

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688

www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

[ITC prefix as assigned]-__

Title Judicial Council–Sponsored Legislation: Resentencing Members of Military	Action Requested Review and submit comments by May 13, 2022
Proposed Rules, Forms, Standards, or Statutes Amend Pen. Code, § 1170.91	Proposed Effective Date January 1, 2024
Proposed by Collaborative Justice Courts Advisory Committee Hon. Richard Vlavianos, Chair	Contact Deanna Adams, 916-263-1378, Deanna.Adams@jud.ca.gov

Executive Summary and Origin

The Collaborative Justice Courts Advisory Committee recommends that the Judicial Council sponsor legislation that allows a defendant who is currently serving a felony sentence, and who 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 the defendant’s military service (“military related trauma”), to petition for recall of a sentence and resentencing without regard to the date of the defendant’s diagnosis or whether the defendant was sentenced prior to January 1, 2015.

Background

Penal Code section 1170.91 was enacted by Assembly Bill 2098 (Levine; Stats. 2014, ch. 163), to allow courts to consider military related trauma in sentencing of eligible individuals. It was later amended (AB 865 (Levine); Stats. 2018, ch. 523) to make the statute retroactive by permitting veterans sentenced prior to January 1, 2015, to petition the court for resentencing. Specifically, Penal Code 1170.91 was amended to provide:

- (b) (1) A person 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

This proposal has not been approved by the Judicial Council and is not intended to represent the views of the council, its Rules Committee, or its Legislation Committee. It is circulated for comment purposes only.

her case, to request resentencing pursuant to subdivision (a) if the person meets both of the following conditions:

(A) 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.

(B) 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.

In 2020, the Fourth District Court of Appeal considered an appeal to the denial of a petition for recall and resentencing pursuant to Penal Code section 1170.91(b) on the basis that the defendant was sentenced prior to January 1, 2015 (*People v. Valliant*, 55 Cal.App.5th 903). On appeal Mr. Valliant argued, among other things, that subdivision (b)(1)(B) extends resentencing relief to all veterans whose military related trauma was not considered at their initial sentencing, without regard to when that sentencing took place. The court denied the appeal holding, among other things, that section 1170.91, subdivision (b) (1)(B) unambiguously authorizes resentencing relief only for persons who were sentenced before January 1, 2015, and thus did not apply to the defendant who was sentenced in March of 2015. The court also stated: "In closing, we wonder if the Legislature foresaw this result when it passed section 1170.91. While Valliant's position here may be unusual, we doubt it is unique. With that thought in mind, we invite the Legislature to revisit this issue and, if it believes it is appropriate to do so, to provide Valliant and any other veteran in a similar position, with statutory relief."

The defendant appealed the ruling and, while the Supreme Court denied review, in a concurring statement in the *People v. Valliant* (S265734) Justice Goodwin Liu also called for renewed legislative attention on this issue agreeing with the Court of Appeal that it is unlikely the Legislature specifically intended the result. Justice Liu pointed to the current science that recognizes post-traumatic stress disorder can take time to fully manifest – particularly for veterans – and noted that backlogs at the U.S. Department of Veterans Affairs are often a barrier to veterans establishing a service-connected condition or disability. Justice Liu also noted that it is "undisputed that Valliant's military-related conditions - PTSD and opioid abuse disorder - were not considered during his sentencing in 2015. In fact, it was not until 2017 that the United States Department of Veterans Affairs (VA) verified that his conditions stemmed from his military service. Thus, Valliant is in the unfortunate position of not having had his military-related conditions considered at his initial sentencing while also being ineligible for resentencing pursuant to section 1170.91, subdivision (b)."

In response to the call for legislative action, Assembly Bill 581 (Levine, 2019) and Senate Bill 763 (Min, 2021) were introduced to address delayed diagnoses and to eliminate the requirement that a defendant be sentenced prior to January 1, 2015, and thereby extend consideration of military related trauma when resentencing currently incarcerated veterans upon petition, but these bills were both held in the Senate Appropriations Committee.

The Proposal

Existing law limits qualification for resentencing of veterans suffering from military related trauma to exclude certain veterans based on arbitrary procedural timelines. The committee recommends amending Penal Code section 1170.91 to eliminate the procedural timeline barrier and to extend eligibility to all veterans serving a felony sentence who meet the statutory requirements. The proposed legislation would 1) remove the January 1, 2015, timeframe, and 2) clarify that veterans may pursue resentencing if they are diagnosed with specified conditions that resulted from their military service without regard to whether there was argument or evidence about the condition during trial.

This proposed legislation will also assist the judicial branch in being responsive to court users who are veterans. This includes:

- **Eliminating Barriers to Fairness**

Amending Penal Code section 1170.91 will provide access to fairness for veterans who have disabilities. Fairness in the circumstances implicated under the proposed legislation will involve veterans who had a delayed diagnosis of the conditions specified in section 1170.91, including delays resulting from disqualification from treatment provided through the U.S. Department of Veterans Affairs; limited competency and familiarity by civilian providers of conditions resulting from military service; and delays in the appearance of symptoms for conditions that manifest over time.

