Date of Hearing: April 27, 2021
Counsel: David Billingsley

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 1245 (Cooley) – As Amended March 11, 2021

SUMMARY: Allows a defendant to petition a court to resentence them to a lower sentence after the defendant has served at least 15 years of their sentence. Creates a presumption that the court will grant a petition to recall and resentence a defendant made by Board of Parole Hearings (BPH), California Department of Corrections and Rehabilitation (CDCR), the sheriff, or the district attorney. Specifically, **this bill**:

1) Establishes additional rules and procedures for the existing court process when CDCR, BPH, Sheriff, or District Attorney, recommend that a sentence of convicted defendant be recalled and that the defendant be resentenced.

2) Allows a petition for recall and resentencing to be filed by the defendant, after the defendant has served at least 15 years of their sentence and prior to the final 24 months of their sentence.

3) Requires a petition for recall and resentencing made by the defendant, CDCR, sheriff, or the district attorney, to be filed with the presiding judge of the superior court in which the defendant was originally sentenced.

4) Requires the presiding judge, or another judge designated by the presiding judge, to act on the petition within 90 days of the petition having been filed.

5) Specifies that for each petition for recall and resentencing made pursuant to this bill, the court shall give notice to all parties of each action taken, shall provide sufficient time for the parties to respond, shall permit the presentation of evidence, and shall specify the reason for its judgment on the petition.

6) States that if a petition for recall and resentencing is made by made by BPH, CDCR, the sheriff, or the district attorney, based on a defendant's exceptional rehabilitation while imprisoned, the court shall appoint counsel to represent the defendant and shall hold a hearing on the petition.

7) Specifies that the court shall not deny the petition to recall and resentence a defendant made by BPH, CDCR, the sheriff, or the district attorney, unless there is evidence beyond a reasonable doubt that the defendant is likely to commit a future violent crime.

8) Specifies that for all petitions for recall and resentencing not made by CDCR, BPH, the sheriff, or district attorney, based on a defendant's exceptional rehabilitation while imprisoned, the court may recall and resentence a defendant in the interest of justice.

9) Provides that in determining whether to recall and resentence a defendant, the court may consider postconviction factors, including, but not limited to, the inmate's disciplinary record and record of rehabilitation while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the inmate's risk for future violence, and evidence that reflects that circumstances have changed since the inmate's original sentencing so that the inmate's continued incarceration is no longer in the interest of justice.

10) Requires a court resentencing a defendant under the provisions of this bill to apply the sentencing rules of the Judicial Council in order to eliminate disparity of sentences and to promote uniformity of sentencing.

11) States that a court resentencing a defendant under the provisions of this bill may reduce a defendant's term of imprisonment, and reconsider any other matter relating to the original sentence, and modify the judgment, including a judgment entered after a plea agreement, accordingly.

12) States that if the original sentence was the result of a plea agreement, resentencing pursuant to this bill shall not constitute grounds for a prosecutor or the court to withdraw their agreement to the original plea agreement.

13) Provides that credit shall be given for time served.

14) Requires the Department of Finance (DOF) to calculate the savings accrued from resentencing a defendant pursuant to this section who was sentenced to imprisonment in the state prison.

15) States that upon appropriation by the Legislature, 25 percent of the savings shall be allocated to the district attorney of the county in which the resentencing occurred, 12.5 percent of the savings shall be allocated to the superior court in the county in which the resentencing occurred, and, for a defendant represented in resentencing proceedings by the public defender, 12.5 percent of the savings shall be allocated to the public defender of the county in which the resentencing occurred.

EXISTING LAW:

1) Provides that the purpose of imprisonment for crime is punishment; that this purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances; and that the elimination of disparity, and the provision of uniformity, of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense, as determined by the Legislature, to be imposed by the court with specified discretion. (Pen. Code, § 1170, subd. (a)(1).)

2) Provides that when a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. (Pen. Code, § 1170, subd. (b).)

