

# Select 2022 Laws

## 1 SENTENCING & RE-SENTENCING

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**AB124: Lenience for trafficking and intimate partner/sexual violence victims; prosecutors and court to consider victim status in plea bargaining and sentencing.** Victims of intimate partner or sexual violence can now petition for relief to vacate non-violent arrests or convictions committed while a victim (Pen. Code, § 236.15) and raise a coercion defense for non-violent offenses where “person was coerced to commit the offense as a direct result of being a victim of intimate partner violence or sexual violence at the time of the offense and had a reasonable fear of harm.” (Pen. Code, §§ 236.15 [Petition for vacatur of conviction]; 236.24, subd. (a) [affirmative defense].) These sections apply to minors declared wards under Welfare and Institutions Code section 602. (Pen. Code, §§ 236.15, subd. (j); 236.24, subd. (f).)

Trafficking victims: Coercion defense now applies to *serious felonies* or a *charge of human trafficking*. (Pen. Code, § 236.23.)

Victim status impact on plea bargaining and sentencing: Prosecutor must consider victim status as mitigation in plea bargaining. (Pen. Code, § 1016.7.) Court must consider victim status as mitigation in sentencing and order the lower term unless aggravating circumstances outweigh mitigating circumstances such that lower term would be “contrary to the interests of justice.” (Pen. Code, § 1170.)

**AB177: Eliminates additional administrative fees.** (Pen. Code, § 1465.9.) Court-imposed costs pursuant to numerous statutes “shall be unenforceable and uncollectible and any portion of a judgment imposing those costs shall be vacated.”

Note: AB1869, signed by the Governor on September 18, 2020, effective July 1, 2021, eliminated 23 different criminal administrative fees and wrote off all outstanding debt related to the eliminated fees.

**AB333: Narrows the definition of “pattern of criminal gang activity”; gang allegations and street terrorism charges must be bifurcated.** (Pen. Code, §§ 186.22, 1109.) Most recent predicate must be “within three years of the date the current offense is alleged to have been committed,” offenses must commonly benefit the gang, and the common benefit must be *more than reputational*. Some controlled substance and additional theft offenses (such as felony vandalism, looting, theft of an access card) eliminated from list of qualifying predicates. The *currently charged offense* cannot be used as a predicate.

Definition of “criminal street gang” narrowed – members must “collectively engage in, or have engaged in, a pattern of criminal gang activity,” eliminating language permitting members to individually engage in such activity.

Gang enhancement (Pen. Code, § 186.22, subds. (b) & (d)) bifurcated upon defense request. (Pen. Code, § 1109.) Active participation in a criminal street gang (Pen. Code, § 186.22, subd. (a)) must “be tried separately from all other counts that do not otherwise require gang evidence as an element of the crime.”

Beginning January 1, 2023, court must impose the middle term unless there are circumstances in aggravation or mitigation. (Pen. Code, §§ 186.22, subd. (b)(3) [Sec. 3, operative January 1, 2022], 186.22, subd. (b)(3) [sec. 4, operative January 1, 2023].)

**AB518: Amends Penal Code section 654.** Court no longer required to sentence on the crime with the greatest punishment, returning Penal Code section 654 to its pre-1998 version.

**AB939: Victim’s manner of dress inadmissible in specified sex offense prosecutions.** (Evid. Code, § 1103.) Victim’s manner of dress is now inadmissible to prove/disprove consent; prior exceptions to this rule have been removed.

**AB1540: Recall and resentencing procedures expanded.** (Pen. Code, § 1170.03, added.) Penal Code section 1170, subdivision (d) recall and resentencing procedure moved to Penal Code section 1170.03. At re-sentencing, court must apply any changes in the law that reduce sentences or provide for judicial discretion. Court may reduce the term of imprisonment or vacate the conviction and impose judgment on lesser included or related offenses and may consider post-conviction factors. The court must consider if the defendant has experienced trauma including sexual violence, intimate partner violence or human trafficking prior to or at the time of the offense, if defendant was a youth at the time of the offense, and whether any of those circumstances were a contributing factor in the commission of the offense. The court must state reasons for any grant or denial.

If request initiated by CDCR, Board of Parole, County Administrator, DA, or AG, court must give notice to the defendant, set a status conference within 30 days, and appoint counsel. Court must grant unless it finds defendant is an unreasonable risk of danger to public safety as defined in Penal Code section 1170.18, subdivision (c).

