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AB-960 Compassionate release. (2021-2022)

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Assembly Bill No. 960

CHAPTER 744

An act to amend Sections 1170 and 1170.02 of, and to add Section 1172.2 to, the Penal Code, relating to sentencing.

[Approved by Governor September 29, 2022. Filed with Secretary of State September 29, 2022.]

LEGISLATIVE COUNSEL'S DIGEST

AB 960, Ting. Compassionate release.

Existing law authorizes a court, upon recommendation for consideration by the Secretary of the Department of Corrections and Rehabilitation, to resentence or recall the sentence of a prisoner if the court finds that the prisoner is terminally ill or the prisoner is permanently medically incapacitated and, in either case, the conditions under which the prisoner would be released or receive treatment do not pose a threat to public safety. Under existing law, a prisoner is terminally ill for the purposes of these provisions if they have an incurable condition caused by an illness or disease that would produce death within 12 months. Under existing law, a prisoner is permanently medically incapacitated if they have a medical condition renders them permanently unable to perform activities of basic daily living, and results in the prisoner requiring 24-hour total care and the incapacitation did not exist at the time of original sentencing.

This bill would reorganize these provisions and require the department to make a recommendation for recall or resentencing of an incarcerated person if an incarcerated person has a serious and advanced illness with an end-of-life trajectory or who is found to be permanently medically incapacitated. The bill would change the criteria for an incarcerated person to be considered permanently medically incapacitated by removing the 24-hour total care requirement and would include functional impairments resulting in the permanent inability to complete activities of daily living and progressive end-stage dementia that did not exist at the time of original sentencing. The bill would also create a presumption in favor of recall and resentencing if the court finds that an incarcerated person is medically qualified, unless the court finds the defendant is an unreasonable risk of danger to public safety, as defined. The bill would require the appointment of counsel for indigent incarcerated persons referred to the court for recall and resentencing under these provisions. Because this bill would place additional duties on local agencies, this bill would impose a state-mandated local program.

This bill would require the Judicial Council, beginning January 1, 2024, to publicly release an annual report regarding these provisions, including the number of people who were referred to the court for recall and resentencing, the number of people denied resentencing, and the number of people who passed away before completing the recall and resentencing process.

This bill would make additional conforming changes.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: yes

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 1170 of the Penal Code is amended to read:

1170. (a) (1) The Legislature finds and declares that the purpose of sentencing is public safety achieved through punishment, rehabilitation, and restorative justice. When a sentence includes incarceration, this purpose is best served by terms that are proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances.

(2) The Legislature further finds and declares that programs should be available for incarcerated persons, including, but not limited to, educational, rehabilitative, and restorative justice programs that are designed to promote behavior change and to prepare all eligible offenders for successful reentry into the community. The Legislature encourages the development of policies and programs designed to educate and rehabilitate all eligible offenders. In implementing this section, the Department of Corrections and Rehabilitation is encouraged to allow all eligible incarcerated persons the opportunity to enroll in programs that promote successful return to the community. The Department of Corrections and Rehabilitation is directed to establish a mission statement consistent with these principles.

