


SPECIAL DIRECTIVE 22-05

TO: ALL DEPUTY DISTRICT ATTORNEYS

FROM: GEORGE GASCÓN   
District Attorney

SUBJECT: RESENTENCING IN POSTCONVICTION CASES; PROSECUTION-INITIATED RESENTENCING REQUESTS.

DATE: JULY 25, 2022

This Special Directive supersedes portions of the Resentencing Policy set forth in Special Directive (SD) 20-14 relating to postconviction resentencing procedures and protocols.

**Introduction**

Through recent legislation, the California Legislature has refined the authority of prosecutors and the California Department of Corrections and Rehabilitation (CDCR) by allowing each to initiate resentencing proceedings. The Legislature further highlighted in express statutory findings the heavy fiscal burden and social costs to Californians of inordinately long sentences where shorter prison terms would achieve accountability, punishment, and public safety goals. (See, Stats. 2021, c. 719, § 1, (A.B. 1540).) In Assembly Bill 1540, effective January 1, 2022, the Legislature made the following findings with respect to incarceration and resentencing:

- (a) Starting in the mid-1970s, rates of incarceration in California began to rise rapidly in an unprecedented manner.
- (b) There are currently approximately 35,000 people serving life sentences in California state prisons, representing 38 percent of the prison population.
- (c) According to the California Department of Corrections and Rehabilitation, as of June 2019, approximately 24 percent of the California prison population was over 50 years of age.
- (d) According to the Committee on Revision of the Penal Code's 2020 Annual Report:
  - (1) It costs taxpayers approximately \$83,000 per year to keep someone in state prison.
  - (2) Researchers have found that lengthy sentences and high rates of incarceration have diminishing returns in reducing crime rates.
  - (3) There is almost no evidence that long sentences deter the crimes they are intended to deter.
  - (4) Research shows that criminal involvement diminishes dramatically after an individual reaches 40 years of age and even more after 50 years of age.
  - (5) Crime rates in California have decreased steadily since the 1990s. This drop has continued alongside reductions in the California prison population and alongside the enactment of numerous criminal justice reforms.

- (6) According to a survey by Crime Survivors for Safety and Justice and Californians for Safety and Justice, most crime victims in California support additional reforms to our criminal legal system. According to the survey, 75 percent of surveyed victims favor reducing sentence lengths for people in prison who are assessed as a low risk to public safety.
- (e) In recent years, Californians have repeatedly and consistently embraced reforms to reduce California’s prison population.
- (f) Under existing law, any person incarcerated in a state prison or county jail can only be referred for resentencing by a law enforcement agency, such as the Secretary of the Department of Corrections and Rehabilitation, a district attorney, or the Board of Parole Hearings.
- (g) These law enforcement agencies devote significant time, analysis, and scrutiny to each referral that they make.
- (h) It is the intent of the Legislature for judges to recognize the scrutiny that has already been brought to these referrals by the referring entity, and to ensure that each referral be granted the court’s consideration by setting an initial status conference, recalling the sentence, and providing the opportunity for resentencing for every felony conviction referred by one of these entities.
- (i) It is the intent of the Legislature that resentencing proceedings pursuant to Section 1170.03 of the Penal Code<sup>1</sup> apply ameliorative laws passed by this body that reduce sentences or provide for judicial discretion, regardless of the date of the offense or conviction.

(Stats. 2021, c. 719, § 1, (A.B. 1540).)

Moreover, in Assembly Bill 200, the legislature moved the statute authorizing prosecution-initiated resentencing from Article 1of Chapter 4.5 of Title 2 of the Penal Code on Initial Sentencing to Article 1.5 on Recall and Resentencing in order to make it clear that a prosecutor has authority to resentence individuals who were imprisoned for life or sentenced to death. (See Penal Code section 1172.1, Stats. 2022, c. 58 (A.B. 200, effective July 1, 2022).)

In accordance with recently enacted laws and to provide additional guidance to deputies on how to resentence individuals in postconviction cases, prosecution-initiated resentencing petitions and CDCR resentencing requests, the following sections will be added to the Legal Policies Manual (LPM): §17.09 Resentencing in Post-Conviction Cases; §17.09.1 Prosecution-Initiated Resentencing Requests; §17.09.2 The Resentencing Unit; §17.09.3 Prosecution-Initiated Resentencing Requests Outside of the Resentencing Unit; and §17.09.4 Reentry Programs and Parole Supervision.

