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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 people often have trouble getting legal information and we cannot give specific advice to everyone who asks 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 § 1172.1 Resentencing**  
**Recommended by CDCR (or the County Sheriff) or the District Attorney,**  
**or Initiated by the Sentencing Court**  
(updated November 2023)

This letter is for people who want information about whether and how they can get resentenced under Penal Code § 1172.1. Although you and your family or advocates cannot file a petition for resentencing under § 1172.1, this letter discusses steps you can take to try to get CDCR or a DA to recommend you for resentencing or to ask a court to consider resentencing you “on its own motion.”

Unfortunately, we cannot provide individual advice, advocacy, or representation regarding resentencing. This letter answers common questions about how § 1172.1 resentencings get started, reasons why cases can be resentenced, and what to expect if your case is considered for resentencing.

**Background:** Penal Code § 1172.1 (formerly § 1170(d)(1) and § 1170.03) allows a court to recall (take back) a sentence and resentence someone to a shorter term *at any time*, even after their case is no longer on appeal. This law has changed a lot in the past few years. Most recently, in October 2023, the Governor signed Assembly Bill 600, which makes further changes to the law that will go into effect on January 1, 2024. There may be legal disputes about the law, and we will try to update this letter if we get information about any important new developments.

The recall and resentencing process can be started by a recommendation from the California Department of Corrections (CDCR), the Board of Parole Hearings (BPH), the District Attorney's (DA's) office, the Attorney General's (AG's) Office (if you were originally prosecuted by the AG), or the local sheriff or correctional administrator (if you are serving a felony term in county jail). As of January 1, 2024, sentencing courts also have independent authority to start recall and resentencing processes in some circumstances. The law allows resentencing even if a person pled no contest or guilty for a specific sentence or range of sentence, and regardless of whether the person is in or out of custody.

**I. What Types of Cases Does CDCR Recommend for Resentencing? Can I Ask CDCR to Recommend Me?**

CDCR has rules and processes for recommending § 1172.1 resentencing for people who are in CDCR custody. The CDCR rules are in Title 15 of the California Code of Regulations at §§ 3076-3076.2 and § 3076.5. There is also information about CDCR's policies on the CDCR website at <https://www.cdcr.ca.gov/family-resources/recall-resentencing/>.

NOTE: For people who are sentenced to serve felony terms in county jail, the county sheriff's offices have their own policies about what, if any, cases they recommend for resentencing. If you are sentenced to county jail, you should ask jail staff about the sheriff's policy and whether your case might be referred for resentencing.

There are four types of situations in which CDCR will consider making a recommendation:

**(1) Sentencing errors or discrepancies:** CDCR can refer your case for resentencing if case records staff find that the sentencing court made a clear error when it sentenced you or that your sentence is unlawful due to new legislation or case law. CDCR case records unit staff review people's sentencing documents and new laws to identify cases for these types of referrals. If there is an error in your sentence, CDCR should refer your case to the court unless you already have a release date within the next six months.

**(2) Changes in sentencing laws:** CDCR can refer your case for resentencing if there are changes to the laws and you could get a lower sentence if you were sentenced under the new law, even though the new law doesn't automatically apply to you. Staff from CDCR case records and classification services review people's sentencing documents and new laws to identify cases for these types of referrals, and then review the person's prison file to prepare a case report. Even if there has been a change in the sentencing law that could be applied to you, you must meet five other requirements before CDCR will recommend resentencing. Those requirements are:

- you have served five continuous years in CDCR custody
- you have not been found guilty of a serious or violent rule violation (Division A-D) within the last year, and you do not have a current serious or violent rule violation charge
- you are not scheduled for release within the next 18 months
- you are not eligible for parole consideration within the next 18 months
- you have not already had a parole suitability hearing

If either case records staff or the CDCR Secretary decides not to proceed with a recommendation, then your case can be reevaluated again by CDCR staff after two years.

**(3) Exceptional conduct:** CDCR can refer your case for resentencing if you have had excellent behavior and participation in rehabilitation programs in prison for a long period of time. Even if you have exceptional conduct, you must meet eight other requirements before CDCR will recommend resentencing. Those requirements are:

- you are not required to register under Penal Code § 290 for a tier 2 or 3 sex offense (offenses that require a minimum of either 20 years or life-long registration)
- you have served at least 10 continuous years in CDCR custody
- you have not been found guilty of a serious or violent rule violation (Divisions A-D) within the last 5 years, and must not have a current serious or violent rule violation charge
- you are not already scheduled for release within the next 18 months
- you are not be already eligible for any type of parole consideration within the next 18 months
- you have not already had any type of parole suitability hearing
- you are not already serving the lowest legal term for a single offense

CDCR staff who know you well and are impressed by your behavior can ask the Warden to request an evaluation of your case for an exceptional conduct recommendation. If the Warden agrees, classification services staff will review your social history, criminal record, sentencing documents, and prison file. They will prepare a report and decide whether to refer your case to the CDCR Secretary. If case records staff or the CDCR Secretary decides not to proceed with a recommendation, your case can be reevaluated again after two years.