3) Provides that the court can recall the defendant's sentence within 120 days of the defendant's commitment, or at any time upon a recommendation of the Secretary of the Department of Corrections and Rehabilitation or the Board of Parole Hearings (for prison sentences) or the county correctional administrator (for jail sentences) and impose a new sentence. (Pen. Code, § 1170, subd. (d)(1).) Provides that when a sentencing enhancement specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. (Pen. Code, § 1170.1(d).)

4) Allows a defendant who was a minor at the time he or she received a sentence of life without the possibility of parole to petition the court for a new sentence after completing 15 years imprisonment. (Pen. Code, § 1170, subd. (d)(2)(A)(i).)

5) Allows the Secretary of the Department of Corrections and Rehabilitation or the Board of Parole Hearings to make a recommendation to the sentencing court that a defendant's sentenced be recalled and that he or she be given a new sentence for medical reasons. (Pen. Code, § 1170, subd. (e)(1).)

6) Provides that sentencing choices requiring a statement of a reason include "[s]electing one of the three authorized prison terms referred to in section 1170(b) for either an offense or an enhancement." (Cal. Rules of Court, Rule 4.406(b)(4).)

7) Provides that, in exercising discretion to select one of the three authorized prison terms referred to in statute, "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).)

8) Requires the sentencing judge to consider relevant criteria enumerated in the Rules of Court. (Cal. Rules of Court, Rule 4.409.)

9) Prohibits the sentencing court from using a fact charged and found as an enhancement as a reason for imposing the upper term unless the court exercises its discretion to strike the punishment for the enhancement. (Cal. Rules of Court, Rule 4.420(c).)

10) Prohibits the sentencing court from using a fact that is an element of the crime to impose a greater term. (Cal. Rules of Court, Rule 4.420(d).)

11) Enumerates circumstances in aggravation, relating both to the crime and to the defendant, as specified. (California Rules of Court, Rule 4.421.)

12) Enumerates circumstances in mitigation, relating both to the crime and to the defendant, as specified. (California Rules of Court, Rule 4.423.)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "Under current law, CDCR, local prosecutors, law enforcement, and the Board of Parole Hearings may request that an incarcerated person be resentenced. However, because there is no formal procedure spelled out in the law for how a court should proceed when receiving such a request, many are simply denied or ignored.

   "AB 1245 seeks to make the process clearer and fairer by creating a new resentencing statute with three types of resentencing, each with specific procedures.

   a) Law enforcement or CDCR is in favor of resentencing. In this situation, there is a presumption in favor of resentencing. This would help codify the current practice of CDCR and prosecutors seeking resentencings for people who have shown exceptional rehabilitation.

   b) Law enforcement or CDCR takes no position on whether the resentencing is appropriate. In this situation, there would be no presumption in favor or against resentencing, and the matter would be left up to the judge's discretion. This would also codify CDCR's current practice of requesting that a sentence be adjusted in cases where there was an error in the original sentence or where it may be appropriate to apply recent changes in the law to an incarcerated person.

   c) An incarcerated person or court brings a request for resentencing after fifteen years of incarceration. There would be no presumption in favor or against resentencing.

   "For all resentencing, a court would be required to give notice of any actions it takes and provide a defendant an opportunity to respond. Courts would also be required to give specific reasons for its actions, including when denying a request for resentencing. Additionally, AB 1245 would direct savings from reduced prison incarceration to local entities, including the local prosecutor's office that made the successful resentencing request as well as the public defender's office that represented the defendant."

2) **Determinate Sentencing**: Most felonies are punished under the Determinate Sentencing Law (DSL). (Pen. Code, § 1170.) The DSL covers felonies for which three specified terms are provided in statute; crimes declared to be felonies but for which there is no specified term; and crimes simply made punishable by imprisonment in the state prison or in the county jail pursuant to realignment. The latter two categories are punishable by 16 months (low term), 2 years (middle term), or 3 years (upper term). (Pen. Code, § 18.)