The LPM is amended to add the following sections:

**17.09 RESENTENCING IN POSTCONVICTION CASES**

Postconviction resentencing cases are defined as any case wherein a defendant or petitioner is legally eligible for resentencing, or recall of sentence, by way of:

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

- Habeas corpus cases.
- Cases remanded to Superior Court by the Court of Appeal or Supreme Court.
- Cases referred to the Superior Court under section 1172.1 (formerly sections 1170, subd. (d) or and 1170.03).
- Cases pending resentencing under sections 1170, subdivision (e), 1170.126, 1170.127, 1170.18, 1170.91, 1172.7 (formerly section 1171), and 1172.75 (formerly section 1171.1).
- Any other case that may be the subject of resentencing not specified here other than those involving felony murders or murders under the natural and probable consequences doctrine or other theory under which malice is implied to a person based solely on that person's participation in a crime, attempted murder under the natural and probable consequences doctrine, or manslaughter pursuant to section 1172.6 (formerly section 1170.95). Defense-initiated resentencing petitions filed pursuant to section 1172.6 (commonly referred to as murder resentencing cases) are governed by policies specific to those cases.

In all non-CDCR and non-prosecution-initiated postconviction resentencing cases where the defendant or petitioner is serving a sentence that is higher than what they would receive today due to current law, the deputy handling the matter shall not oppose resentencing unless the defendant or petitioner is an unreasonable risk of danger to public safety as evidenced by compelling and imminent public safety concerns which include post-conviction factors. If the deputy believes the defendant poses such a risk, the deputy must submit those concerns in writing to their Head Deputy for approval. If the potential resentencing involves a defendant who was under 18 years of age at the time of the offense, the Chief Deputy or their Designee shall be notified. (See GOM 22-015 on Notification Requirements for Cases Involving Minor Defendants.)

In all postconviction resentencing cases where the defendant has been recommended for resentencing by the CDCR pursuant to section 1172.1, the court must appoint counsel and set a status conference within 30 days of receiving the recommendation. (§1172.1, subd. (b)(1).) This section sets forth a presumption that resentencing shall be granted unless the court finds the defendant is an unreasonable risk to public safety as defined in section 1170.18, subdivision (c). (§1172.1, subd. (b)(2).) Hence, the deputy handling the matter shall not oppose resentencing unless the defendant is an unreasonable risk of danger to public safety, i.e. at risk of committing a new violent felony. If the deputy believes the defendant poses such a risk, the deputy must submit those concerns in writing to their Head Deputy for approval. If the CDCR recommendation is based on exceptional/meritorious conduct, their Head Deputy shall additionally seek authorization to oppose resentencing from the Director of Prosecution Support Operations.

CDCR initiated resentencing requests based on a medical urgency or requesting a compassionate release will be handled by the Branch/Unit where the case is before the court. Deputies handling these cases shall not oppose release absent evidence that the individual is an unreasonable risk of danger to public safety as evidenced by compelling and imminent public safety concerns which include post-conviction factors. If a deputy believes the individual poses such a risk, the deputy

must submit those concerns in writing to their Head Deputy for approval. The Head Deputy shall additionally seek authorization to oppose CDCR's recommendation from the Director of Prosecution Support Operations.

The Branch or Unit will also handle all other defense initiated resentencing requests including those made pursuant to Senate Bill 483 which went into effect on January 1, 2022 and relates to incarcerated persons whose sentences include enhancements under Health and Safety Code section 11370.2 or section 667.5, subdivision (b). Objections to such requests shall only be made where there is "clear and convincing evidence that imposing a lesser sentence would endanger public safety." If a deputy believes the individual poses such a risk, the deputy must submit those concerns in writing to their Head Deputy for approval.

Deputies handling postconviction resentencing cases shall ensure adherence to the constitutional and statutory rights of victims at resentencing proceedings.

### **17.09.1 PROSECUTION-INITIATED RESENTENCING REQUESTS**

Pursuant to section 1172.1, deputies may initiate a request to recall and resentence an individual when continued incarceration of the individual is no longer in the interest of justice. In deciding to initiate such a request, deputies should consider the pre-conviction and postconviction factors outlined in both statutes as well as recently amended section 1385.

Pre-conviction factors to be considered include if the defendant has experienced psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence; if the defendant was a victim of intimate partner violence or human trafficking prior to or at the time of the commission of the offense; if the defendant is a youth or was a youth as defined under subdivision (b) of section 1016.7 at the time of the commission of the offense; and whether those circumstances were a contributing factor in the commission of the offense. (§ 1172.1, subd. (a)(4)). Postconviction factors to be considered include, but are not limited to, the disciplinary record and record of rehabilitation of the defendant while incarcerated and evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the defendant's risk for future violence and evidence that reflects a change in circumstances since the original sentencing so that continued incarceration is no longer in the interest of justice. (*Ibid.*)

Recent legislative amendments to section 1385, intended to improve fairness in sentencing, will also be of value to deputies. Specifically, section 1385, subdivision (c)(1) which requires courts to dismiss an enhancement if doing so is in the furtherance of justice, and section 1385, subdivisions (c)(2)(A)-(I), lists nine nonexclusive factors to be used in making that determination that "weigh greatly" in favor of dismissal.