**SB73: Probation eligibility for specified drug offenses.** (Health & Saf. Code, § 11370; Pen. Code, § 1203.07; Pen. Code, § 1203.073, repealed.) Numerous drug offenses eliminated from the list of charges rendering a defendant ineligible for probation. (Health & Saf. Code, § 11370, subd. (a).) The balance of the offenses permit probation upon a finding that it is an “unusual case where the interests of justice would best be served.” (Health & Saf. Code, § 11370, subd. (e), added.; Pen. Code, § 1203.07, subd. (c).)

**SB81: Dismissal of enhancements – Prospective only to sentencings *after* January 1, 2022.** (Pen. Code, § 1385, subd. (c).) Court must dismiss enhancement if it is “in the furtherance of justice to do so” and no law prohibits such dismissal. Sets forth nine mitigating factors (not an exclusive list) which weigh in favor of dismissal, unless the court finds dismissal would “endanger public safety,” meaning “there is a likelihood that the dismissal of the enhancement would result in physical injury or other serious danger to others.” Such discretion can be exercised anytime (i.e., before, during, or after trial/plea, or at sentencing).

**SB483: Eliminates prison and drug priors; fully retroactive.** (Pen. Code, § 1171, added.) Health and Safety Code section 11370.2 enhancements imposed prior to January 1, 2018 (except for an enhancement based on a prior conviction for violating or conspiring to violate Health and Safety Code section 11380) are legally invalid. (Pen. Code, § 1171, added.) Penal Code section 667.5, subdivision (b), priors imposed prior to January 1, 2020 (except for an enhancement imposed for a prior conviction for a sexually violent offense) are legally invalid. (Pen. Code, § 1171.1, added.)

Both sections require the CDCR or county correctional administrator to identify eligible cases and notify the sentencing court and set a timeline for doing so. A court determining that the judgment includes an invalid sentencing enhancement must recall the sentence and resentence the defendant. In re-sentencing, the court must “apply any other changes in the law that reduce sentences or provide for judicial discretion,” may consider postconviction factors, may not impose a term exceeding the middle term (exceptions set forth in statute), and must appoint counsel.

Legislature intends that any resulting sentencing changes based on this act “shall not be a basis for a prosecutor or court to rescind a plea agreement.”

Caution: Both statutes provide that resentencing should result in a lower sentence, “unless the court finds by clear and convincing evidence that imposing a lesser sentence would endanger public safety.” Resentencing cannot result in a longer sentence than originally imposed. (§§ 1171, subd. (d)(1), & 1171.1, subd. (d)(1).)

**SB567: Determinate sentencing overhauled, limiting imposition of the upper-term and requiring lower-term in certain circumstances.** (Pen. Code, §§ 1170, subd. (b) [Sec. 1.3], & 1170.1, subd. (d).) Court cannot impose sentence exceeding the middle term unless circumstances in aggravation and facts underlying those circumstances have been stipulated to by the defendant or found true beyond a reasonable doubt by the jury or judge. If defendant requests, the trial on aggravating factors must be bifurcated unless evidence is admissible at the trial on the charges. Exception: Prior convictions need not be submitted to a jury if proved by a certified record of conviction.

Court must impose the lower term unless aggravating circumstances outweigh mitigating circumstances such that imposition would be “contrary to the interests of justice” if any of the following contributed to commission of the offense: defendant experienced psychological, physical, or child trauma; defendant is a youth (or was a youth as defined by Penal Code section 1016.7, subd. (b)); defendant was a victim of intimate partner violence or human trafficking. Same factors should be considered in evaluating a petition for recall and resentencing based on the defendant’s age at the time of the offense pursuant to revised Penal Code section 1170, subdivision (d)). (§ 1170, subd. (d)(8).)

**SB775: Clarifies SB1437 – expressly permitting attempted murder and manslaughter, expanding eligible theories of conviction, and clarifying procedure.** (Pen. Code, § 1170.95.) Amendment clarifies that SB1437 relief applies to persons convicted of felony murder or murder under NPC *or any other theory* in which malice is imputed, attempted murder based on NPC, and manslaughter.

