GENERAL OFFICE MEMORANDUM 18-177

TO: ALL DISTRICT ATTORNEY PERSONNEL

FROM: JOSEPH P. ESPOSITO
Chief Deputy District Attorney

SUBJECT: RECENT AMENDMENTS TO PENAL CODE SECTION 1170 (D)(1), EXPANDING THE COURT'S AUTHORITY TO RECALL AND RESENTENCE

DATE: DECEMBER 27, 2018

Two recent bills, Assembly Bills (AB) 2942 and 1812, have amended Penal Code[1] section 1170, subdivision (d)(1), the statutory provision that allows the court to recall and resentence a prisoner who was sentenced to a determinate sentence under section 1170 or to an indeterminate sentence under section 1168, subdivision (b)[2]. The court may recall and resentence a defendant on its own motion within 120 days, or at any time upon the recommendation of the California Department of Corrections and Rehabilitation (CDCR), the Board of Parole Hearings, the county correctional administrator, or the District Attorney. Prisoners do not have standing to directly petition the court for recall and resentencing.

Section 1170, subdivision (d)(1) authorizes the court to recall a sentence within 120 days of the date of commitment on its own motion, or at any time at the recommendation of the secretary of the California Department of Corrections and Rehabilitation (CDCR), the Board of Parole Hearings, or the county correctional administrator. The court is not required to resentence a prisoner, but if it exercises this discretion, it resentences the prisoner "in the same manner as if he or she had not previously been sentenced" and must apply the Judicial Council sentencing rules upon resentencing "so as to eliminate disparity of sentences and to promote uniformity of sentencing." The new sentence cannot be longer than the initial sentence and credit must be given for time served.

AB 2942 added "the district attorney of the county in which the defendant was sentenced" to the list of parties who may recommend that the court recall a sentence under section 1170, subdivision (d)(1). The district attorney can make this recommendation at any time. The legislative history suggests this change is intended to provide the district attorney a vehicle to act if there is "new evidence that casts real doubts on the justice of a sentence." (Assem. Com. on Public Safety, comments on Assem. Bill No. 2942 (2017-2018 Reg. Sess.) April 24, 2018, p. 4.) AB 2942 takes effect on January 1, 2019.

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[1] All further statutory references are to the Penal Code unless otherwise indicated

[2] Indeterminate sentences under section 1168, subdivision (b) include sentences such as death, life imprisonment, and 25-years-to-life. (*People v. Community Release Board* (1979) 96 Cal.App.3d 792, 796; *People v. Felix* (2000) 22 Cal.4th 651, 654.)

AB 1812, added the following language to section 1170, subdivision (d)(1):

> 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.

AB 1812 took effect immediately as urgency legislation. Importantly, AB 1812 did not eliminate any limitations under section 1170, subdivision (d)(1). In particular:

- Prisoners do not have standing to directly petition the court for recall and resentencing. (*People v. Laue* (1982) 130 Cal.App.3d 1055, 1060.)
- The court "may" but is not required to resentence the prisoner.
- Should the court exercise its discretion to resentence the prisoner, sentencing is "in the same manner as if he or she had not previously been sentenced."
- If resentencing occurs, the Judicial Council sentencing rules must be applied "to eliminate disparity of sentences and to promote uniformity in sentencing."

Accordingly, the added language regarding "modify[ing] the judgment, including a judgment entered after a plea agreement" and consideration of post-conviction factors, should be read in the context of these limitations as well as within AB 1812's language requiring the court to act "in the interest of justice." Given these limitations and certain constitutional protections, such as the protection of victims' rights under Marsy's Law, which includes the right "to a prompt and final conclusion of the case and any related post-judgment proceedings" and the right that "sentences shall not be substantially diminished by early release policies intended to alleviate overcrowding in custodial facilities" (Cal. Const., Article I, § 28, (b)(9), (f)(5))[3], resentencing authority if exercised at all, should likely occur only in exceptional cases.

Nonetheless, because sentencing discretion has traditionally been the sole province of the judiciary[4] and plea bargaining and charging discretion has been the sole province of the executive[5], AB 1812's expansion of the court's authority to not only reduce a prisoner's term of imprisonment but also to "modify the judgment, including a judgment entered after a plea

[3] Deputies are reminded that under Marsy's Law, victims must be provided with notice and an opportunity to be heard at any hearing involving post-release decisions or sentencing. (Cal. Const., Art. I, § 28, subd. (b)(8).)

[4] "The imposition of sentence and the sentencing discretion are fundamentally and inherently judicial functions." (*People v. Navarro* (1972) 7 Cal.3d 248, 258.)

[5] The authority to charge and plea bargain cases is within the sole province of the executive branch. (*People v. Clancey* (2013) 56 Cal.4th 562, 574.)

agreement" jeopardizes the People's right to the benefit of the bargain[6] and raises a potential separation of powers challenge.

Although the court has the authority to dismiss charges and certain enhancements in the interests of justice under section 1385, a dismissal in the interest of justice must take into consideration society's legitimate interest, represented by the People, in "'the fair prosecution of crimes properly alleged.' [Citation.]" (*People v. Orin* (1975) 13 Cal.3d 937, 947.) The fair prosecution of crimes cannot exist if the People were to dismiss charges in exchange for a specific punishment only to have the court later unilaterally change that agreement without any recourse to the People.

Should a court endeavor to do more than exercise its authorized sentencing discretion upon resentencing, such as modifying or dismissing the primary charge, then deputies must object on the record to the trial court's actions, including a separation of powers objection. Deputies should then request, through their chain of command, for the Appellate Division to consider challenging the court's decision.

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[6] The People as well as the defendant are entitled to enforce the terms of the plea bargain. (*People v. Collins* (1978) 21 Cal.3d 208, 214.) "The state, in entering a plea bargain, generally contemplates a certain ultimate result; integral to its bargain is the defendant's vulnerability to a term of punishment." (*Id*. at p. 215.)