   Under the DSL, where three terms are specified, the court is free to choose any of the three terms, using valid discretion. The judge must still state reasons for the term selected. (Pen. Code, § 1170, subd. (b); see also Cal. Rules of Court, rules 4.406(b)(4) , 4.420(e).) "[T]he 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), see also Pen. Code, § 1170, subd. (b).) The Rules of Court list both aggravating factors and mitigating factors. In each category there are factors relating to the crime and factors relating to the defendant. (See Cal.

Rules of Court, rule 4.421 and rule 4.423.)

Currently, under Penal Code section 1170, subdivision (d), a trial court may recall a defendant's sentence and "impose any otherwise permissible new sentence, which may include consideration of facts that arose after [the defendant] was committed to serve the original sentence." (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 465.) The new sentence cannot be greater than the original sentence. (Pen. Code, § 1170, subd. (d)(1).) The court's recall of a sentence for resentencing on the recommendation of the county correctional administrator, the Secretary of the CDCR, or the Board of Parole Hearings, or the county correctional administrator may occur at any time. However, a trial court's recall for resentencing on its own motion must occur within 120 days after the commitment date. (Pen. Code, § 1170, subd. (d)(1).)

3) **Prison Over-Crowding**: In January 2010, a three-judge panel issued a ruling ordering the State of California to reduce its prison population to 137.5% of design capacity because overcrowding was the primary reason that CDCR was unable to provide inmates with constitutionally adequate healthcare. (*Coleman/Plata vs. Schwarzenegger* (2010) No. Civ S-90-0520 LKK JFM P/NO. C01-1351 THE.) The United State Supreme Court upheld the decision, declaring that "without a reduction in overcrowding, there will be no efficacious remedy for the unconstitutional care of the sick and mentally ill" inmates in California's prisons. (*Brown v. Plata* (2011) 131 S.Ct. 1910, 1939; 179 L.Ed.2d 969, 999.)

After continued litigation, on February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows: 143% of design bed capacity by June 30, 2014; 141.5% of design bed capacity by February 28, 2015; and, 137.5% of design bed capacity by February 28, 2016.

CDCR's weekly report, as of April 7, 20201, on the prison population notes that the in-state adult institution population is currently 92,028 inmates, which amounts to approximately 103.7% of design capacity. (https://www.cdcr.ca.gov/research/wp-content/uploads/sites/174/2021/04/Tpop1d210407.pdf)

Thus, while CDCR is currently in compliance with the three-judge panel's order on the prison population, the state needs to maintain a "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14).) In addition California is also exploring closing a prison or prisons.

California has announced it is closing two prisons and it possible more prisons could be closed in coming years. California has declared that Deuel Vocational Institution in Tracy and California Correctional Center in Susanville will be closed. According to the Legislative Analyst's Office, the state could close a total of five prisons by 2025, which in turn could save an estimated $1.5 billion in annual spending. The corrections department, which has a budget of $16 billion, oversees 34 prisons and more than 50,000 employees. (https://abgt.assembly.ca.gov/sites/abgt.assembly.ca.gov/files/Feb%2022%20Sub%205%20Agenda.pdf). The measures proposed by this bill should help reduce the number of inmates in the prison system and make it more likely that California can close additional prisons.

4) **Committee on the Revision of the Penal Code Recommendation on Resentencing:** On January 1, 2020, the Committee on Revision of the Penal Code (Committee) was formed. The Committee has seven members. Five are appointed by the Governor for four-year terms. One is an assembly member selected by the speaker of the assembly; the last is a senator selected by the Senate Committee on Rules. The Governor selects the Committee's chair.

