal residence, unless the in-custody
35 credits equal the total sentence, including both confinement time and the period of parole. The
36 sentence shall be deemed a separate prior prison term under Section 667.5, and a copy of the
37 judgment and other necessary documentation shall be forwarded to the secretary.

38 (b) When a judgment of imprisonment is to be imposed and the statute specifies three
39 possible terms, the choice of the appropriate term shall rest within the sound discretion of the
40 court. At least four days prior to the time set for imposition of judgment, either party or the
41 victim, or the family of the victim if the victim is deceased, may submit a statement in
42 aggravation or mitigation. In determining the appropriate term, the court may consider the record
43 in the case, the probation officer's report, other reports, including reports received pursuant to
44 Section 1203.03, and statements in aggravation or mitigation submitted by the prosecution, the
45 defendant, or the victim, or the family of the victim if the victim is deceased, and any further
46 evidence introduced at the sentencing hearing. The court shall select the term which, in the
47 court's discretion, best serves the interests of justice. The court shall set forth on the record the
48 reasons for imposing the term selected and the court may not impose an upper term by using the
49 fact of any enhancement upon which sentence is imposed under any provision of law. A term of
50 imprisonment shall not be specified if imposition of sentence is suspended.

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

54 (d) (1) When a defendant subject to this section or subdivision (b) of Section 1168 has
55 been sentenced to be imprisoned in the state prison and has been committed to the custody of the
56 secretary, or has been sentenced to imprisonment pursuant to subdivision (h) of Section 1170, the
57 court may, within 120 days of the date of commitment to the custody of the secretary or sentence
58 to imprisonment pursuant to subdivision (h) of Section 1170 on its own motion, or at any time
59 upon the recommendation of the secretary or the Board of Parole Hearings, the District Attorney
60 of the county of sentence, or the official in charge of the facility where the defendant has been
61 imprisoned pursuant to subdivision (h) of Section 1170, recall the sentence and commitment
62 previously ordered and resentence the defendant in the same manner as if he or she had not
63 previously been sentenced, provided the new sentence, if any, is no greater than the initial
64 sentence. The court resentencing under this subdivision shall apply the sentencing rules of the
65 Judicial Council so as to eliminate disparity of sentences and to promote uniformity of
66 sentencing. Credit shall be given for time served.

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

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

77 (B) The defendant shall file the original petition with the sentencing court. A copy of the
78 petition shall be served on the agency that prosecuted the case. The petition shall include the
79 defendant's statement that he or she was under 18 years of age at the time of the crime and was

80 sentenced to life in prison without the possibility of parole, the defendant's statement describing
81 his or her remorse and work towards rehabilitation, and the defendant's statement that one of the
82 following is true:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

137 (H) If the sentence is not recalled, the defendant may submit another petition for recall
138 and resentencing to the sentencing court when the defendant has been committed to the custody
139 of the department for at least 20 years. If recall and resentencing is not granted under that
140 petition, the defendant may file another petition after having served 24 years. The final petition
141 may be submitted, and the response to that petition shall be determined, during the 25th year of
142 the defendant's sentence.

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

147 (J) This subdivision shall have retroactive application.

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

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

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

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

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

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

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

169 (4) Any physician employed by the department who determines that a prisoner has six
170 months or less to live shall notify the chief medical officer of the prognosis. If the chief medical
171 officer concurs with the prognosis, he or she shall notify the warden. Within 48 hours of

172 receiving notification, the warden or the warden's representative shall notify the prisoner of the
173 recall and resentencing procedures, and shall arrange for the prisoner to designate a family
174 member or other outside agent to be notified as to the prisoner's medical condition and
175 prognosis, and as to the recall and resentencing procedures. If the inmate is deemed mentally
176 unfit, the warden or the warden's representative shall contact the inmate's emergency contact and
177 provide the information described in paragraph (2).

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

182 (6) Notwithstanding any other provisions of this section, the prisoner or his or her family
183 member or designee may independently request consideration for recall and resentencing by
184 contacting the chief medical officer at the prison or the secretary. Upon receipt of the request, the
185 chief medical officer and the warden or the warden's representative shall follow the procedures
186 described in paragraph (4). If the secretary determines that the prisoner satisfies the criteria set
187 forth in paragraph (2), the secretary or board may recommend to the court that the prisoner's
188 sentence be recalled. The secretary shall submit a recommendation for release within 30 days in
189 the case of inmates sentenced to determinate terms and, in the case of inmates sentenced to
190 indeterminate terms, the secretary shall make a recommendation to the Board of Parole Hearings
191 with respect to the inmates who have applied under this section. The board shall consider this
192 information and make an independent judgment pursuant to paragraph (2) and make findings
193 related thereto before rejecting the request or making a recommendation to the court. This action
194 shall be taken at the next lawfully noticed board meeting.

