

# JUDICIAL COUNCIL OF CALIFORNIA

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## INVITATION TO COMMENT

### SPR20-14

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**Title**

Criminal Procedure: Resentencing  
Recommendations Under Penal Code  
Section 1170(d)(1)

**Action Requested**

Review and submit comments by June 9,  
2020

**Proposed Effective Date**

January 1, 2021

**Proposed Rules, Forms, Standards, or Statutes**

Adopt Cal. Rules of Court, rule 4.520

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**Proposed by**

Criminal Law Advisory Committee  
Hon. J. Richard Couzens, Chair

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### Executive Summary and Origin

The Criminal Law Advisory Committee recommends adopting a new rule of court establishing procedures for resentencing recommendations under Penal Code section 1170(d)(1) (see Link A).

### Background

California law allows felony resentencing by the court within 120 days of commitment to state prison, or at any time, on recommendation by the Secretary of the California Department of Corrections and Rehabilitation (CDCR), the CDCR's Board of Parole Hearings, a county correctional administrator, or the district attorney. (Pen. Code, § 1170(d)(1).) Assembly Bill 1812 (Stats. 2018, ch. 36) (see Link B) recently added the following language regarding factors that a court could consider when reviewing a resentencing recommendation:

The court resentencing under this paragraph may reduce a defendant's term of imprisonment and modify the judgment, including a judgment entered after a plea agreement, if it is in the interest of justice. The court may consider postconviction factors, including, but not limited to, the inmate's disciplinary record and record of rehabilitation while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the inmate's risk for future violence, and evidence that reflects that circumstances have changed

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It is circulated for comment purposes only.*

since the inmate's original sentencing so that the inmate's continued incarceration is no longer in the interest of justice.

(Pen. Code, § 1170(d)(1).)

CDCR created the Recall and Resentencing Recommendation Program to identify and recommend felony resentencing in prison cases under section 1170(d)(1). As of December 31, 2019, CDCR made 1,310 resentencing recommendations to courts in 46 counties based on either a defendant's exceptional conduct, a law enforcement agency referral, sentencing discrepancies based on case law, or changes in the law. Currently, recommendations based on changes in the law are for gun enhancements under Penal Code sections 12022.5(c) and 12022.53(h) (Sen. Bill 620 (Stats. 2017, ch. 682)); prior serious felony enhancements under Penal Code section 667(a)(1) (Sen. Bill 1393 (Stats. 2018, ch. 1013)); and controlled substance enhancements under Health and Safety Code section 11370.2 (Sen. Bill 180 (Stats. 2017, ch. 677)). Overall, courts have responded to 838 of these 1,310 requests, resulting in 383 reductions. Emergency regulations were recently issued on qualifying criteria and procedures. (See Link C.) The emergency regulations state the CDCR's internal screening criteria for each category of recommendations.

## **The Proposal**

Based on the increase in section 1170(d)(1) resentencing recommendations from CDCR, the committee recommends adoption of a new rule of court setting the following procedures for resentencing recommendations. The committee believes that the rule will assist courts by clarifying how resentencing recommendations should be handled.

- Require the recommendation to go before the original sentencing judge who entered judgment of conviction in the case, and require the presiding judge or the presiding judge's designee to assign a judge if the original sentencing judge is unavailable;
- Provide for an initial review by the court to determine the basis of the recommendation, and, for recommendations based on equitable considerations, appoint counsel for the defendant if the court sets a status conference or hearing;
- Provide for courts to summarily deny a recommendation, including notification of the parties and an opportunity to request a status conference or hearing if either disagrees with the court's proposed summary disposition;
- Provide for a court's tentative response, including notification of the parties and an opportunity to object and set the matter for a status conference or hearing;
- Provide guidelines on status conferences, including a provision on the purpose of a status conference, that the defendant need not be present, and, if all parties agree on a new sentence, allowing the court to resentence the defendant in the defendant's absence with a knowing and intelligent waiver of the right to be present;
- Provide guidelines on hearings, including a provision that the defendant's presence may be waived, factors the court may consider at the hearing, and procedures the court must follow if it changes the sentence; and

- State that a supplemental probation report is not required for resentencing unless ordered by the court.