The principal duties of the Committee include establishing alternatives to incarceration that will aid in the rehabilitation of offenders and improving the system of parole and probation. The Committee made several recommendations to improve the criminal justice system in its 2020 Annual Report and Recommendations. One of the 10 recommendations made by the Committee was to establish a judicial process for "second look" resentencing. The recommendation builds on California's existing law allowing incarcerated individuals to be resentenced in the interest of justice. (http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2020.pdf)

California has expanded the statute governing resentencing to allow certain law enforcement officials, including the Secretary of CDCR or the district attorney of the county of conviction, to request that a person be resentenced at any time for any reason. A court that receives such a request is vested with authority to recall the person's sentence and issue a new, reduced punishment, if "circumstances have changed since the inmate's original sentencing so that the inmate's continued incarceration is no longer in the interest of justice."

The Committee noted that despite these expansions to the resentencing statute, current law has failed to protect many important interests at stake. For example, because the Penal Code does not provide any rules, many trial courts provide virtually no process while considering these requests, including denying resentencing requests without providing notice to the parties, appointing counsel, or giving parties an opportunity to be heard. (Id.)

With respect recall and resentencing, the Committee recommended the following:

a) Establish judicial procedures for evaluating resentencing requests;

   i) In all cases, require notice, initial conference within 60 days, and written reasons for court decisions.

   ii) For all cases initiated by law enforcement, require appointment of counsel.

b) Establish that resentencing is presumed if law enforcement officials recommend resentencing because a sentence is unjust or because of a person's exceptional rehabilitative achievement while incarcerated; and

c) Expand "second look" sentencing opportunities by allowing any person who has served more than 15 years to request a reconsideration of sentence by establishing that "continued incarceration is no longer in the interest of justice." (Id.)

This bill incorporates a number of the Committee's recommendations. Consistent with the Committee's recommendation, this bill would presume recall and resentencing when there is a recommendation initiated by BPH, CDCR, the Sheriff, or the District Attorney, based on based on a defendant's exceptional rehabilitation while imprisoned. In those cases, the court

would be required to appoint an attorney for the defendant. In those cases, the court would grant the petition to recall and resentence recall unless there is evidence beyond a reasonable doubt that the defendant is likely to commit a future violent crime.

Many of the elements of this bill are similar to AB 1540 (Ting). One notable difference, is that this bill would allow an inmate that has served 15 years of their sentence to request the court to recall and resentence them. This provision is consistent with one of the Committee's recommendations for expanding resentencing options. Current law requires recall and resentencing to be initiated by the judge or through a recommendation from a source such as the district attorney or CDCR. This bill would enable the defendant to initiate the process themselves, but not until they have served at least 15 years of their sentence. The court would evaluate these petitions by determining if granting the petition was in the interest of justice and allow the court to consider post-conviction factors in making that determination.

There are some procedural questions raised by this process of defendant initiated petitions. Could a defendant apply for recall and resentencing more than once, if their initial petition was denied? This bill does not require that an inmate initiating the petition be provided counsel. Is it expected, that the court would rule based purely on what was contained in the inmates written petition or would the defendant be transported to the sentencing court to present evidence. It is not clear if the requirement that the defendant serve at least 15 years of their sentence means 15 years of actual time, or the 15 years would be calculated including the inmate's custody credits. Allowing inmate referrals could also result in a large number of petitions for recall and resentencing. However, this bill does not impose a presumption of recall and resentencing on the petitions submitted by inmates. There is no explicit requirement that the inmate petitions be given a hearing, but this bill does require that all petitions the court shall permit the presentation of evidence, and shall specify the reason for its judgment on the petition.

5) **Argument in Support:** According to the *California Public Defenders Association*, "Under existing law, the recall of a prisoner's sentence can be initiated by the court, the Department of Corrections and Rehabilitation (CDCR), or the district attorney, in the case of an inadvertent over-sentence, or in the case of a particularly deserving prisoner. Although this limited permitting of sentence recall is decades old, the procedures have never been codified in detail, which has resulted in confusion and inequity, including a high percentage of recall motions never being acted upon at all.

"AB 1245 would correct that problem in a fair and equitable manner while it would also expand the recall rules in a limited common-sense manner. It would strengthen due process protections by providing notice to the inmate, establishing deadlines, and requiring a hearing at which evidence could be presented.

