SELECTED CHANGES TO CALIFORNIA SENTENCING LAWS EFFECTIVE 2022

J. RICHARD COUZENS
Judge of the Superior Court
County of Placer (Ret.)

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I. INTRODUCTION

The 2020-2021 legislative session saw the enactment of broad changes to the California sentencing laws. Virtually all the changes are designed to increase the court's discretion to impose shorter custody terms; in some instances, the legislation directs the court's discretion to impose a lesser sentence. This memorandum will review the following major changes to the Penal Code[1] effective January 1, 2022:

<u>At sentencing:</u>

- §§ 1170 and 1170.1: Limiting the ability of the court to impose an upper term of custody without aggravating factors being found by a jury or admitted by the defendant.
- § 1170, sub. (b)(6): Requiring the imposition of the low term of custody in specified circumstances.
- § 1170, sub. (h)(9): Specifying term for enhancement to be served where the base term is served.
- § 186.22, subd. (b)(3): Extending the existing gang sentencing structure to January 1, 2023.
- § 654: Permitting the court to select the punishment from the triad for any crime when section 654 applies, not just from the triad of the crime having the longest possible term.
- § 1385: Directing the exercise of discretion in striking enhancements in specified circumstances.
- § 4019: Extending presentence conduct credits to persons committed to facilities to restore trial competency under sections 1368, *et seq.*
- § 1370.01: Providing for diversion of mentally incompetent misdemeanor offenders.

<u>Following sentencing:</u>

- § 1172.1: directing the discretion of the court in considering requests for recall of a custody sentence.
- §§ 1171 and 1172.75: Requiring the removal of specified enhancements from the defendant's criminal record.
- § 1170.95: Limiting the ability of the court to summarily reject a petition for relief regarding accomplice liability.

[1] Unless otherwise indicated, all statutory references are to the Penal Code.

II. IMPOSITION OF SENTENCE UNDER THE DETERMINATE SENTENCING LAW (§§ 1170 AND 1170.1)

Senate Bill No. 567 (2021-2022 Reg. Leg. Sess.) (SB 567)[2], amends section 1170 and 1170.1 to establish a sentencing procedure consistent with the decisions of the United States Supreme Court in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), and *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*), when a trial court seeks to impose the upper term of custody. Section 1170 also is amended to direct the court to impose the low term of imprisonment in specified circumstances. Section 1170, subdivision (h)(9), is amended to require the service of an enhancement in the same setting (county jail or state prison) as required by the sentence imposed on the base term.

A. Historical Context

The U.S. Supreme Court in *Apprendi* determined "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi*, *supra*, 530 U.S. at p. 490.) In *Blakely*, the court defined "statutory maximum" to mean "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Blakely*, *supra*, 542 U.S. at p. 303.)

Prior to 2007, section 1170, subdivision (b), provided in relevant part: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime. . . ." Section 1170 thus provided a statutory presumption that the middle term was to be imposed unless aggravating or mitigating factors supported the imposition of the upper or lower term.

The California Supreme Court held the triad sentencing options of the Determinate Sentencing Law (DSL) did not violate *Apprendi* or *Blakely*. (*People v. Black* (2005) 35 Cal.4th 1238 (*Black I*). However, in *Cunningham* the U.S. Supreme Court overruled *Black I*, holding that California's DSL, insofar as it gives the judge, not the jury, the authority to find the facts that expose a defendant to an upper term sentence by a preponderance of the evidence and not by proof beyond a reasonable doubt, violates the 6th and 14th Amendment rights to a jury trial. (*Cunningham*, *supra*, 549 U.S. at p. 274.)

In response to *Cunningham*, the Legislature amended section 1170, subdivision (b), in 2007 to provide in relevant part: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound

[2] Assembly Bill Nos. 124 and 1540 (2021-2022 Reg. Leg. Sess.), containing parallel amendments to sections 1170 and 1170.1, also were enacted into law. A reconciliation provision in SB 567 provides that if all three bills are enacted, version 1.3 of the legislation becomes the law. (SB 567, § 3, subd. (c).) Accordingly, the legislation effecting sections 1170 and 1170.1 quoted in this memorandum is taken from version 1.3 of SB 567.

discretion of the court. . . . The court shall select the term which, in the court's discretion, best serves the interests of justice." The amendment eliminated the presumption of the middle term, giving the court full discretion to impose any of the three sentencing choices. The change eliminated the problems identified by the Supreme Court in *Apprendi*, *Blakely* and *Cunningham*. (See *People v. Wilson* (2008) 164 Cal.App.4th 988, 991-992.)

