


GENERAL OFFICE MEMORANDUM 18-169

TO: ALL DISTRICT ATTORNEY PERSONNEL

FROM: JOHN K. SPILLANE   
Chief Deputy District Attorney

SUBJECT: AB 865 - RETROACTIVE APPLICATION OF PENAL CODE § 1170.91  
MITIGATION FOR U.S. MILITARY; RESENTENCING

DATE: DECEMBER 21, 2018

On September 19, 2018, Governor Brown approved Assembly Bill (AB) 865, which amended Penal Code<sup>1</sup> section 1170.91. As of January 1, 2015, the court has been required to consider as a factor in mitigation the fact that a defendant “is or was a member of the United States military 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”<sup>2</sup> when imposing a felony sentence under section 1170, subdivision(b)<sup>3</sup>. (§ 1170.91, subd. (a).)

Effective January 1, 2019, AB 865 applies section 1170.91, subdivision (a) retroactively to defendants who had been sentenced before January 1, 2015, and creates a sentencing recall provision to allow the court to comply with this requirement. (§ 1170.91, subd. (b)(1), (b)(1)(B).)

To be eligible for the recall of a sentence under section 1170.91, a defendant may petition the court that entered the judgment of conviction in his or her case<sup>4</sup> and must demonstrate that he or she:

- is or was a member of the United States military;
- was sentenced before January 1, 2015;
- is *currently* serving a sentence for a felony conviction<sup>5</sup>, whether by trial or plea;
- may be suffering from one of the conditions specified under this provision;
- did not have the benefit of the court’s consideration at the original sentencing of the fact that he or she may have been suffering from one of the specified conditions.

(§ 1170.91, subd. (b).)

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> Section 1170.9 requires the court to consider this same factor in determining whether to grant probation to a defendant who has committed any criminal offense. However, that provision is not directly affected by AB 865.

<sup>3</sup> Where a statute specifies three possible terms of punishment, section 1170, subdivision (b) confers discretion on the court to choose from one of these terms. (§ 1170, subd. (b).)

<sup>4</sup> “If the court that originally sentenced the person is not available, the presiding judge shall designate another judge to rule on the petition.” (§1170.91, subd. (b)(2).)

<sup>5</sup> Subject to section 1170, subdivision (b). (§1170.91, subd. (a).)

Before recalling a defendant's sentence under section 1170.91, subdivision (b) the court must conduct a hearing and must give the prosecution, the defense, and any victim at least 15 days' notice regarding the hearing. (§ 1170.91, subd. (b) (3).) At that hearing, the court must allow the prosecution an opportunity to be heard on the defendant's eligibility and suitability for resentencing. (*Ibid.*)

Even if the court finds that the defendant is eligible for a recall of the sentence, the court may, but is not required to, resentence the defendant. (*Ibid.*) If the court exercises its discretion to resentence the defendant, the new sentence cannot be longer than the original sentence, and credit for time served must be given. (§ 1170.91, subd. (b)(4), (b)(5).)

The new section 1170.9 further provides: it does not alter or diminish any rights under Marsy's Law (§ 1170.91, subd. (b)(6)); it does not diminish or abrogate any rights or remedies otherwise available to the defendant (§1170.91, subd. (b)(7)); it does not diminish or abrogate the finality of judgments in any case not falling within its purview (§1170.01, subd. (b)(8)); and it does not mandate the Department of Corrections and Rehabilitation to provide medical or mental health assessments to identify potential service-related injuries. (§ 1170.91, subd. (b)(9).)

Things to keep in mind when handling a section 1170.91 recall and resentencing petition:

- Section 1170.91 is different from the recall and resentencing provision of section 1170 (d)(1) in that, unlike section 1170 (d)(1), a veteran defendant can directly petition the court, and the court can recall the sentence for an eligible defendant at any time. The court is not subject to the 120-day limitation of section 1170 (d)(1).
- The Legislative history states that: “[this bill does not require the military service-related trauma to be a contributing factor of the offense. Consequently, if an inmate-veteran suffered from one of the specified condition[s] as a result of his or her military service, but that condition played no role in the commission of the offense, the court still would be required to consider the condition as a mitigating factor of the crime.” (Sen. Com. on Appropriations, Senator Anthony Portantino, Chair, analysis of Sen. Bill No. 865 (2017-2018 Reg. Sess.) p. 3.)
- For the vast majority of cases, the defense may have already presented the specified mitigating factor to the court. However, the court was not *required* to consider the specified mitigating factor until 2015, and now must consider it for cases before 2015. Consequently, upon receipt of a section 1170.91 recall and resentencing petition, it is important to review the original sentencing hearing transcripts, the probation report, and any sentencing memorandum filed by the defense to see if the mitigating factor had been presented *and* considered by the court. If the mitigating factor had been presented, but the record is silent as to whether the court had considered it, a request should be made for the court to state on the record whether it had considered that mitigating factor at the original sentencing. If the court indicates that it had, then recall would be inappropriate.

- Victims must be notified that they have a right to be present and to be heard as required under Marsy’s law. (Cal. Const. Art. I, § 28, subd. (b)(8).)
- The express language of section 1170.91 limits the court’s consideration of the specified mitigating factor upon resentencing to only cases involving a triad determinate sentence imposed under section 1170, subdivision (b). Thus cases that do not involve a determinate triad sentence should not be eligible for recall and resentencing under this provision.
- The language under section 1170.91 specifically limits the court’s consideration of the mitigating factor only in deciding which sentencing option within the triad to impose. Thus, the “full resentencing rule,” that allows the court to modify every aspect of the sentence, not just the portion subjected to the recall that has been applied in the Proposition 36<sup>6</sup> and Proposition 47<sup>7</sup> cases, should arguably not apply to resentencing under section 1170.91.

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<sup>6</sup> *People v. Hubbard* (2018) 27 Cal.App.5th 9, 12-14.

<sup>7</sup> *People v. Buycks* (2018) 5 Cal.5th 857, 893.