## **Alternatives Considered**

A committee workgroup discussed in depth what factors should trigger appointment of counsel by the court. A workgroup member was concerned that CDCR was not providing courts with sufficient information. On review of CDCR's emergency regulations, recommendation letters, and cumulative case summaries, the workgroup recommended appointment of counsel for defendants whose recommendations are based on equitable considerations, such as changes in sentencing laws and exceptional conduct, and where the court does not summarily deny the recommendation and instead sets a status conference or hearing. The committee agreed with the recommendation. The workgroup has suggested to CDCR that the recommendation letters going to the courts clearly state the basis for the recommendation (e.g., exceptional conduct, change in sentencing law).

The committee discussed whether the rule should direct courts, at hearing, to consider whether consecutive sentences could have been imposed and whether the original sentence was the result of a negotiated disposition where charges or cases were dismissed. Some members thought that including these factors in the rule would give them undue emphasis, especially since they were not reflected in the statute and were perhaps contrary to the statutory language stating "the court resentencing under this paragraph may reduce a defendant's term of imprisonment and modify the judgment, including a judgment entered after a plea agreement, if it is in the interest of justice." Other members thought they were highly relevant factors. Ultimately, the committee decided to include a provision in the rule that the court may consider any factors that were present at the original sentencing, including but not limited to whether consecutive sentences could have been imposed, and the terms of a negotiated plea, including whether charges or cases were dismissed. The committee also included a provision stating that the court must not deny a resentencing recommendation solely because the original sentence resulted from a negotiated plea.

The committee agreed that a defendant has a right to be personally present at resentencing but expressed concern that requiring a defendant to be personally present could cause a loss of housing and programming opportunities because of the defendant's removal from state prison to be transported to and from court. To address the issue, the committee initially discussed including a provision recommending issuance of a removal order that would minimally interfere with a defendant's housing and programming in state prison. However, CDCR does not have a process to minimize the impact of temporarily removing a defendant for resentencing, so the committee decided not to reference a specialized removal order in the rule.

The committee then discussed creating a mechanism in the rule for a defendant to waive the right to be personally present for resentencing in writing but expressed concern about possible statutory conflicts. Penal Code section 977(b)(1) states that a defendant's written waiver of personal presence must be executed in open court, and Penal Code section 1193(a) provides, in

relevant part, that a defendant may waive the right to be present for judgment in a felony conviction in open court and on the record, or in a notarized writing. However, the Supreme Court has upheld out-of-court written waivers for voir dire and a hearing to relieve defense counsel in a capital case because they substantially complied with section 977.<sup>1</sup> Under this reasoning, an out-of-court written waiver that substantially complies with statutory requirements may be sufficient, and accordingly, the committee decided to include a provision allowing a defendant to submit a written waiver of the right to be personally present with language adapted from sections 977(b)(2) and 1193(a). Further, the committee is tracking pending legislation allowing for an out-of-court written waiver for felony judgments, which would provide a clear statutory basis for a defendant to file a written waiver of the right to be present. The committee considered not addressing the issue of waiving personal presence but decided to include a waiver provision in the draft rule, recognizing that it likely will be a point of interest to commenters.

### **Fiscal and Operational Impacts**

This proposal may result in greater costs to the courts because it sets up formal procedures for handling resentencing recommendations. However, the proposed procedures provide a measure of clarity to courts receiving these recommendations.

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<sup>1</sup> See *People v. Price* (1991) 1 Cal.4th 324, 406.

## 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?
- Should the rule address a defendant's ability to waive the defendant's physical presence at resentencing?