"Recognizing that most individuals age out of crime, AB 1245 would also permit a defendant who has served at least 15 years of their sentence, to file a petition for recall. Under AB 1245, while the court can only recall a sentence in the interest of justice, it would be able to consider postconviction facts such as the individual's disciplinary record, rehabilitation record, age, and physical condition in determining whether to recall and modify a sentence.

"AB 1245 is similar to AB 1540 (Ting), which is also set for hearing on April 27, and which CPDA is supporting as well. CPDA respectfully suggests that the two bills be combined or

otherwise amended in such a way that the provisions of both bills can become law."

6) **Argument in Opposition**: According to the *California District Attorneys Association*, "AB 1245 would allow any inmate to petition the court for resentencing for the most serious and violent crimes up to and including continuous sexual abuse of a child and multiple murder without regard for their disciplinary record, their participation in rehabilitation programs or other such factors that reflect on their suitability to reenter society without risk for future criminal conduct. This change would result in an avalanche of petitions by nearly every single incarcerated individual.

"Additionally, AB 1245 would shift the burden of proof from a standard which allows the court to grant a petition when the evidence shows that the inmate's continued incarceration is no longer in the interest of justice, to an impossible-to-rebut standard that would require the court to grant every petition 'unless there is evidence beyond a reasonable doubt that the defendant is likely to commit a future violent crime.' This would not only impose the highest standard of proof in the inverse but would require the impossible – the ability to not only accurately predict the future, but to do so beyond a reasonable doubt. There will never be proof beyond a reasonable doubt of the future conduct of any human being because no human is possessed of such ability. Moreover, the proposed standard only contemplates the commission of a future 'violent' crime. This, by definition, precludes consideration of the likelihood that the inmate will commit future non-violent crimes such as domestic violence, rape by intoxication or child molestation which are highly likely to be repeated in the absence of successful rehabilitation.

"Finally, AB 1245 would apply not only to convictions at trial but also to convictions resulting from plea bargain and would preclude the prosecution and court from withdrawing their end of the original plea agreement when resentencing was granted. Freeing the inmate of the obligations of a plea agreement while continuing to bind the court and prosecution will have negative consequences. Neither prosecutors nor the court will be willing to enter into plea bargains that entail reduced sentences or dismissal of charges when the defendant will not be bound by his or her end of the agreement."

7) **Related Legislation**:

a) AB 1540 (Ting), would require the court to provide counsel for the defendant when there is recommendation from the CDCR, BPH, or the district attorney, to recall an inmate's sentence and resentence that inmate to a lesser sentence. AB 1540 is set for hearing in the Assembly Public Safety Committee on April 27, 2021.

b) AB 124 (Kamlager), would authorize the court to resentence inmate upon a motion by the inmate and would require the court, when resentencing an inmate, to consider if the inmate experienced intimate partner violence, commercial sex trafficking, commercial sexual exploitation, or human trafficking. AB 124 is awaiting hearing in the Assembly Appropriations Committee.

8) **Prior Legislation**:

a) AB 865 (Levine), Chapter 523, Statutes of 2018, authorized the court, under specified conditions, to resentence any person who was sentenced for a felony conviction prior to January 1, 2016, and who is, or was, a member of the United States military and who may be suffering from specified mental health problems as a result of his or her military service.

b) AB 1076 (Ting), Chapter 578, Statutes of 2019, requires starting on January 1, 2021, and subject to an appropriation in the annual Budget Act, that the DOJ, on a monthly basis, review the records in the statewide criminal justice databases grant relief to persons who identify persons who are eligible for relief by having their arrest records, or their criminal conviction records, withheld from disclosure, as specified.

c) AB 2942 (Ting), Chapter 1001, Statutes of 2018, allowed the district attorney of the county where a defendant was convicted and sentenced to make a recommendation that the court recall and resentence the defendant.

REGISTERED SUPPORT / OPPOSITION:

Support

California Public Defenders Association (CPDA)

Oppose

California District Attorneys Association

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