(3) In any case in which the sentence prescribed by statute for a person convicted of a public offense is a term of imprisonment in the state prison, or a term pursuant to subdivision (h), of any specification of three time periods, the court shall sentence the defendant to one of the terms of imprisonment specified unless the convicted person is given any other disposition provided by law, including a fine, jail, probation, or the suspension of imposition or execution of sentence or is sentenced pursuant to subdivision (b) of Section 1168 because they had committed their crime prior to July 1, 1977. In sentencing the convicted person, the court shall apply the sentencing rules of the Judicial Council. The court, unless it determines that there are circumstances in mitigation of the sentence prescribed, shall also impose any other term that it is required by law to impose as an additional term. Nothing in this article shall affect any provision of law that imposes the death penalty, that authorizes or restricts the granting of probation or suspending the execution or imposition of sentence, or expressly provides for imprisonment in the state prison for life, except as provided in subdivision (d). In any case in which the amount of preimprisonment credit under Section 2900.5 or any other provision of law is equal to or exceeds any sentence imposed pursuant to this chapter, except for a remaining portion of mandatory supervision imposed pursuant to subparagraph (B) of paragraph (5) of subdivision (h), the entire sentence shall be deemed to have been served, except for the remaining period of mandatory supervision, and the defendant shall not be actually delivered to the custody of the secretary or the county correctional administrator. The court shall advise the defendant that they shall serve an applicable period of parole, postrelease community supervision, or mandatory supervision and order the defendant to report to the parole or probation office closest to the defendant's last legal residence, unless the in-custody credits equal the total sentence, including both confinement time and the period of parole, postrelease community supervision, or mandatory supervision. The sentence shall be deemed a separate prior prison term or a sentence of imprisonment in a county jail under subdivision (h) for purposes of Section 667.5, and a copy of the judgment and other necessary documentation shall be forwarded to the secretary.

(b) (1) When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall, in its sound discretion, order imposition of a sentence not to exceed the middle term, except as otherwise provided in paragraph (2).

(2) The court may impose a sentence exceeding the middle term only when there are circumstances in aggravation of the crime that justify the imposition of a term of imprisonment exceeding the middle term, and the facts underlying those circumstances have been stipulated to by the defendant, or have been found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial. Except where evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law, upon request of a defendant, trial on the circumstances in aggravation alleged in the indictment or information shall be bifurcated from the trial of charges and enhancements. The jury shall not be informed of the bifurcated allegations until there has been a conviction of a felony offense.

(3) Notwithstanding paragraphs (1) and (2), the court may consider the defendant's prior convictions in determining sentencing based on a certified record of conviction without submitting the prior convictions to a jury. This paragraph does not apply to enhancements imposed on prior convictions.

(4) At least four days prior to the time set for imposition of judgment, either party or the victim, or the family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation to dispute facts in the record or the probation officer's report, or to present additional facts. The court may consider the record in the case, the probation officer's report, other reports, including reports received pursuant to Section 1203.03, and statements in aggravation or mitigation submitted by the

prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing.

(5) The court shall set forth on the record the facts and reasons for choosing the sentence imposed. The court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law. A term of imprisonment shall not be specified if imposition of sentence is suspended.

(6) Notwithstanding paragraph (1), and unless the court finds that the aggravating circumstances outweigh the mitigating circumstances that imposition of the lower term would be contrary to the interests of justice, the court shall order imposition of the lower term if any of the following was a contributing factor in the commission of the offense:

(A) The person has experienced psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence.

(B) The person is a youth, or was a youth as defined under subdivision (b) of Section 1016.7 at the time of the commission of the offense.

(C) Prior to the instant offense, or at the time of the commission of the offense, the person is or was a victim of intimate partner violence or human trafficking.

(7) Paragraph (6) does not preclude the court from imposing the lower term even if there is no evidence of those circumstances listed in paragraph (6) present.

(c) The court shall state the reasons for its sentence choice on the record at the time of sentencing. The court shall also inform the defendant that as part of the sentence after expiration of the term they may be on parole for a period as provided in Section 3000 or 3000.08 or postrelease community supervision for a period as provided in Section 3451.

(d) (1) (A) When a defendant who was under 18 years of age at the time of the commission of the offense for which the defendant was sentenced to imprisonment for life without the possibility of parole has been incarcerated for at least 15 years, the defendant may submit to the sentencing court a petition for recall and resentencing.

(B) Notwithstanding subparagraph (A), this paragraph shall not apply to defendants sentenced to life without parole for an offense where it was pled and proved that the defendant tortured, as described in Section 206, their victim or the victim was a public safety official, including any law enforcement personnel mentioned in Chapter 4.5 (commencing with Section 830) of Title 3, or any firefighter as described in Section 245.1, as well as any other officer in any segment of law enforcement who is employed by the federal government, the state, or any of its political subdivisions.