Moreover, section 1172.1, subdivision (a)(2) provides that, in recalling and resentencing under this section, the court "shall apply the resentencing rules of the Judicial Council and apply any changes in law that reduce sentences or provide for judicial discretion so as to eliminate disparity of sentences and to promote uniformity of sentencing." With the concurrence of the District Attorney and the defense, the court may also "vacate the defendant's conviction and impose judgment on any necessarily included lesser offense or lesser related offense, whether or not that

offense was charged in the original pleading, and then resentence the defendant to a reduced term of imprisonment. (§ 1172.1, subd. (a)(3)(B).)

Section 1172.1 further states there is a presumption favoring recall and resentencing of the defendant upon the recommendation of the prosecution. The presumption can only be overcome if a court finds the defendant is an unreasonable risk of danger to public safety (§ 1172.1, subd. (b)(2)) and requires the court to state on the record the reasons for its decision to grant or deny recall and resentencing (§ 1172.1, subd. (a)(6)).

Lastly, whenever a prosecution-initiated resentencing petition is before the court, only the deputy assigned to litigate the matter, or their designee, may appear on the record as a representative of the People. If the assigned deputy, or their designee, is unable to personally appear on the matter, then it is the responsibility of the assigned deputy to seek coverage and have a deputy stand-in on the matter and continue it to a date convenient with the assigned deputy.

### **17.09.2 THE RESENTENCING UNIT**

The Resentencing Unit (RU) will evaluate cases of incarcerated individuals whose sentences are inconsistent with current law and who have served more than ten years in custody. Due to the large number of cases that meet these criteria, the RU has developed guidelines outlining the types of cases they will prioritize for review. (See <https://da.lacounty.gov/policies/resentencing>.) Exceptions may only be made with the concurrence of the Director of Prosecution Support Operations.

CDCR initiates resentencing requests and submits them to the court for a variety of reasons. When the reason for the referral is due to a change in the law or because of an individual's meritorious or exceptional conduct while incarcerated pursuant to section 1172.1, the RU will handle those cases.

In seeking resentencing under section 1172.1, deputies may argue that resentencing is necessary to eliminate disparity in sentences and to promote uniformity in sentencing. Additionally, deputies should assist the court by setting forth post-conviction factors relevant to resentencing, including, but not limited to: mitigation evidence; CDCR disciplinary records and records of rehabilitation and positive programming while incarcerated; evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the risk for future violence; evidence that reflects that circumstances have changed since the original sentencing so that continued incarceration is no longer in the interest of justice; and post-release reentry plans, demonstrating any family or community support that is available upon release.

The Deputy-in-Charge of the RU is responsible for keeping records of all CDCR and prosecution-initiated resentencing cases filed pursuant to section 1172.1.

### **17.09.3 PROSECUTION-INITIATED RESENTENCING REQUESTS OUTSIDE OF THE RESENTENCING UNIT**

Many cases which fall outside of those prioritized for review by the RU may, nonetheless, be appropriate for resentencing. If a case comes to a deputy's attention which warrants resentencing

in the interests of justice but is not being prioritized or being handled by the RU, the deputy may initiate a resentencing request on their own motion with the concurrence of their Head Deputy. Any deputy who submits a resentencing request pursuant to section 1172.1 shall upload the request to the eFolder and notify the Deputy-in-Charge of the RU of the filing of the request and outcome.

#### **17.09.4 REENTRY PROGRAMS AND PAROLE SUPERVISION**

Studies have found that the likelihood of re-arrest of individuals released from custody who participated in a reentry program for at least seven months decreased by eight percentage points, while those who participated for nine months decreased by 13 percentage points with the rate of reconviction declining by 11 percentage points. (Effects of Male Community Reentry Program (MCRP) on Recidivism in the State of California, Stanford University School of Public Policy, Published June 2021.) Thus, where a sentence in a postconviction case will result in immediate release, deputies shall request the following, absent approval from their Head Deputy:

- A time waiver to ensure the individual can be placed on parole to the CDCR Division of Parole Operations or to the Post Release Community Supervision branch of the Probation Department for a minimum period of one year; and
- Acceptance into a residential reentry program for a minimum of nine months.

Additionally, if there are special needs or concerns such as a prior substance abuse problem or current mental health issue, the deputy shall request that the reentry program be able to provide services to address these issues. Deputies should ensure that the minute order appropriately reflects the defendant's time waiver and the above conditions/recommendations. The Deputy-in-Charge of the RU can provide additional guidance and referrals to deputies on reentry program-related issues

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