



JUDICIAL COUNCIL OF CALIFORNIA

770 L Street, Suite 1240 • Sacramento, California 95814-3368
Telephone 916-323-3121 • Fax 916-323-4347 • TDD 415-865-4272

TANI G. CANTIL-SAKAUYE
Chief Justice of California
Chair of the Judicial Council

MARTIN HOSHINO
Administrative Director

CORY T. JASPERSON
Director, Governmental Affairs

May 13, 2016

Hon. Mark Leno
Member of the Senate
State Capitol, Room 5100
Sacramento, California 95814

Subject: SB 1202 (Leno), as amended March 28, 2016 - Oppose

Dear Senator Leno:

The Judicial Council regrettably opposes SB 1202, which, among other things: (a) provides that the court may not impose an upper term sentence based on aggravating facts unless the facts were first presented to a jury and the jury found the facts to be true; (b) prohibits a fact pled in the indictment, information, or accusatory pleading in aggravation of the sentence from being used as an aggravating factor in sentencing unless proven to the trier of fact or admitted by the defendant; and (c) requires the bifurcation of the trial of all facts pled in aggravation of sentence, as specified.

The Judicial Council opposes SB 1202 for two reasons: first SB 1202 would interfere with judicial discretion to set appropriate sentences; and second, by requiring bifurcated trials SB 1202 would result in significant fiscal burdens in addition to the logistical problems that it would trigger.

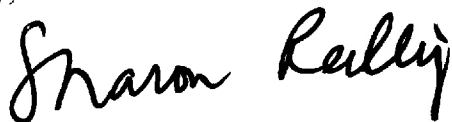
Under current law, courts are vested with broad discretion to fashion appropriate sentences. The bill appears to diminish the discretion by a separate trial in order to impose upper terms. The

council believes that the determination of the existence of aggravating factors should be left to judicial officers' discretion. The council further believes this determination is a function of judicial officers, in order to ensure fair and appropriate sentences. The council also notes that judges must already state their reasons for a sentence on the record, whether aggravated or mitigated.

Moreover, SB 1202 would significantly impact the length of trials because it would require juries to make a factual finding as to aggravating circumstances through a bifurcated trial process. SB 1202 would increase the length of criminal trials by a day or more so that juries can make a factual finding as to any aggravating circumstances. Thus, SB 1202 would place undue burdens on criminal court calendars, as the sentencing phase could add additional time on the courts—from one day to a week or more—each trial. It would also place hardships on the jury process, as more jurors would be required for bifurcated trials, and the trials would be longer. Further, the complexity of the penalty phase, as in capital cases, can add pressures on trial and appellate courts because penalty phase trials conceivably would be confused as a “defense” to each proffered aggravating factor. Thus, these “aggravating factor trials” could potentially last longer than the guilt phase as distinctions between facts and aggravating factors are addressed. As a result, the council is very concerned that SB 1202 will unduly prolong trials and burden already stretched judicial resources.

For these reasons, the Judicial Council regretfully opposes SB 1202.

Sincerely,

A handwritten signature in black ink that reads "Sharon Reilly". The signature is written in a cursive, flowing style.

Sharon Reilly
Attorney

SR/yc-s

cc: Mr. Daniel Seeman, Deputy Legislative Affairs Secretary, Office of the Governor
Mr. Martin Hoshino, Administrative Director, Judicial Council of California



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May 13, 2016

Hon. Ricardo Lara, Chair
Senate Appropriations Committee
State Capitol, Room 5050
Sacramento, California 95814

Subject: SB 1202 (Leno), as amended March 28, 2016 – Fiscal Impact Statement

Dear Senator Lara:

SB 1202, if enacted, would (1) prohibit a court from imposing an upper term sentence based on aggravating facts unless those facts are first presented to a jury and the jury finds the facts to be true; (2) prohibit a fact pled in the indictment, information, or accusatory pleading in aggravation of the sentence from being used as an aggravating factor in sentencing unless proven to the trier of fact or admitted by the defendant; and, (3) require the bifurcation of the trial of all facts pled in aggravation of the sentence, as specified.