In its 2007 amendment to section 1170, and thereafter, the legislature also provided for a sunset of the new provisions which, over the past thirteen years, has been regularly extended by the Legislature – until 2021.

B. Application of *Estrada* to cases not final

There is no question the new sentencing procedures in section 1170 and 1170.1 will be applicable to sentences imposed after January 1, 2022, the effective date of the statutory changes. There remains the issue of whether the changes will be applicable to any case not final as of that date under *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*). Because the legislative changes confer a substantial benefit on the defendant at sentencing, likely *Estrada* will apply, at least to some extent. Whether *Estrada* will apply in a particular case will depend on the exact circumstances of sentencing.

1. Cases where the court imposed the upper term of imprisonment

Appellate courts agree that *Estrada* and its progeny apply to all cases not final as of January 1, 2022. (*People v. Lopez* (2022) 78 Cal.App.5th 459, 465; *People v. Flores* (2022) 73 Cal.App.5h 1032, 1039; *People v. Jones* (2022) 79 Cal.App.5th 37, 33-34; *People v. Zabelle* (2022) 80 Cal.App.5th 1098, 1108-1109.) The courts disagree on the standard of error and whether remand is always necessary.

The defendant likely is entitled to a redetermination of the sentence where the court, as a matter of its own discretion, imposed the upper term based solely on an aggravating factor that must now be submitted to the trier of act. For example, if the defendant was convicted after trial of committing a lewd act on a child, and the court thereafter sentenced the defendant to the upper term solely because the defendant violated a position of trust, the defendant likely will be entitled to a trial on the aggravating factor.

The defendant likely will not be entitled to a new sentencing determination where the court, as a matter of its own discretion, imposed the upper term based on a combination of aggravating factors, but at least one of those factors is included in the "prior conviction" exception or was admitted by the defendant. As observed in *People v. Black* (2007) 41 Cal.4th 799 (*Black II*): "[I]mposition of the upper term does not infringe upon the defendant's constitutional right to jury trial so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior

convictions." (*Black II*, *supra*, 41 Cal.4th at p. 816; *People v. Osband* (1996) 13 Cal.4th 622, 728-729.)

People v. Garcia (2022) 76 Cal.App.5th 887, holds *Estrada* is applicable to the changes made by SB 567 and AB 124 to section 1170. Although the appellate opinion did not review the factors considered by the court in imposing the upper term, the Attorney General conceded the court used factors which now must be either admitted by the defendant or proved to a jury beyond a reasonable doubt. The appellate court remanded the matter for resentencing, admonishing the trial court that it may reconsider *all* sentencing decisions and choices.

In *People v. Flores* (2022) 75 Cal.App.5th 495 (*Flores*), the appellate court observed that because defendant's case was not final as of January 1, 2022, the amendments made by SB 567 retroactively applied to the case. However, the court declined to remand the case for resentencing because, in imposing an upper term sentence, the trial court referenced defendant's extensive adult and juvenile criminal record and that defendant was on probation when he committed the current crimes. The trial court also found the crimes in this case "involved a high degree of cruelty, viciousness, and callousness, as the defendant physically assaulted the victim by pulling her hair and punching her on the mouth." Based on *People v. Sandoval* (2007) 41 Cal.4th 825, *Flores* concluded remand was unnecessary because any error in failing to separately prove the aggravating factors was harmless beyond a reasonable doubt. "[I]f a reviewing court concludes, beyond a reasonable doubt, that the jury, applying the beyond-a-reasonable-doubt standard, unquestionably would have found true at least a single aggravating circumstance had it been submitted to the jury," the error is harmless. (*People v. Sandoval*, *supra*, 41 Cal.4th at p. 839, 62 Cal.Rptr.3d 588, 161 P.3d 1146; see also *People v. Osband* (1996) 13 Cal.4th 622, 728, 55 Cal.Rptr.2d 26, 919 P.2d 640 [single aggravating factor is sufficient to support an upper term].)" (*Flores*, *supra*, 75 Cal.App.5th at pp. 500-501.) *Flores* concluded, beyond a reasonable doubt, that a trier of fact would find at least one aggravating factor true.