(2) The defendant shall file the original petition with the sentencing court. A copy of the petition shall be served on the agency that prosecuted the case. The petition shall include the defendant's statement that the defendant was under 18 years of age at the time of the crime and was sentenced to life in prison without the possibility of parole, the defendant's statement describing their remorse and work towards rehabilitation, and the defendant's statement that one of the following is true:

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

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

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

(D) The defendant has performed acts that tend to indicate rehabilitation or the potential for rehabilitation, including, but not limited to, availing themselves of rehabilitative, educational, or vocational programs, if those programs have been available at their classification level and facility, using self-study for self-improvement, or showing evidence of remorse.

(3) If any of the information required in paragraph (2) is missing from the petition, or if proof of service on the prosecuting agency is not provided, the court shall return the petition to the defendant and advise the defendant that the matter cannot be considered without the missing information.

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

(5) If the court finds by a preponderance of the evidence that one or more of the statements specified in subparagraphs (A) to (D), inclusive, of paragraph (2) is true, the court shall recall the sentence and commitment previously ordered and hold a hearing to resentence the defendant in the same manner as if the defendant had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence. Victims, or victim family members if the victim is deceased, shall retain the rights to participate in the hearing.

(6) The factors that the court may consider when determining whether to resentence the defendant to a term of imprisonment with the possibility of parole include, but are not limited to, the following:

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

(B) The defendant does not have juvenile felony adjudications for assault or other felony crimes with a significant potential for personal harm to victims prior to the offense for which the defendant was sentenced to life without the possibility of parole.

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

(D) Prior to the offense for which the defendant was sentenced to life without the possibility of parole, the defendant had insufficient adult support or supervision and had suffered from psychological or physical trauma, or significant stress.

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

(F) The defendant has performed acts that tend to indicate rehabilitation or the potential for rehabilitation, including, but not limited to, availing themselves of rehabilitative, educational, or vocational programs, if those programs have been available at their classification level and facility, using self-study for self-improvement, or showing evidence of remorse.

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

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

(7) The court shall have the discretion to resentence the defendant in the same manner as if the defendant had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence. The discretion of the court shall be exercised in consideration of the criteria in paragraph (6). Victims, or victim family members if the victim is deceased, shall be notified of the resentencing hearing and shall retain their rights to participate in the hearing.

(8) Notwithstanding paragraph (7), the court may also resentence the defendant to a term that is less than the initial sentence if any of the following were a contributing factor in the commission of the alleged offense:

(A) The person has experienced psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence.

(B) The person is a youth, or was a youth as defined under subdivision (b) of Section 1016.7 at the time of the commission of the offense.

(C) Prior to the instant offense, or at the time of the commission of the offense, the person is or was a victim of intimate partner violence or human trafficking.

(9) Paragraph (8) does not prohibit the court from resentencing the defendant to a term that is less than the initial sentence even if none of the circumstances listed in paragraph (8) are present.

(10) If the sentence is not recalled or the defendant is resented to imprisonment for life without the possibility of parole, the defendant may submit another petition for recall and resentencing to the sentencing court when the defendant has been committed to the custody of the department for at least 20 years. If the sentence is not recalled or the defendant is resented to imprisonment for life without the possibility of parole under that petition, the defendant may file another petition after having served 24 years. The final petition may be submitted, and the response to that petition shall be determined, during the 25th year of the defendant's sentence.

(11) In addition to the criteria in paragraph (6) the court may consider any other criteria that the court deems relevant to its decision, so long as the court identifies them on the record, provides a statement of reasons for adopting them, and states why the defendant does or does not satisfy the criteria.

(12) This subdivision shall have retroactive application.

(13) Nothing in this paragraph is intended to diminish or abrogate any rights or remedies otherwise available to the defendant.

(e) Notwithstanding subdivision (a), the court may recall and resentence an incarcerated person pursuant to the compassionate release program set forth in Section 1172.2.