**(4) Request from a law enforcement agency, prosecutorial agency, or judicial officer:** CDCR can refer you for resentencing upon request by a police or sheriff's department, a prosecutor, or a court. This sometimes happens when someone has helped in the investigation of a crime, but it can happen in other situations as well.

The CDCR Secretary has the final say on which people to recommend for resentencing. The CDCR Secretary is supposed to make a decision within 10 business days after receiving a referral from classification or case records staff. You should get a notice if the classification or case records staff decide not to send your case to the CDCR Secretary or if the CDCR Secretary decides not to recommend your case to the court. If the CDCR Secretary decides not to recommend your case to the court, you cannot submit a grievance or appeal challenging the Secretary's decision.

If the CDCR Secretary refers your case to the court, the Secretary will send a letter stating that CDCR is recommending resentencing under § 1172.1. You should be provided with a copy of the letter and any report that is sent with the letter. The court will then hold proceedings as described in sections IV and V of this letter.

The CDCR Secretary will not consider a request for a recommendation made directly by you or your family, friends, or advocates, and you cannot petition a court to force the CDCR Secretary to

make a referral. However, if you think you meet the requirements for a recommendation, you can ask a local staff member, such as your correctional counselor, to bring your case to the attention of the Warden. If you think there is a sentencing error or discrepancy or a change in the sentencing laws in your case, you can also ask the case records office to determine whether you are eligible for resentencing. If you think that CDCR staff are not following CDCR's rules about what cases they will refer to the CDCR Secretary, then you can file a 602-1 administrative grievance and, if necessary, a 602-2 administrative appeal.

## **II. What Types of Cases Do District Attorneys Recommend for Resentencing? Can I Ask the DA to Recommend Me?**

Each county DA's office decides which types of cases it will or will not recommend for sentencing, and has its own process for screening cases. Some DAs actively recommend certain types of cases for resentencing and other DAs might not recommend any cases at all. You cannot petition to court to force the DA to make a referral. If you want information or advice about whether you can get a DA recommendation, contact the public defender's office for the county where you were sentenced. Alternatively, you could try contacting the attorney who represented you at sentencing in your criminal appeal.

## **III. What Types of Cases Can a Court Resentence "On Its Own Motion?" Can I Ask a Court to Consider Resentencing Me?**

Effective January 1, 2024, § 1172.1 allows a sentencing court to resentence you on its own motion (without a recommendation by a DA or correctional agency) "if the applicable sentencing laws at the time of the original sentencing are subsequently changed by a new statutory authority or case law." Resentencing can be started by the judge who originally sentenced you or by another judge who gets assigned to your case. However, the law says that you are "not entitled to file a petition" seeking resentencing, and that if you send the court a request for resentencing, "the court is not required to respond."

As discussed in sections IV and V of this letter, you have many more rights if CDCR, the DA, or the sheriff recommends you for resentencing than if you directly ask the court for resentencing. Also, as discussed in sections I and II of this letter, CDCR, the DA, or the sheriff can recommend you for resentencing even if there has not been a change in the sentencing laws that could apply to you. Thus, you should review the information in sections I and II of this letter and take any steps you can to try to get a recommendation.

If you cannot get a recommendation from CDCR, the DA, or the sheriff, you should contact the public defender's office for the county where you were sentenced. The public defender's office may be able to give you advice about how to make a strong resentencing request directly to the court or they may be able to prepare and submit a resentencing request for you. Alternatively, you could try

asking for help from the attorney who represented you at sentencing, your criminal appeal attorney, or a private criminal defense attorney who works in the county where you were convicted.

If you cannot get an attorney to help you, then you could send your own request for resentencing to the court. If you do this, you should explain what sentencing law has changed and why resentencing you would not pose a danger to public safety. You should discuss why the factors described in section V of this letter support resentencing you. You also should send any documents that support your request.

NOTE: In some cases, there may be ways *other* than § 1172.1 to get a court to resentence you, such as a resentencing motion, a direct appeal from your sentence, or a state court petition for writ of habeas corpus. A court might have authority to resentence you at any time if your sentence was “unauthorized” when it was originally imposed (meaning that there is no way a court could lawfully have given you that sentence at that time). If the judgment in your case is not yet final when there is a change in the law, you might be entitled to ask for resentencing as part of your direct appeal. There might also be other sentencing issues that you can raise if your case is on direct appeal. If you think you might have one of these situations, you should try to discuss your case with your sentencing attorney or criminal appeal attorney, or with the public defender’s office or another private criminal defense attorney.