People v. Lopez (2022) 78 Cal.App.5th 459 (*Lopez*), also applied a harmless error test. "In order to conclude that the trial court's reliance on improper factors that were not found true by a jury or admitted by Lopez was not prejudicial, we would have to conclude beyond a reasonable doubt that a jury would have found true beyond a reasonable doubt *every factor on which the court relied*, because the amended statute requires that every factor on which a court intends to rely in imposing an upper term, with the exception of factors related to a defendant's prior conviction(s), have been admitted by the defendant or proven to a jury (see § 1170, subd. (b))." (Lopez, supra, 78 Cal.App.5th at pp. 465-466; italics original.) "[T]he second relevant prejudice question is whether we can be assured that the trial court *would have exercised its discretion to impose the upper term* based on a single permissible aggravating factor, or even two or three permissible aggravating factors, related to the defendant's prior convictions, when the

court originally relied on both permissible and impermissible factors in selecting the upper term." (*Lopez*, *supra*, 78 Cal.App.5th at p. 467, italics original.)

People v. Zabelle (2022) 80 Cal.App.5th 1098 (*Zabelle*), held that failure to submit the aggravating factor to the jury was structural error. "We . . . must review the trial court's error under the standard described in *Chapman*. And more particularly, we must apply this standard in the manner detailed in *People v. Sandoval* (2007) 41 Cal.4th 825, 62 Cal.Rptr.3d 588, 161 P.3d 1146 (*Sandoval*). Our Supreme Court there, in the wake of *Cunningham*, considered the appropriate application of *Chapman* for '[t]he [unconstitutional] denial of the right to a jury trial on aggravating circumstances.' (*Id.* at p. 838, 62 Cal.Rptr.3d 588, 161 P.3d 1146.) In laying out its reasoning, the court explained that ' "the constitutional requirement of a jury trial and proof beyond a reasonable doubt applies only to a fact that is 'legally essential to the punishment.' " ' (*Id.* at pp. 838-839, 62 Cal.Rptr.3d 588, 161 P.3d 1146.) And because, the court went on, all that was legally essential to authorize a trial court to impose an upper term sentence under former section 1170 was a single aggravating circumstance, a jury's finding a single aggravating circumstance to be true would be enough to satisfy the Sixth Amendment. (*Sandoval, supra,* at p. 839, 62 Cal.Rptr.3d 588, 161 P.3d 1146.) On this reasoning, the court concluded: '[I]f a reviewing court concludes, beyond a reasonable doubt, that the jury, applying the beyond-a-reasonable-doubt standard, unquestionably would have found true at least a single aggravating circumstance had it been submitted to the jury, the Sixth Amendment error properly may be found harmless.' (*Ibid.*) Considering the parallels between *Sandoval* and the case here, we must (and will shortly) apply this standard in evaluating whether the Sixth Amendment error here properly may be found harmless." (*Zabelle*, *supra*, 80 Cal.App.5th at pp. 1111-1112.)

Zabelle also found there was *Watson* error. "[A]part from finding *Chapman* applies, we also find *Watson* applies in this case. It applies because even if we find the jury would have found true at least one of the aggravating circumstances that the trial court relied on, we still must grapple with the trial court's reliance on other aggravating circumstances inconsistent with the current requirements of section 1170. That is because, unlike for the Sixth Amendment error, it is not enough that we find the trial court *could* have imposed the upper term sentence (based on the conclusion that the jury would have found true at least one aggravating circumstance). Rather, to find harmless error for the state law error, we must find that the trial *would* have imposed the upper term sentence even absent the error. In particular, we must consider whether it is reasonably probable that the trial court would have chosen a lesser sentence in the absence of the error. (See *People v. Price* (1991) 1 Cal.4th 324, 492, 3 Cal.Rptr.2d 106, 821 P.2d 610 ['When a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper'].) Resolving this issue entails two layers of review. We must first, for each aggravating fact, consider whether it is reasonably probable that the jury would have found the fact not true. We must then, with the aggravating facts

that survive this review, consider whether it is reasonably probable that the trial court would have chosen a lesser sentence had it considered only these aggravating facts." (*Zabelle*, *supra*, 80 Cal.App.5th at p. 1112.)