Each year, there are more than 200,000¹ felonies disposed of by the courts. In the most recent year for which there is complete data, the number of felony dispositions was 254,410. A small

¹ See *2015 Court Statistics Report Statewide Caseload Trends 2004-2005 through 2013-2014*, p. 73, "Criminal Filings, Dispositions, and Caseload Clearance Rate." In 2005, there were 200,110 felony dispositions in California. In 2010, there were 238,751. In 2014, there were 254,410. The report can be found here: <http://www.courts.ca.gov/documents/2015-Court-Statistics-Report.pdf>

fraction of those—6,630 (2.6%)—went to trial². Only the most contested cases reach trial, owing to the complex and often significant charges involved in these cases. SB 1202 would require, among other things, that the sentencing component of a felony case in which the upper term of a sentence is sought to be bifurcated into a separate trial.

Should SB 1202 be signed into law, some significant percentage of felony trials would require bifurcation to settle the issues related to an upper term sentence. From January 2010 through and including December 2014, 42,349 CDCR felon admissions to custody were flagged with at least one upper term sentence, representing 19.3 percent of all felon admissions during that time³. The addition of an entirely new hearing to existing felony court proceedings could have a significant fiscal impact on the trial courts. Since the Judicial Council has no way to know for certain how many sentencing trials might be required, a range of hearings and costs is presented here for consideration.

A day in court costs \$6,695 including the time of the judicial officer, court staff, and appropriate OE&E. While most trials last more than a day, for calculations here we have assumed that the sentencing component of a bifurcated trial would require a single court day. Using 6,630 as the maximum number of bifurcated trials:

- At 10%, or 663 bifurcated trials at a one-day cost of \$6,695, the cost to California's trial courts would be \$4,438,785.
- At 20%, or 1,326 bifurcated trials, the cost would be \$8,877,570 million.

Criminal law experts, attorneys and judicial officers alike agree that most sentencing hearings will require more than a day. Additionally, many experienced bench officers believe that more than 20 percent of the felony trials will include an upper term sentence hearing, which is consistent with the trend that CDCR reports in the percentage of admitted felons with upper term flags. In 2010, 17.3 percent of admitted felons had upper term flags. In 2014, the number had reached 21.5 percent. Any expansion beyond one day for the sentencing phase of a bifurcated trial, or any increase in the number of trials in which the upper term sentence is sought would increase the costs listed here.

² *Ibid*, see Table 8a, p. 114; the remainder of the felony dispositions were resolved by plea arrangement, before or after preliminary hearings, and through acquittals, dismissals and transfers.

³ Data provided by CDCR pursuant to *Cunningham v. California*, 549 U.S. 270 (2007), which held that the rule first announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) applies to California's Determinate Sentencing Law. In California, a judge may choose one of three sentences for a crime—a low, middle, or high term. There must exist specific aggravating factors about the crime before a judge may impose the high term. Under the *Apprendi* rule, as explained in *Blakely v. Washington*, 542 U.S. 296 (2004), any fact that increases the punishment above that which the judge may impose without that fact must be found by a jury beyond a reasonable doubt.

Hon. Ricardo Lara

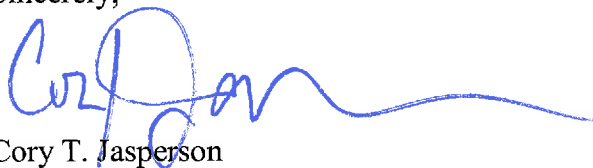
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At current workloads and levels of filings, California's trial courts are underfunded by as much as \$400 million. Additional delays and costs for undertaking bifurcated sentencing trials, will, without a commensurate increase in funding, result in additional court backlogs and delays in justice.

Please contact me if you have questions about the information contained in this letter.

Sincerely,



Cory T. Jasperson

Director, Governmental Affairs

CTJ/AL/yc-s

cc: Members, Senate Appropriations Committee
Hon. Mark Leno, Member of the Senate
Ms. Jolie Onodera, Consultant, Senate Appropriations Committee
Mr. Matt Osterli, Fiscal Consultant, Senate Republican Fiscal Office
Mr. Jerome McGuire, Counsel, Senate Public Safety Committee
Mr. Eric Csizmar, Consultant, Senate Republican Office of Policy
Mr. Daniel Seeman, Deputy Legislative Secretary, Office of the Governor
Ms. Tiffany Garcia, Budget Analyst, Department of Finance
Mr. Martin Hoshino, Administrative Director, Judicial Council of California



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Director, Governmental Affairs

June 21, 2016

Hon. Reginald B. Jones-Sawyer, Sr., Chair
Assembly Public Safety Committee
State Capitol, Room 5100
Sacramento, California 95814

Subject: SB 1202 (Leno), as amended May 31, 2016 – Oppose
Hearing: Assembly Public Safety Committee – June 28, 2016

Dear Assembly Member Jones-Sawyer:

The Judicial Council regrettably opposes SB 1202, which, among other things: (a) provides that the court may not impose an upper term sentence based on aggravating facts unless the facts were first presented to a jury and the jury found the facts to be true; (b) prohibits a fact pled in the indictment, information, or accusatory pleading in aggravation of the sentence from being used as an aggravating factor in sentencing unless proven to the trier of fact or admitted by the defendant; and (c) requires the bifurcation of the trial of all facts pled in aggravation of sentence, as specified.