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 three 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. Proposed Cal. Rules of Court, rule 4.520, at pages 6–10
2. Link A: Penal Code section 1170,  
[http://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?sectionNum=1170.&lawCode=PEN](http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1170.&lawCode=PEN)
3. Link B: Assembly Bill 1812 (Stats. 2018, ch. 36),  
[http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201720180AB1812](http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB1812)
4. Link C: Emergency Regulations in Temporary Effect for Penal Code Section 1170(d) Recall and Resentence Recommendation (Cal. Code Regs., tit. 15, §§ 3076, 3076.1, 3076.2, 3076.3, 3076.4, 3076.5), [https://www.cdcr.ca.gov/regulations/wp-content/uploads/sites/171/2020/02/Recall-and-Resentence-Emergency-Regulations.pdf?label=Emergency%20Regulations%20in%20Temporary%20Effect%20for%20Penal%20Code%20Section%201170\(d\)%20Recall%20and%20Resentence%20Recommendation&from=https://www.cdcr.ca.gov/regulations/adult-operations/new-rules-page/](https://www.cdcr.ca.gov/regulations/wp-content/uploads/sites/171/2020/02/Recall-and-Resentence-Emergency-Regulations.pdf?label=Emergency%20Regulations%20in%20Temporary%20Effect%20for%20Penal%20Code%20Section%201170(d)%20Recall%20and%20Resentence%20Recommendation&from=https://www.cdcr.ca.gov/regulations/adult-operations/new-rules-page/)

Rule 4.520 of the California Rules of Court would be adopted, effective January 1, 2021, to read:

1 **Rule 4.520. Recommendations to recall a sentence and resentence a defendant**  
2 **under Penal Code section 1170(d)(1)**

3  
4 **(a) Application**

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6 This rule applies to recommendations under Penal Code section 1170(d)(1) by the  
7 Secretary of the California Department of Corrections and Rehabilitation or the  
8 Board of Parole Hearings in the case of state prison inmates, the county  
9 correctional administrator in the case of county jail inmates, or the district attorney  
10 of the county in which the defendant was sentenced, to recall a previously imposed  
11 sentence and resentence a defendant.

12  
13 **(b) Definitions**

- 14  
15 (1) Equitable considerations include eliminating the disparity of sentences and  
16 promoting uniformity of sentencing.  
17  
18 (2) A clerical error is one made in recording the judgment. It can be made by a  
19 clerk, counsel, or the court.  
20

21 **(c) Original sentencing judge**

- 22  
23 (1) A recommendation to recall a sentence and resentence a defendant must go  
24 before the original sentencing judge who entered judgment of conviction in  
25 the case.  
26  
27 (2) If the original sentencing judge is unavailable, the presiding judge or the  
28 presiding judge's designee must assign a judge.  
29

30 **(d) Initial review**

- 31  
32 (1) The court must conduct an initial review of the request to recall a sentence  
33 and resentence a defendant to determine if the recommendation is based on:  
34  
35 (A) An unauthorized sentence;  
36  
37 (B) Clerical error; or  
38  
39 (C) Equitable considerations.  
40

- 1 (2) The court must consider specific facts related to equitable considerations  
2 specified in the recommendation for resentencing.  
3  
4 (3) When based on equitable considerations, the court must appoint counsel for  
5 the defendant if the court sets a status conference or hearing.  
6

7 **(e) Summary disposition**  
8

- 9 (1) The court may summarily deny a recommendation to recall a sentence and  
10 resentence the defendant if it finds that the basis for the recommendation is  
11 facially incorrect, or the court may decline to exercise its discretion to recall a  
12 sentence and resentence the defendant if the recommendation fails to state  
13 sufficient facts warranting resentencing.  
14  
15 (2) If the court intends to summarily deny a recommendation to recall a sentence  
16 and resentence the defendant, the court must notify the prosecuting agency  
17 and defense counsel of record of such intention and its reasons.  
18  
19 (3) The prosecuting agency or defense counsel may request a status conference  
20 or hearing if either disagrees with the court's proposed summary disposition  
21 of the recommendation. The matter must be set for a status conference  
22 following an objection to the court's proposed summary disposition.  
23  
24 (4) If no party requests a status conference or hearing within 10 court days, the  
25 summary disposition of the recommendation to recall a sentence and  
26 resentence the defendant must be noted on a minute order.  
27  
28 (5) The court must send copies of a minute order reflecting a summary  
29 disposition to the facility where the defendant is housed, the recommending  
30 agency, the prosecuting agency, and defense counsel of record.  
31

32 **(f) Tentative response for recommendations based on factors other than equitable**  
33 **considerations**  
34

- 35 (1) If the recommendation is based on factors other than equitable  
36 considerations, the court may prepare a tentative response and send it to the  
37 prosecuting agency and defense counsel of record for comment within 10  
38 court days.  
39  
40 (A) If no objection is received, the court must send its response to the  
41 recommending agency, with an amended abstract of judgment if the  
42 defendant is in state prison and the court corrects the sentence.  
43

1 (B) If there is an objection, the matter must be set for a status conference or  
2 hearing.