People v. Berdoll (2022) 85 Cal.App.5th 159 (*Berdoll*), concludes remand was unnecessary based on the *Flores* test. "Here the contested issues were not tried by a jury and the sentencing issues were determined by the trial judge. Nevertheless, we conclude that any jury would have found at least one of the aggravating factors here beyond a reasonable doubt just as the trial court did. Berdoll pled no contest to the charges. The trial court was the exclusive trier of fact. Moreover, Berdoll *stipulated* to a factual basis for the plea 'based on the police reports.' Those reports contained the uncontradicted foundation for the findings of aggravating sentencing factors. The trial court, exercising its sentencing discretion, declared it was imposing the aggregate sentence because the aggravating factors outweighed the mitigating factors." (*Berdoll*, *supra*, 85 Cal.App.5th at p. 164, italics original.)

People v. Lewis (2023) 88 Cal.App.5th 1125, 1137-1138, states a different test for remand: "[T]here are two questions the reviewing court must ask to determine whether remanding for resentencing under amended section 1170, subdivision (b) is appropriate. First, we must ask whether a defendant *could* still lawfully be sentenced to an upper term under federal and state law. This requires us to conclude that the jury would have found at least one aggravating circumstance true beyond a reasonable doubt. (See *Sandoval, supra*, 41 Cal.4th at pp. 838-839; *Zabelle, supra*, 80 Cal.App.5th at pp. 1111-1112.) If the answer to that question is no, then the sentence is invalid and must be vacated, and the matter remanded for resentencing. (See *Sandoval, supra*, at pp. 838-839; *Zabelle, supra*, at pp. 1111-1112.) But if the answer to that question is yes, we ask whether the trial court *would* impose the same sentence in its informed discretion under amended section 1170, subdivision (b). To answer that question, we must apply *Gutierrez* and ask whether the record *clearly indicates* that the trial court would have imposed the same sentence under the new law." (Italics original.)

Sentencing based on plea bargain

The right to resentencing is less clear where the defendant has been sentenced to an upper term based on a plea bargain. Likely much will depend on the specific circumstances of the plea. On the one hand, just like a plea to the underlying charge, the agreement of the defendant to receive the upper term punishment assumes that such a sentence is proper; in essence, the defendant has admitted the aggravating facts that justify the imposition of the upper term. (See *Blakely*, *supra*, 542 U.S. at p. 310.) "Where the defendants have pleaded guilty in return for a *specified* sentence, appellate courts will not find error even though the trial court acted in excess of jurisdiction in reaching that figure, so long as the trial court did not lack *fundamental* jurisdiction. The rationale behind this policy is that defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the

bargain through the appellate process." (*People v. Hester* (2000) 22 Cal.4th 290, 295; italics original.)

People v. Mitchell (2022) 83 Cal.App.5th 1051 and *People v. Berdoll* (2022) 85 Cal.App.5th 159, indicate a stipulated plea agreement or plea based on an indicated sentence does not call for the court to find any aggravating factors if the upper term is being imposed. Remand under such circumstances is unnecessary. *Mitchell* has been granted review.

Generally in accord with the foregoing cases is *People v. Sallee* (2023) 88 Cal.App.5th 330 (*Sallee*) in the context of an upper term imposed for violation of a *Cruz* waiver. "Defendant agreed to a stipulated sentence pursuant to a negotiated plea agreement, and the trial court approved the agreement and imposed the agreed-upon sentence. The trial court did not exercise discretion to choose an upper, middle, or lower determinate term based on factors in mitigation and aggravation. Nor could the court exercise discretion to choose an alternative term based on factors in mitigation and aggravation without effectively withdrawing its approval of the plea. The trial court therefore did not, and could not, exercise discretion under section 1170, subdivision (b). Under the plain language of the statute, the limitations on the court's sentencing discretion set forth in section 1170, subdivision (b), are inapplicable in this context." (*Sallee*, *supra*, 88 Cal.App.5th at p. 340.)

People v. Todd (2023) 88 Cal.App.5th 373, reaches a contrary conclusion. *Todd* held defendant was entitled to the benefits of the revisions to section 1170 even though the upper term was imposed as a result of plea agreement. The court found that "the imposition of the aggravated term exceeds the court's authority unless the statutory prerequisites are met or waived because the aggravated term cannot be imposed absent the court's finding of those circumstances." (*Todd*, *supra*, 88 Cal.App.5th at p. 379.) The court further found that the plea agreement was subject to the limitations of *Doe v. Harris* (2013) 57 Cal.4th 64, that held, " 'as a general rule, plea agreements are deemed to incorporate the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy. That the parties enter into a plea agreement does not have the effect of insulating them from changes in the law that the Legislature has intended to apply to them.' [Citation.] Therefore, '[a] plea bargain that requires a defendant to generally waive unknown future benefits of legislative enactments, initiatives, appellate decisions, or other changes in the law that may occur after the date of the plea is not knowing and intelligent.' [Citation.]" (*Todd*, *supra*, 88 Cal.App.5th at p. 379.) Finally, *Todd* found nothing in the legislation that limited its retroactive application. (*Todd*, *supra*, 88 Cal.App.5th at p. 380.) Generally in accord with *Todd* is *People v. Fox* (2023) 90 Cal.App.5th 826, based on the application of *People v. Stamps* (2020) 9 Cal.5th 685.