The Judicial Council opposes SB 1202 for two reasons: first, SB 1202 would interfere with judicial discretion to set appropriate sentences; and second, by requiring bifurcated trials SB 1202 would result in significant fiscal burdens in addition to the logistical problems it would trigger.

Hon. Reginald B. Jones-Sawyer, Sr.

June 21, 2016

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Under current law, courts are vested with broad discretion to fashion appropriate sentences. The bill appears to diminish this discretion by requiring a separate trial in order to impose an upper term sentence. The council believes that the determination of the existence of aggravating factors should be left to judicial officers' discretion. The council further believes this determination is a function of judicial officers, in order to ensure fair and appropriate sentences. The council also notes that judges must already state their reasons for a sentence on the record, whether aggravated or mitigated.

Moreover, SB 1202 would significantly impact the length of trials because it would require juries to make a factual finding as to aggravating circumstances through a bifurcated trial process. SB 1202 would increase the length of criminal trials by a day or more so that juries can make a factual finding as to any aggravating circumstances. Thus, SB 1202 would place undue burdens on criminal court calendars, as the sentencing phase could add additional time on the courts—from one day to a week or more per trial. It would also place hardships on the jury process, as more jurors would be required for bifurcated trials, and the trials would be longer. Further, the complexity of the penalty phase, as in capital cases, can add pressures on trial and appellate courts because penalty phase trials conceivably would be confused as a “defense” to each proffered aggravating factor. Thus, these “aggravating factor trials” could potentially last longer than the guilt phase as distinctions between facts and aggravating factors are addressed. As a result, the council is very concerned that SB 1202 will unduly prolong trials and burden already stretched judicial resources.

For these reasons, the Judicial Council regretfully opposes SB 1202.

Should you have any questions or require additional information, please contact Sharon Reilly at 916-323-3121.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Cory Jasperson', with a long, sweeping horizontal line extending to the right.

Cory T. Jasperson

Director, Governmental Affairs

Hon. Reginald B. Jones-Sawyer, Sr.

June 21, 2016

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CTJ/SR/yc-s

cc: Members, Assembly Public Safety Committee

Hon. Mark Leno, Member of the Senate

Ms. Sandy Uribe, Counsel, Assembly Public Safety Committee

Mr. Gary Olson, Consultant, Assembly Republican Office of Policy

Mr. Daniel Seeman, Deputy Legislative Affairs Secretary, Office of the Governor

Mr. Martin Hoshino, Administrative Director, Judicial Council of California



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July 13, 2016

Hon. Lorena Gonzalez, Chair
Assembly Appropriations Committee
State Capitol, Room 2114
Sacramento, California 95814

Subject: SB 1202 (Leno), as amended May 31, 2016 – Fiscal Impact Statement

Dear Assembly Member Gonzalez:

SB 1202, if enacted, would (1) prohibit a court from imposing an upper term sentence based on aggravating facts unless those facts are first presented to a jury and the jury finds the facts to be true; (2) prohibit a fact pled in the indictment, information, or accusatory pleading in aggravation of the sentence from being used as an aggravating factor in sentencing unless proven to the trier of fact or admitted by the defendant; and, (3) require the bifurcation of the trial of all facts pled in aggravation of the sentence in order for the upper term sentence to be imposed.

There is no way for the Judicial Council to state the precise impact of the bill, so we provide you an analysis and a range of possible cost impacts for your consideration. Each year, there are more than 200,000¹ felonies disposed of by the courts. In the most recent year for which there is

¹ See *2015 Court Statistics Report Statewide Caseload Trends 2004-2005 through 2013-2014*, p. 73, "Criminal Filings, Dispositions, and Caseload Clearance Rate." In 2005, there were 200,110 felony dispositions in California. In 2010, there were 238,751. In 2014, there were 254,410. The report can be found here: <http://www.courts.ca.gov/documents/2015-Court-Statistics-Report.pdf>

complete data, the number of felony dispositions was 254,410. A small fraction of those—6,630 (2.6%)—went to trial². Only the most contested cases reach trial, owing to the complex and often significant charges involved in these cases.