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

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

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

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

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

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

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

(B) The portion of a defendant's sentenced term that is suspended pursuant to this paragraph shall be known as mandatory supervision, and, unless otherwise ordered by the court, shall commence upon release from physical custody or an alternative custody program, whichever is later. During the period of mandatory supervision, the defendant shall be supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation, for the remaining unserved portion of the sentence imposed by the court. The period of supervision shall be mandatory, and may not be earlier terminated except by court order. Any proceeding to revoke or modify mandatory supervision under this subparagraph shall be conducted pursuant to either subdivisions (a) and (b) of Section 1203.2 or Section 1203.3. During the period when the defendant is under that supervision, unless in actual custody related to the sentence imposed by the court, the defendant shall be entitled to only actual time credit against the term of imprisonment imposed by the court. Any time period which is suspended because a person has absconded shall not be credited toward the period of supervision.

(6) When the court is imposing a judgment pursuant to this subdivision concurrent or consecutive to a judgment or judgments previously imposed pursuant to this subdivision in another county or counties, the court rendering the second or other subsequent judgment shall determine the county or counties of incarceration and supervision of the defendant.

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

(8) The sentencing changes made to paragraph (5) by the act that added this paragraph shall become effective and operative on January 1, 2015, and shall be applied prospectively to any person sentenced on or after January 1, 2015.

(9) Notwithstanding the separate punishment for any enhancement, any enhancement shall be punishable in county jail or state prison as required by the underlying offense and not as would be required by the enhancement. The intent of the Legislature in enacting this paragraph is to abrogate the holding in *People v. Vega* (2014) 222 Cal.App.4th 1374, that if an enhancement specifies service of sentence in state prison, the entire sentence is served in state prison, even if the punishment for the underlying offense is a term of imprisonment in the county jail.

SEC. 2. Section 1170.02 of the Penal Code is amended to read:

1170.02. A prisoner is not eligible for resentencing or recall pursuant to Section 1172.2 if they were convicted of first-degree murder if the victim was a peace officer, as defined in Section 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.4, 830.5, 830.6, 830.10, 830.11, or 830.12, who was killed while engaged in the performance of their duties, and the individual knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of their duties, or the victim was a peace officer or a former peace officer under any of the above-enumerated sections, and was intentionally killed in retaliation for the performance of their official duties.

SEC. 3. Section 1172.2 is added to the Penal Code, to read:

1172.2. (a) Notwithstanding any other law and consistent with paragraph (1) of subdivision (a) of Section 1170, if the statewide chief medical executive, in consultation with other clinical executives, as needed, determines that an incarcerated person satisfies the medical criteria set forth in subdivision (b), the department shall recommend to the court that the incarcerated person's sentence be recalled.

(b) There shall be a presumption favoring recall and resentencing under this section if the court finds that the facts described in paragraph (1) or (2) exist, which may only be overcome if a court finds the defendant is an unreasonable risk of danger to public safety, as defined in subdivision (c) of Section 1170.18, based on the incarcerated person's current physical and mental condition.

(1) The incarcerated person has a serious and advanced illness with an end-of-life trajectory. Examples include, but are not limited to, metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced end-stage dementia.

(2) The incarcerated person is permanently medically incapacitated with a medical condition or functional impairment that renders them permanently unable to complete basic activities of daily living, including, but not limited to, bathing, eating, dressing, toileting, transferring, and ambulation, or has progressive end-stage dementia, and that incapacitation did not exist at the time of the original sentencing.

(c) Within 10 days of receipt of a positive recommendation by the department, the court shall hold a hearing to consider whether the incarcerated person's sentence should be recalled.

(d) Any physician employed by the department, or their designee, who determines that an incarcerated person has a serious and advanced illness with an end-of-life trajectory or has a medical condition or functional impairment that renders them permanently medically incapacitated shall notify the chief medical executive of the prognosis. If the chief medical executive concurs with the prognosis, they shall notify the warden. Within 48 hours of receiving notification, the warden or the warden's representative shall notify the incarcerated person of the recall and resentencing procedures, and shall arrange for the incarcerated person to designate a family member or other outside agent to be notified as to the incarcerated person's medical condition and prognosis, and as to the recall and resentencing procedures. If the incarcerated person is deemed mentally unfit, the warden or the warden's representative shall contact the incarcerated person's emergency contact and provide the information described in subdivision (b).