Moreover, *People v. French* (2008) 43 Cal.4th 36 (*French*), severely limits the effect of a plea which implicates the right to a jury under *Apprendi*. "[W]e hold that defendant, by entering into a plea agreement that included the upper term as the maximum sentence, did not implicitly admit that his conduct could support that term. The determinate sentencing law contemplates that issues related to the trial court's decision whether to impose the upper, middle, or lower term will be litigated at a posttrial (or postplea) sentencing hearing. [Citation.] The defendant must be provided with notice of potential aggravating and mitigating circumstances prior to the hearing, by means of the probation report. [Citation.] Any statement in aggravation filed by the prosecution, the victim, or the victim's family must be submitted four days prior to the hearing. [Citation.] In imposing sentence, the trial court may consider those documents as well as any additional evidence introduced at the sentencing hearing. [Citation.] A defendant who enters into an agreement to plead guilty or no contest, with a sentence to be imposed within a specified maximum, reasonably expects to have the opportunity to litigate any matters related to the trial court's choice of sentence—including the existence of aggravating and mitigating circumstances—at the sentencing hearing." (*French*, *supra*, 43 Cal.4th at pp. 48-49.) While the defendant's no contest plea to six counts constituted an admission to all the elements of the offenses, it did not constitute an admission to any aggravating circumstances. (*French*, *supra*, 43 Cal.4th at p. 49.) It is important to observe that the plea in *French* authorized the court to sentence the defendant within a *range* of punishment.

French also did not accept the factual statement of the crime to be sufficient for the purposes of *Apprendi* without an express admission or stipulation by the defendant or his counsel that the facts as stated are true. It is not sufficient that counsel simply acknowledge that witnesses will testify in a particular way; there must be an admission or stipulation that the facts as testified to by the witnesses are true. (*French*, *supra*, 43 Cal.4th at p. 51.)

Based on the factors discussed in *French* and *Hester*, the following factors may be relevant in determining whether the defendant will be entitled to resentencing of an upper term sentence based on a plea agreement:

- Whether the defendant agreed to a specific upper term sentence. A plea to a specific term includes an implied agreement to the underlying facts supporting the sentence.

- Whether the defendant agreed to a range of sentence, a portion of which could be the imposition of the upper term. If there was no stated agreement to the facts supporting the upper term, the defendant likely will be entitled to resentencing under the new provisions.

- Whether the defendant individually or through counsel agreed to the aggravating factors necessary to support an upper term sentence. Such agreement could be included in the factual statement of the offense under section 1192.5, provided the defendant personally or through counsel *admitted the truth* of the facts as stated.

2. Required imposition of the low term of imprisonment

The application of *Estrada* to the provisions of section 1170, subdivision (b)(6), requiring the imposition of the low term of imprisonment likely will be the same as for the restrictions on the imposition of the upper term of imprisonment discussed, *supra*.. Because section 1170, subdivision (b)(6), directs the court to exercise sentencing discretion to impose the low term of imprisonment in certain circumstances, likely its provisions will be potentially applicable to cases not final as of January 1, 2022.

- If the court imposed the middle or upper term of imprisonment as a matter of independent exercise of discretion such as after a trial, likely the defendant will be entitled to a reconsideration of the sentence under section 1170, subdivision (b)(6).

- If the defendant is sentenced to the middle or upper term as part of a specific plea agreement to the sentence, for the reasons discussed in *French* and *Hester*, *supra*, likely the defendant will not be entitled to reconsideration of the sentence.

People v. Banner (2022) 77 Cal.App.5th 226, 240, holds AB 124, requiring the imposition of the low term of imprisonment, applies retroactively to all nonfinal cases on direct appeal.