SB 1202 would require, among other things, that the sentencing component of a felony case in which the upper term of a sentence is sought to be bifurcated into a separate trial. Should SB 1202 be signed into law, some significant percentage of felony trials would require bifurcation to settle the issues related to an upper term sentence. The following information may provide some guidance into the possible fiscal impacts should SB 1202 be enacted.

From January 2010 through December 2014, 42,349 CDCR felon admissions to custody were flagged with at least one upper term sentence, representing 19.3 percent of all felons for that same time period.³ While certainly not all of these admissions with an upper term sentence were resolved by trial, filings data show that 2.6 percent of *all* felony filings were resolved at trial.

If 2.6 percent of the CDCR felon admissions with at least one upper term sentence were resolved by trial, under the authority in SB 1202, the number of bifurcated trials (that is, trials seeking at least one upper term sentence) would be 1,100. It is possible, however, that felonies involving circumstances for which upper term sentences are likely also require trials at a rate higher than the average, and for that reason a range is presented here for your consideration.

- At 2.6%, or 1,100 bifurcated trials per year in California, at a one-day court cost of \$6,695⁴, the cost to California's trial courts for bifurcated sentencing hearings would be an additional \$7.3 million
- At 5%, or 2,117 bifurcated trials, the cost would be \$14.1 million.

Criminal law experts, attorneys and judicial officers alike agree that most sentencing hearings will require more than a day of court time, which would drive up these costs significantly. Additionally, many experienced bench officers believe there will be an increase in the number of

² *Ibid*, see Table 8a, p. 114; the remainder of the felony dispositions were resolved by plea arrangement, before or after preliminary hearings, and through acquittals, dismissals and transfers.

³ Data provided by CDCR pursuant to *Cunningham v. California*, 549 U.S. 270 (2007), which held that the rule first announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) applies to California's Determinate Sentencing Law. In California, a judge may choose one of three sentences for a crime—a low, middle, or high term. There must exist specific aggravating factors about the crime before a judge may impose the high term. Under the *Apprendi* rule, as explained in *Blakely v. Washington*, 542 U.S. 296 (2004), any fact that increases the punishment above that which the judge may impose without that fact must be found by a jury beyond a reasonable doubt.

⁴ A day in court costs \$6,695 including the time of the judicial officer, court staff, and appropriate OE&E. While most trials last more than a day, for calculations here we have assumed that the sentencing component of a bifurcated trial would require a single court day.

Hon. Lorena Gonzalez

July 13, 2016

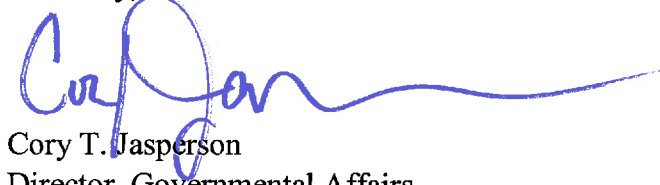
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felony trials that include an upper term sentence hearing, which is consistent with the trend that CDCR reports in the percentage of admitted felons with upper term flags. In 2010, 17.3 percent of admitted felons had upper term flags. In 2014, the number had reached 21.5 percent. Any expansion beyond the average of 19.3 percent of admitted felons with an upper term sentence, or an increase beyond one day for the sentencing phase of a bifurcated trial, or any increase in the number of trials in which the upper term sentence is sought, would increase the costs listed here.

At current workloads and levels of filings, California's trial courts are underfunded by as much as \$400 million. Additional delays and costs for undertaking bifurcated sentencing trials, will, without a commensurate increase in funding, result in additional court backlogs and delays in justice.

Please note that the information contained herein is provided for fiscal analysis only and is not intended to present a position on the merits of the bill. For additional information, please contact Andi Liebenbaum if you have questions about the information contained in this letter at (916) 323-3121, or andi.liebenbaum@jud.ca.gov.

Sincerely,



Cory T. Jaspersen

Director, Governmental Affairs

CTJ/AL/yc-s

cc: Members, Assembly Appropriations Committee
Hon. Mark Leno, Member of the Senate
Mr. Pedro Reyes, Chief Consultant, Assembly Appropriations Committee
Mr. Allan Cooper, Senior Consultant, Assembly Republican Fiscal Office
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