#### **IV. What Will Happen If the Court Considers My Case for Resentencing?**

Recall and resentencing proceedings will usually be in front of the county superior court judge who originally sentenced you. However, if that judge is not available, another judge from that court may be assigned to your case.

When CDCR, a DA, or a sheriff recommends you for resentencing, the court must appoint an attorney to represent you and set a status conference within 30 days. The law does not say whether a court must appoint an attorney if the court is considering resentencing you on its own motions (without a recommendation); however, it is likely that the court will appoint an attorney anyway.

If the court is considering resentencing you, it must give you an opportunity to present arguments and information about why you should be resented. Your attorney will prepare briefs explaining why you should be resented, the DA will prepare briefs setting forth their position, and the court will hold a hearing so both sides can present witness testimony and/or oral arguments. However, if you and the DA agree that you should be resented, the court can grant resentencing without holding a hearing. When the court makes its decision, it must state its reasons for denying or granting resentencing.

If the court decides to resentence you, it shall apply any new laws that reduce sentences or provide judicial discretion to impose lesser sentences. The court can either modify the sentence for your convictions or vacate one or more of your convictions and sentence you on lesser crimes. The exception is that if resentencing is on the court’s own motion and your conviction was by a plea bargain, then the court cannot sentence you on a lesser crime unless both you and the DA agree to it.

Your new sentence cannot be longer than your original sentence, and all of the time you have already served in custody should be credited toward your new sentence.

**V. If the Court Considers My Case for Resentencing, What Factors Will the Court Consider?**

Penal Code § 1172.1 sets forth factors a court must consider when deciding whether or not to resentence you and in setting your new sentence. The court shall consider whether certain types of factors contributed to your crime, such as if you experienced psychological, physical, or childhood trauma; if you were a victim of intimate partner violence or human trafficking; or if you were a youth under age 26 at the time of your crime. The court also shall consider post-conviction factors, such as your disciplinary record, your rehabilitation efforts, whether your age, time served, and/or physical condition have reduced your risk for future violence, and other evidence that shows that keeping you in custody is no longer in the “interest of justice.” The court shall also consider any evidence that undermines the integrity of your original conviction or sentence, such as evidence that your constitutional rights were violated.

When CDCR, the DA, or a sheriff recommends resentencing, the sentencing court must recall your sentence and resentence you unless the court finds that you pose an “unreasonable risk” of committing a violent felony “super-strike” crime. It appears from the way § 1172.1 is written that the court does *not* have to apply this standard if it is considering resentencing you on the court’s own motion.

**VI. What Can I Do If the Court Denies (or Has Already Denied) Me Resentencing?**

You have a right to appeal if the court improperly denies you resentencing or makes an error in setting your new sentence. The court should advise you of your right to appeal, and you should talk with your attorney about whether or not to appeal. To appeal, you or your attorney will need to file a notice of appeal in the sentencing court within 60 calendar days after the date on which the court made the decision you want to challenge. If you do appeal, the district court of appeal will review the case to see whether there were any legal errors that affected the sentencing court’s decision. If you cannot afford to hire an attorney, the court will appoint an attorney to represent you during the appeal.

One question that may come up is what you should do if CDCR referred you for resentencing in the past and the court decided not to resentence you using pre-January 2022 versions of the law that gave you fewer rights than the current law. If this happened in your case, and you have a current appeal challenging the denial, you may be able to get the court of appeal to send your case back to the sentencing court for reconsideration under the current law. If you do not have an appeal pending, you can ask prison staff to consider preparing a new referral and sending it to the court so that your case can be reconsidered under the current law.

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Prison Law Office has a free information letter about changes that have been made to the sentencing and enhancement laws in the past few years. You can request the information by writing to Prison Law Office, General Delivery, San Quentin, CA 94964. The information is also available on the Resources page of Prison Law Office's website at <https://prisonlaw.com>.

Ella Baker Center for Human Rights has an August 2022 manual called *Back to Court: a Resentencing Guide for Penal Code § 1172.1 and New Sentence Enhancement Laws in California*, with detailed information about the referral and resentencing processes, and about what you can do to try to get your case considered for resentencing and to persuade a court to resentence you. However, as of this date, that information has not yet been updated to reflect the latest changes to the law. You can write to Ella Baker Center at 1419 34th Ave, Suite 202, Oakland, CA 94601 to get any new materials that they have on this topic. Ella Baker Center also publishes its manuals on the Resources page of its website at <https://ellabakercenter.org/>.