3  
4 **(g) Status conference**

- 5  
6 (1) The purpose of the status conference is to determine whether a hearing  
7 should be scheduled on the recommendation to recall the defendant's  
8 sentence.  
9  
10 (2) The defendant need not be present for the status conference.  
11  
12 (3) If the parties agree on a new sentence at the status conference, the court may  
13 recall the sentence and resentence an absent defendant if the defendant  
14 provides a written waiver of the right to be present in accordance with the  
15 requirements for a written waiver listed in (g)(4), if defense counsel is present  
16 at the sentencing, and if the court approves of the defendant's absence. The  
17 defendant may also appear for resentencing through a videoconference  
18 system without a written waiver.  
19  
20 (4) The written waiver must substantially state the following:  
21  
22 (A) The defendant has been advised of the right to be personally present for  
23 sentencing;  
24  
25 (B) The defendant waives the right to be personally present for sentencing;  
26  
27 (C) The defendant requests the court to sentence the defendant in absentia;  
28 and  
29  
30 (D) The defendant agrees that the defendant's interests are represented by  
31 the presence of the defendant's attorney the same as if the defendant  
32 were personally present.  
33  
34 (5) If there is no resolution at the status conference, the court must set a  
35 contested hearing.  
36

37 **(h) Hearing and resentencing**

- 38  
39 (1) The defendant's presence at the hearing and resentencing may be waived if  
40 there is a written waiver of the right to be personally present in accordance  
41 with the requirements for a written waiver listed in (g)(4). If the defendant's  
42 presence is waived, defense counsel must be present on behalf of the  
43 defendant.



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- (2) The defendant may appear at the hearing and resentencing through a videoconference system without a written waiver.
  
- (3) A court resentencing under Penal Code section 1170(d)(1) must apply the sentencing rules in the California Rules of Court so as to eliminate disparity of sentences and to promote uniformity of sentencing.
  
- (4) The court may consider any factors that were present at the original sentencing, including:
  - (A) Whether consecutive sentences could have been imposed; and
  - (B) The terms of a negotiated plea, including whether charges or cases were dismissed. The court must not deny a resentencing recommendation solely because the original sentence resulted from a negotiated plea.
  
- (5) Under Penal Code section 1170(d)(1), the court may consider postconviction factors, including:
  - (A) The defendant’s disciplinary record and record of rehabilitation while incarcerated;
  - (B) Evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the defendant’s risk for future violence; and
  - (C) Evidence that reflects that circumstances have changed since the defendant’s original sentencing so that the defendant’s continued incarceration is no longer in the interest of justice.
  
- (6) After the hearing, if the court determines that no change in the sentence is to be made, it must issue an order stating the reasons for the determination and enter the order in the minutes. A copy of the minute order must be sent to the recommending agency.
  
- (7) If the court finds it necessary to correct an unauthorized sentence or clerical error, it must issue an order vacating the sentence, state the reasons for doing so, and indicate the correct sentence. The court must state its reasons either orally on the record or in a written order.

1 (8) If the court decides to exercise its discretion to recall a sentence and  
2 resentence a defendant for equitable reasons, it must state the reasons for  
3 doing so, and indicate the new sentence. The court must state its reasons  
4 either orally on the record or in a written order.  
5

6 (9) If the court corrects a sentence or recalls a sentence and resentsences the  
7 defendant, and the defendant is in state prison, an amended abstract of  
8 judgment must be sent by the court to the California Department of  
9 Corrections and Rehabilitation.

10

11 **(i) Probation report**

12

13 (1) A supplemental probation report is not required for resentencing, but a report  
14 must be prepared if ordered by the court based on the request of either party  
15 or on the court's own motion.