(e) The department shall refer the matter to the court for recall and resentencing within 45 days of the primary physician's, or their designee's, diagnosis and referral to the chief medical executive.

(f) The warden or the warden's representative shall provide the incarcerated person and their family member, agent, or emergency contact, as described in subdivision (d), updated information throughout the recall and resentencing process with regard to the incarcerated person's medical condition and the status of the incarcerated person's recall and resentencing proceedings.

(g) Notwithstanding any other provisions of this section, the incarcerated person or their family member or designee may independently request consideration for recall and resentencing by contacting the chief medical executive at the prison. Upon receipt of the request, the chief medical executive and the warden or the warden's representative shall follow the procedures described in subdivision (d). If the department determines that the incarcerated person satisfies the criteria set forth in subdivision (b), the department shall recommend to the court that the incarcerated person's sentence be recalled. The department shall submit a recommendation for release within 45 days.

(h) Any recommendation for recall submitted to the court by the department shall include one or more medical evaluations, a postrelease plan, and findings pursuant to subdivision (b).

(i) If possible, the matter shall be heard before the same judge of the court who sentenced the incarcerated person.

(j) The referring physician or their designees from the department shall be available to the court or defense counsel as necessary throughout the recall and resentencing proceedings.

(k) Upon recommendation to the court for recall of sentence, the incarcerated person shall have the right to counsel and, if indigent, the right to court appointed counsel.

(l) If the court grants the recall and resentencing application, the incarcerated person shall be released by the department within 48 hours of receipt of the court's order, unless a longer time period is agreed to by the incarcerated person. At the time of release, the warden or the warden's representative shall ensure that the incarcerated person has each of the following in their possession: a discharge medical summary, full medical records, state identification, parole or postrelease community supervision medications,

and all property belonging to the incarcerated person. After discharge, any additional records shall be sent to the incarcerated person's forwarding address.

(m) The secretary shall issue a directive to medical and correctional staff employed by the department that details the guidelines and procedures for initiating a recall and resentencing procedure. The directive shall clearly state that any incarcerated person who has a serious and advanced illness with an end-of-life trajectory or who is found to be permanently medically incapacitated is eligible for recall and resentencing consideration, and that recall and resentencing procedures shall be initiated upon that prognosis.

(n) The provisions of this section shall be available to an incarcerated person who is sentenced to a county jail pursuant to subdivision (h) of Section 1170. For purposes of those incarcerated persons, "secretary" or "warden" shall mean the county correctional administrator and "chief medical executive" shall mean a physician designated by the county correctional administrator for this purpose.

(o) This section does not apply to an incarcerated person sentenced to death or a term of life without the possibility of parole.

(p) Beginning January 1, 2024, the California Judicial Council shall publicly release an annual report on the compassionate release program based on records provided by the department pursuant to this section and subsequent court records. The report shall include, but is not limited to, all of the following:

(1) The number of people who were referred to the court for recall and resentencing disaggregated by race, ethnicity, age, gender identity and further disaggregated by the type of criteria on which the referral was based. The report shall identify the following categories of criteria for recall and resentencing referrals:

(A) A serious and advanced illness with an end-of-life trajectory.

(B) Functional impairment.

(C) Cognitive impairment.

(2) The number of people released by the court pursuant to this section, disaggregated by race, ethnicity, age, and gender identity.

(3) The number of people denied resentencing sought pursuant to this section disaggregated by race, ethnicity, age, and gender identity.

(4) Number of people who pass away before completing the recall and resentencing process disaggregated by race, ethnicity, age, and gender identity.

(5) Number of people denied resentencing sought pursuant to this section for lack of release plans with data disaggregated by race, ethnicity, age, and gender identity.

(6) Number of cases pending decision with data disaggregated by race, ethnicity, age, and gender identity.

SEC. 4. If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.