SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2017 - 2018 Regular

Bill No:	AB 865	**Hearing Date:**	May 15, 2018
Author:	Levine		
Version:	April 30, 2018		
Urgency:	No	**Fiscal:**	Yes
Consultant:	SC		

Subject: ***Military Personnel: Veterans: Resentencing: Mitigating Circumstances***

HISTORY

Source: California Veteran Legal Task Force

Prior Legislation: AB 665 (Levine), 2017, held in Sen. Appropriations
SB 1227 (Hancock), Ch. 658, Stats. 2014
AB 2098 (Levine), Ch. 163, Stats. 2014
SB 769 (Block), Ch. 46, Stats. 2013
AB 2371 (Butler), Ch. 403, Stats. 2012
AB 674 (Salas), Ch. 347, Stats. 2010
AB 2586 (Parra), Ch. 788, Stats. 2006

Support: American Civil Liberties Union of California; American G.I. Forum of California; American Legion – Department of California; AMVETS – Department of California; California Association of County Veterans Service Officers; California Public Defenders Association; California State Commanders Veterans Council; County Behavioral Health Directors Association; Judicial Council of California; Military Officers Association of California – California Council of Chapters; Vietnam Veterans of America – California Council

Opposition: None known

Assembly Floor Vote: 76 - 0

PURPOSE

The purpose of this bill is to allow a person who was sentenced on 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 as a result of his or her military service, to petition for a recall and resentencing.

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, starting 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, 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.)

This bill 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 sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of the person's military service was not considered as a factor in mitigation at the time of sentencing; and,
- The person was sentenced prior to January 1, 2015. This subdivision shall apply retroactively, whether or not the case was final as of January 1, 2015.

This bill provides that if the court that originally sentenced the person is not available, the presiding judge shall designate another judge to rule on the petition.

This bill requires, upon receiving a petition under the provisions of this bill, the court to determine, at a public hearing held after not less than 15 days' notice to the prosecution, the defense, and any victim of the offense, whether the person satisfies the criteria required by this bill.

This bill provides that at the hearing, the prosecution shall have an opportunity to be heard on the petitioner's eligibility and suitability for resentencing.

This bill states that if the petitioner satisfies the criteria, the court may, in its discretion, resentence the person following a resentencing hearing.

This bill specifies that a person who is resentenced under the provisions of this bill shall be given credit for time served.

This bill prohibits resentencing of a petitioner that results in the imposition of a term longer than the original sentence.

This bill clarifies that its provisions do not alter or diminish any rights conferred under Section 28 of Article I of the California Constitution (Marsy's Law) or diminish or abrogate the finality of judgments in any case not falling within its purview.

This bill clarifies that its provisions do not diminish or abrogate any rights or remedies otherwise available to the person.

COMMENTS

1. Need for This Bill

According to the author of this bill:

> Existing law provides if the court concludes that a defendant convicted of a felony offense is, or was, a member of the United States military who may be suffering from sexual trauma, traumatic brain injury, post-traumatic stress disorder (PTSD), substance abuse, or mental health problems as a result of his or her military service, the court shall consider the circumstance as a factor in mitigation when imposing a term under subdivision (b) of Section 1170. This consideration does not preclude the court from considering similar trauma, injury, substance abuse, or mental health problems due to other causes, as evidence or factors in mitigation. (Fn. omitted.)
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> Unfortunately, this provision does not apply to veterans convicted prior to January 1, 2015.
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> The Institute of Medicine (IOM) estimates that of the 2.6 million U.S. service members who served in Iraq or Afghanistan since 2001, 13% to 20% will have PTSD, that is a figure of approximately 338,000 veterans on the low end. (Fn. omitted.)

> In an analysis of that national population of incarcerated veterans, veterans of the most recent conflicts: Operation Enduring Freedom (OEF), Operation Iraqi Freedom (OIF) and Operation New Dawn (OND), are three times more likely than other incarcerated veterans to have combat-related PTSD. (Fn. omitted.)
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> . . . .
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> While AB 2098 mostly affects veterans from Operation Iraqi Freedom and Operation New Dawn, veterans from prior wars are mostly left out. It is estimated that 41% of veterans in prison in 2011-2012 were Vietnam Veterans. (Fn. omitted.)
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> Expanding Penal Code section 1170.91 to be retroactive will ensure there is equal treatment of all veterans, not just those convicted after January 1, 2015.

2. UCSF and San Francisco V.A. Medical Center Study on Veterans and PTSD

The Journal of Traumatic Stress, Vol. 23, No. 1, February 2010, discussed a study conducted by the University of California-San Francisco and the San Francisco Veterans Affairs Medical Center. The study found that approximately one-third of the 238,000 veterans returning from Iraq and Afghanistan in the study population received one or more mental health or psychosocial diagnoses. The diagnoses include PTSD, depression, anxiety, adjustment disorder, alcohol use disorder, and substance use disorder. (http://www.healthemotions.org/downloads/marmar4.pdf)

3. Determinate Sentencing Law and Resentencing Provisions

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 provides lists of 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.)

SB 2098 (Levine), Chapter 163, Statutes of 2014, which became effective January 1, 2015, requires the court to consider a defendant's status as a veteran, or current member of the military, who is suffering from sexual trauma, traumatic brain injury, PTSD,

substance abuse, or other mental health problems as result of his or her military service as a factor in mitigation when choosing one of three authorized terms of imprisonment. (Pen. Code, § 1170.91.)

This bill would allow a person who was sentenced for a felony conviction prior to January 1, 2015, the effective date of SB 2098, and who is, or was, a member of the military and who may be suffering from any of these conditions as a result of his or her military service to petition for a recall of his or her sentence and be resentenced in accordance with the provisions of Penal Code section 1170.91. The petitioner would be allowed to request a resentencing hearing in which the court considers his or her mental health issues stemming from military service in imposing one of the three terms of imprisonment. The court may, in its discretion, resentence the defendant.

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).)

This bill expands the scope of the trial court's power to recall and resentence in a limited manner. Specifically, a defendant with mental health issues stemming from military service may petition the court, as specified, and the court has discretion to resentence the defendant. This bill limits resentencing to circumstances in which the person's mental health problems as a result of military service were not considered as a factor in mitigation at the time of the original sentencing. Because the court is authorized to consider any evidence in mitigation or aggravation at sentencing, the defendant's mental health could have been presented and considered at the defendant's original sentencing, though the court was not expressly required to consider it prior to January 1, 2015. This limitation is intended to prohibit rehearing the issue if it had already been presented and considered at sentencing.

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