- **Providing Access to Procedural Justice**

Existing law does not consider federal changes that modify standards used by branches of the United State military for reconsidering requests for discharge upgrades, which can impact veterans' ability to meet statutory requirements described in Penal Code section 1170.91. Settlements in separate actions against the U.S. Army Corps (*Kennedy v. McCarthy*, 3:16-cv-2010 (CSH) (D. Conn. Apr. 26, 2021)) and against the U.S. Navy and U.S. Marine Corps (*Manker v. Toro*, 3:18-cv-372 (CSH) (D. Conn. Oct. 12, 2021)) now require these branches to reconsider discharge upgrade requests that were previously denied. These branches must now use an updated standard to qualify former members of the military, which will allow more veterans to access services through the U.S. Department of Veterans Affairs and to be diagnosed with military related trauma conditions set forth in Penal Code section 1170.91. A third action against the U.S. Air Force is pending (*Johnson v. Kendall*, 3:21-cv-01214 (CSH) (D. Conn 2021) (filed September 13, 2021)). The proposed legislation would provide recourse to incarcerated veterans who are more recently diagnosed with conditions set forth in section 1170.91 as the federal government reconsiders and approves discharge upgrade requests.

Alternatives Considered

The advisory committee did not consider alternatives because the proposed legislation seeks to accomplish similar outcomes as Assembly Bill 581 and Senate Bill 763, which both were supported by the Judicial Council.

Fiscal and Operational Impacts

The fiscal impact to the courts is anticipated to be minor and absorbable. This proposal is for the Judicial Council to sponsor legislation similar to SB 763, which was supported by the Judicial Council and deemed at that time to be minor and absorbable.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would 12 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Pen. Code, § 1170.91, at page 5
2. Link A: Senate Bill 763 (Min),
https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB763
3. Link B: Assembly Bill 581 (Levine),
https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB581
4. Link C: Assembly Bill 865 (Levine),
https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB865
Link D: *People v. Valliant*, <https://www.courts.ca.gov/opinions/archive/G058568S.PDF>
5. Link E: Review Denied: *People v. Valliant*,
<https://www.courts.ca.gov/opinions/archive/G058568S.PDF>
6. Link F: *Kennedy v. McCarthy*, 3:16-cv-2010 (CSH) (D. Conn. Apr. 26, 2021),
<https://www.kennedysettlement.com/admin/services/connectedapps.cms.extensions/1.0.0.0/as/set?id=9d993d88-f371-4790-b67b-6683307ca558&languageId=1033&inline=true>
7. Link G: *Manker v. Toro*, 3:18-cv-372 (CSH) (D. Conn. Oct. 12, 2021),
https://ecf.ctd.uscourts.gov/cgi-bin/show_public_doc?2018cv0372-216
9. Link H: *Johnson v. Kendall*, 3:21-cv-01214 (CSH) (D. Conn 2021),
https://www.pacermonitor.com/public/case/41811513/Johnson_et_al_v_Kendall

Section 1170.91 of the Penal Code would be amended, effective January 1, 2024, to read:

1 **1170.91.**

2
3 **(a)**

4
5 If the court concludes that a defendant convicted of a felony offense is, or was, a
6 member of the United States military who may be suffering from sexual trauma,
7 traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental
8 health problems as a result of ~~his or her~~ the defendant's military service, the court
9 shall consider the circumstance as a factor in mitigation when imposing a term
10 under subdivision (b) of Section 1170. This consideration does not preclude the
11 court from considering similar trauma, injury, substance abuse, or mental health
12 problems due to other causes, as evidence or factors in mitigation.

13 **(b)**

14
15 (1) A person currently serving a sentence for a felony conviction, whether by
16 trial or plea, who is, or was, a member of the United States military and who
17 may be suffering from sexual trauma, traumatic brain injury, post-traumatic
18 stress disorder, substance abuse, or mental health problems as a result of ~~his~~
19 ~~or her~~ the person's military service may petition for a recall of sentence,
20 before the trial court that entered the judgment of conviction in ~~his or her~~ the
21 case, to request resentencing pursuant to subdivision (a) if the ~~person meets~~
22 ~~both of the following conditions:~~

23
24 ~~(A) The circumstance of suffering from sexual trauma, traumatic brain~~
25 ~~injury, post-traumatic stress disorder, substance abuse, or mental health~~
26 ~~problems as a result of the person's military service was not considered~~
27 ~~as a factor in mitigation at the time of sentencing-, whether or not there~~
28 ~~was argument or evidence about the condition during trial.~~

29
30 ~~(B) The person was sentenced prior to January 1, 2015. This subdivision~~
31 ~~shall apply retroactively, whether or not the case was final as of~~
32 ~~January 1, 2015.~~

33
34 (2)-(4) ***

35
36 (5) ~~Under no circumstances may resentencing~~ Resentencing under this
37 subdivision shall not result in the imposition of a term longer than the
38 original sentence.

39
40 (6)-(9) ***

41