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

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

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

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

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

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

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

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

224 (3) Notwithstanding paragraphs (1) and (2), where the defendant (A) has a prior or
225 current felony conviction for a serious felony described in subdivision (c) of Section 1192.7 or a
226 prior or current conviction for a violent felony described in subdivision (c) of Section 667.5, (B)
227 has a prior felony conviction in another jurisdiction for an offense that has all the elements of a
228 serious felony described in subdivision (c) of Section 1192.7 or a violent felony described in
229 subdivision (c) of Section 667.5, (C) is required to register as a sex offender pursuant to Chapter
230 5.5 (commencing with Section 290) of Title 9 of Part 1, or (D) is convicted of a crime and as part
231 of the sentence an enhancement pursuant to Section 186.11 is imposed, an executed sentence for
232 a felony punishable pursuant to this subdivision shall be served in state prison.

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

236 (5) (A) Unless the court finds that, in the interests of justice, it is not appropriate in a
237 particular case, the court, when imposing a sentence pursuant to paragraph (1) or (2) of this
238 subdivision, shall suspend execution of a concluding portion of the term for a period selected at
239 the court's discretion.

240 (B) The portion of a defendant's sentenced term that is suspended pursuant to this
241 paragraph shall be known as mandatory supervision, and shall begin upon release from custody.
242 During the period of mandatory supervision, the defendant shall be supervised by the county
243 probation officer in accordance with the terms, conditions, and procedures generally applicable
244 to persons placed on probation, for the remaining unserved portion of the sentence imposed by
245 the court. The period of supervision shall be mandatory, and may not be earlier terminated
246 except by court order. Any proceeding to revoke or modify mandatory supervision under this
247 subparagraph shall be conducted pursuant to either subdivisions (a) and (b) of Section 1203.2 or
248 Section 1203.3. During the period when the defendant is under such supervision, unless in actual
249 custody related to the sentence imposed by the court, the defendant shall be entitled to only
250 actual time credit against the term of imprisonment imposed by the court. Any time period which
251 is suspended because a person has absconded shall not be credited toward the period of
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 (7) The sentencing changes made to paragraph (5) by the act that added this paragraph
256 shall become effective and operative on January 1, 2015, and shall be applied prospectively to
257 any person sentenced on or after January 1, 2015.

258 (i) This section shall remain in effect only until January 1, 2017, and as of that date is
259 repealed, unless a later enacted statute, that is enacted before that date, deletes or extends that
260 date.

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

PROPONENT: Los Angeles County Bar Association.

STATEMENT OF REASONS:

The Problem: Trial courts have long had the power to recall the sentence of a person committed to state prison and to give that person a different (usually lesser) sentence. This section, however, was not amended when the realignment laws came into effect. Realignment created a new type of felony “prison” sentence, which is a felony, non-probationary sentence served in county jail. In the codes, this punishment is commonly denoted as a sentence “pursuant to subdivision (h) of Section 1170.” The persons who are sentenced under this provision are non-violent and their crimes of commitment are less serious. Only the most serious offenders are actually sentenced to state prison. This is essentially a technical fix.

One other issue is that at times District Attorneys become aware of defendants who, for one reason or another, should have their sentences recalled and be resentenced to a lesser term. There presently is no mechanism for a District Attorney to ask the court to recall a sentence to fix the problem.

The Solution: This resolution fixes the two problems. It applies the power to recall to county jail prison sentences. It also give the District Attorney the power to ask the court to recall a sentence.

IMPACT STATEMENT

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

CURRENT OR PRIOR RELATED LEGISLATION

This concept is currently part of AB 1156, now pending before the Legislature.

AUTHOR AND/OR PERMANENT CONTACT: Mark Harvis, Los Angeles County Public Defender, 320 W. Temple Ste 590, Los Angeles, CA 90012 213 974-3066, mharvis@pubdef.lacounty.gov

RESPONSIBLE FLOOR DELEGATE: Mark Harvis

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

Similar to Resolution 09-01-2013, which was approved in principle.

Reasons:

This resolution amends Penal Code section 1170 to allow courts to recall prison sentences served in county jail and to allow district attorneys to recommend recall of any felony sentences. This resolution should be approved in principle because it includes district attorneys among the

relevant stakeholders who can recommend recall when a different sentence is appropriate, and eliminates an unintended distinction between inmates serving felony sentences in county jail.

Penal Code section 1170 is designed to permit the recall of all felony sentences that involve imprisonment, in appropriate circumstances. The section denotes felony imprisonment with the phrase “committed to the custody of the secretary.” However, this phrase no longer describes all felony inmates, in light of the enactment of the Public Safety Realignment Act in 2011, which provides for imprisonment in county jail for certain types of felonies. There is no indication that the Legislature intended to preclude the recall of felony sentences being served in county jails. This resolution amends section 1170 in line with its original purpose of permitting recall of all felony sentences of imprisonment.

If the resolution is approved in principle, it should be amended to eliminate the phrase “of Section 1170,” since statutes typically omit the section number when referring to another subdivision of the same statute. Corresponding amendments will also need to be made to subdivision (e) of the statute, adding “, the District Attorney of the county of sentence, or the official in charge of the facility where the defendant has been imprisoned pursuant to subdivision (h)” after each mention of the secretary or the Board of Parole Hearings.

This resolution is similar to an active bill, AB 1156 (Brown).