Codifies *People v. Lewis* (2021) 11 Cal.4th 952, 961-970 re: right to counsel upon filing of a facially sufficient petition and standard for determining prima facie case. Clarifies *Lewis, supra*, at pp. 970-972 re: what evidence can be considered at a resentencing hearing (Pen. Cod. § 1170.95, subd. (d)), setting forth specific guidelines (e.g. *procedural history* in an appellate opinion, evidence previously admitted if *admissible under current law*). Prosecution must prove beyond a reasonable doubt appellant is guilty of murder/attempted murder based on current law.

Defendants may challenge the validity of their convictions based on SB1437 in the direct appeal from the conviction. Possible parole supervision is two years, not three years.

## 2 OTHER CRIMINAL

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**AB292: Requires CDCR to conduct rehabilitative programming.** (Pen. Code, § 2933.7.) Programming must accomplish numerous goals, including minimizing transfers between institutions, prioritizing transferees to resume programming, provide programming even if facility restricted by security or medical concerns, offering in-person alternatives, minimizing waitlist times, minimizing conflicts with work schedules, timely accessibility, and offering a variety of opportunities.

**AB1171: Rape of a spouse part of general rape statute.** (Pen. Code, §§ 261.) Rape of a spouse moved to general rape statute. (Pen. Code, § 262, repealed.) Rape of a spouse is now a registerable offense. (Pen. Code, § 290, subd. (c)(1).)

**AB1228: Probationers released pending probation revocation hearing absent certain findings; limits on cash bail.** (Pen. Code, §§ 1203.2, 1203.25 (added).) Court must release probationer on his or her own recognizance pending revocation unless it finds by clear and convincing evidence conditions of release are necessary to protect the public and secure the probationer's presence in court. Reasonable conditions of release may include reporting to the probation officer, GPS monitoring, etc. Court must impose the *least restrictive* condition.

Bail, defined as cash bail, cannot be imposed unless the court finds by clear and convincing evidence that other conditions are inadequate. Any bail must be set at an amount a person can "reasonably afford."

**AB1259: Motion to vacate based on inadequate immigration consequence advisal expanded to any "conviction or sentence."** (Pen. Code, § 1473.7.) Motion is no longer limited to guilty or nolo contendere pleas. Can now challenge conviction or sentence whether obtained by plea or trial.

**SB317: Competence to stand trial – misdemeanor defendants and state hospital credits.** (Pen. Code, § 1370.01.) Misdemeanor defendants found incompetent may receive diversion pursuant to Penal Code section 1001.36 or have their charges dismissed. Court has additional options if the defendant is ineligible for diversion such as modification of the treatment plan, outpatient treatment, or conservatorship.

Conduct credits apply to persons confined in a state hospital or other mental health treatment facility pending return of competency. (Pen. Code, § 4019.)

## 3 JUVENILES: DELINQUENCY AND DEPENDENCY

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**AB624: Interlocutory appeal from transfer order.** (Welf. & Inst. Code, § 801.) Transfer order is subject to immediate appeal; notice of appeal must be filed within 30 days of the transfer order. Upon defense request, criminal court proceedings shall be stayed until the appeal is resolved. Fast track appeal. Transfer order cannot be challenged in the appeal from the conviction.

**AB788: Juveniles: Bypassing reunification services – Clarifies the term "resisted" does not include passive resistance.** (Welf. & Inst., § 361.5, subd. (b)(13).) The term "resisted" as used in the bypass provision in subdivision (b)(13) means the parent/guardian "refused to participate meaningfully in a

prior court-ordered drug or alcohol treatment program.” Statute expressly provides that the term “does not include ‘passive resistance,’ as described in *In re B.E.* (2020) 46 Cal.App.5<sup>th</sup> 932.”

**SB383: Expands eligibility for informal supervision and deferred entry of judgment.** Eliminates presumptive ineligibility for possession, sales or possession for sale of a controlled substance and commission of a Welfare and Institutions Code section 707, subdivision (b) felony offense when minor at least 14 years. (Welf. & Inst. Code, § 654.3.) Replaces the latter with violations of Penal Code sections 245.5, 626.9, or 626.10. In cases being transferred to another county, the court can adjudicate the case without determining minor’s suitability, allowing the receiving county to make that determination. (Welf. & Inst. Code, § 790.)