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Your Responsibility When Using the Information Provided Below:

When putting this material together, we did our best to give you useful and accurate information because we know that prisoners often have trouble getting legal information and we cannot give specific advice to all prisoners who ask for it. The laws change often and can be looked at in different ways. We do not always have the resources to make changes to this material every time the law changes. If you use this pamphlet, it is your responsibility to make sure that the law has not changed and still applies to your situation. Most of the materials you need should be available in your facility's law library.

Penal Code § 1170(d)(1) CDCR Resentencing Recommendations (AB 1812) (September 2018)

In June 2018, the Legislature passed and Governor Brown signed Assembly Bill (AB) 1812, which amended Penal Code § 1170(d)(1). The new law took effect immediately.

Penal Code § 1170(d)(1) authorizes a court to recall a sentence and resentence a person to a lesser sentence in two circumstances: (1) on the court's own motion within 120 days after sentencing, or (2) *at any time* upon a recommendation from the California Department of Corrections (CDCR) or the Board of Parole Hearings (BPH) (or, for people in county jails, a recommendation from the county correctional administrator). The CDCR's current regulations about § 1170(d)(1) sentence recall recommendations are in the California Code of Regulations, Title 15, §§ 3076-3076.2 (these have not been modified since AB 1812 took effect). In the past, the CDCR rarely used its authority to recommend sentence recalls.

AB 1812 made changes that may help more people get CDCR recommendations for resentencing and also may help more people actually get resentenced. The text of the new Penal Code § 1170(d)(1) is at the end of this letter. Here is a summary of the changes made by AB 1812:

- ◆ Perhaps most importantly, AB 1812 grants additional funds to the CDCR to investigate potential cases to refer for recall of sentence.
- ◆ § 1170(d)(1) now specifically states that courts have authority to recall sentences imposed after *plea agreements*, as well as sentences imposed after trials.
- ◆ § 1170(d)(1) was modified to state that courts have authority to recall a sentence and resentence a person if "it is in the interests of justice." This language could cause the CDCR to expand the scope of the cases for which it recommends recalls of sentences and could encourage courts to grant resentencing in more situations. As in the past, if a court

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decides to resentence someone, the court must apply the sentencing rules “so as to eliminate disparity of sentences and to promote uniformity of sentencing.”

- ◆ § 1170(d)(1) was modified to specifically allow courts to consider post-conviction factors when resentencing a person, including (but not limited to) the person’s disciplinary record and record of rehabilitation while incarcerated, evidence of whether age, time served, and diminished physical condition (if any) have reduced the person’s risk for future violence, and evidence that reflects that circumstances have changed since the person’s original sentencing so that continued incarceration is no longer in the interest of justice.

It appears that the CDCR has broad discretion under the new law to decide which sentences to recommend for recall. As of early August 2018, the CDCR says it had made over 300 referrals for recall of sentence and is referring about 40 new cases a week in response to AB 1812. Most of these are cases in which the CDCR believes the sentence imposed by the court was not lawful under the sentencing laws, and a few are cases in which a person demonstrated exceptionally meritorious conduct in prison.¹

At this point, it is not known how many or what types of cases the CDCR will recommend for recall. Prison Law Office hopes that CDCR will continue to refer for resentencing cases in which a person received an illegal sentence, or has demonstrated exceptionally meritorious conduct. We also hope CDCR will recommend recalls in situations where new statutes or court decisions reduce the length of sentences as to future cases (and sometimes also require resentencing of people whose cases are not yet final), but the new statutes or court decisions did not provide any relief for people whose cases were already final. We further hope the CDCR might recommend recalls in some cases where people previously filed petitions asking for discretionary resentencing under Propositions 36, 47, or 64, but were denied resentencing. But again, it is not known what the CDCR will do.

We also do not know whether the CDCR will consider requests from prisoners or their attorneys or advocates asking to be recommended for sentencing reconsideration, and there is no set process for making requests. If you believe your case should be reviewed for a recall recommendation, you can try sending a written request to your counselor, the prison warden, and the CDCR Secretary, P.O. Box 942883, Sacramento, CA 94283. However, at this point, we do not know whether or when prison officials will act on such requests.

If you are wondering whether changes in the criminal laws make your sentence “disparate” (unfairly harsh) compared to the sentences that courts are allowed to impose under current laws, you can try writing to the lawyer who represented you in your trial or plea, and/or the lawyer who represented you in your direct criminal appeal to see if that lawyer can give you more information or advice. (Note: If you provided us with information about your case, and if we have any information about changes in the laws that might be relevant to your case, that information should be included with this letter.)

¹This information was provided to Prison Law Office by the Stanford Three Strikes and Justice Advocacy Project.

It also appears that courts have broad discretion in deciding whether or not to resentence someone. There may be legal disputes about when and how courts exercise their discretion. In addition, there may be legal disputes about what procedures a court should use when the CDCR recommends a recall of sentence, such as whether the person is entitled to notice of the recommendation, a hearing, and to present evidence, and whether the person is entitled to attend any court hearings that are held.

We will update this letter when we have new information about how CDCR and the courts are implementing the changes to Penal Code § 1170(d)(1).

TEXT OF CURRENT PENAL CODE § 1170(d)(1), effective June 27, 2018:

When a defendant subject to this section or subdivision (b) of Section 1168 has been sentenced to be imprisoned in the state prison or a county jail pursuant to subdivision (h) and has been committed to the custody of the secretary or the county correctional administrator, the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the secretary or the Board of Parole Hearings in the case of state prison inmates, or the county correctional administrator in the case of county jail inmates, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence. The court resentencing under this subdivision shall apply the sentencing rules of the Judicial Council so as to eliminate disparity of sentences and to promote uniformity of sentencing. 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 since the inmate's original sentencing so that the inmate's continued incarceration is no longer in the interest of justice. Credit shall be given for time served.