3. Service of enhancement follows the base term

Section 1170, subdivision (h)(9), provides that punishment for an enhancement will be served in county jail or state prison as required for the base term of the underlying crime: "Notwithstanding the separate punishment for any enhancement, any enhancement shall be punishable in county jail or state prison as required by the underlying offense and not as would be required by the enhancement." The amendment abrogates the holding of *People v. Vega* (2014) 222 Cal.App.4th 1374, which held if the enhancement specifies punishment in state prison, the entire sentence must be served in state prison, even if the base term provided for punishment in county jail under section 1170, subdivision (h).

Clearly the legislative change will apply to all sentences imposed after January 1, 2022. It is not clear whether the application of *Estrada* will require a reconsideration of the sentence in all cases not final as of January 1, 2022. The application of *Estrada* to the Realignment Law, which created county jail sentencing under section 1170, subdivision (h), was never an issue. The Realignment Law was created with a "savings clause" which made it effective only as to crimes committed on or after October 1, 2011. The addition of section 1170, subdivision (h)(9), by SB 567 comes without a "savings clause." *Estrada*, therefore, likely will apply to the change, at least if the service of a term in county jail is considered a lesser punishment than a term to be served in prison. The materiality of the difference between the service of a term in county jail or state prison has been a matter of disagreement between the appellate courts. *People v. Reece* (2013) 220 Cal.App.4th 204, concluded the state prison aspect of a suspended sentence was not an integral part of the plea bargain since there was no difference in the custody term ultimately served. *People v. Wilson* (2013) 220 Cal.App.4th 962, reached the opposite conclusion. *Wilson* reasoned the parties might have negotiated a different plea had they known the court was able to impose a split sentence. The Supreme Court granted review of both cases and ordered them reconsidered in light of *People v. Scott* (2014) 58 Cal.4th 1415 – the opinions were not republished.

Notwithstanding the technical discussion in *Reece* and *Wilson*, the common understanding is that service of a sentence in the local county jail is considered less onerous than a comparable term in state prison, particularly since the court will have the ability to place the defendant on mandatory supervision under section 1170, subdivision (h). Much will depend on the availability of custody rehabilitative services and use of monitored release programs in the particular county. In any event, the court may well wish to reconsider the sentence for equitable reasons after a recall of a sentence under section 1172.1, discussed *infra*.

C. Imposing an upper term of imprisonment

Effective January 1, 2022, section 1170, subdivision (b), provides, in relevant part: "(1) When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall, in its sound discretion, order imposition of a sentence not to exceed the middle term, except as otherwise provided in paragraph(2). (2) The court may impose a sentence exceeding the middle term only when there are circumstances in aggravation of the crime that justify the imposition of a term of imprisonment exceeding the middle term, and the facts underlying those circumstances have been stipulated to by the defendant, or have been found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial."

1. Discretion to impose lower or middle base term of imprisonment

The amendment to section 1170, subdivision (b)(1), preserves the court's traditional discretion to impose the lower or middle term of imprisonment for a base term sentenced under the DSL. Provided the court is not considering the imposition of an upper term sentence, nothing in the subdivision (b)(1) requires the submission of sentencing factors to the jury. Consistent with California Rules of Court, rules 4.421 and 4.423, in determining whether to impose the middle or lower term of imprisonment, the court will have discretion to consider all relevant sentencing factors, whether they are aggravating or mitigating factors.

2. Imposition of the upper base term of imprisonment

If the court is considering the imposition of the upper base term of imprisonment, unless the facts are stipulated to by the defendant or the factor in aggravation relates to the record of conviction, any fact justifying the imposition of the upper term must be submitted to the trier of fact and proved beyond a reasonable doubt. (§ 1170, sub. (b)(2).)

Aggravating factors admitted by plea

If it is the intent of the parties in a plea agreement that the defendant receive the upper term of imprisonment, some care should be taken in stating the terms of the plea. Likely it would be sufficient for the court to accept a "guilty" or "no contest" plea, coupled with a statement of the agreed upper term sentence. Under such circumstances, the defendant's admission to aggravating factors could be implied from the plea. Indeed, California Rule of Court, rule 4.412, subdivision (a), provides, in relevant part: "It is an adequate reason for a sentence or other disposition that the defendant, personally and by counsel, has expressed agreement that it be imposed and the prosecuting attorney has not expressed an objection."

The better practice, however, would be to require an express admission to the aggravating factors justifying the upper term. The court also may request a stipulation by counsel in the presence of the defendant as to the truth of the factual basis for the plea, which statement of facts includes the aggravating factors. (*People* v. *French* (2008) 43 Cal.4th 36, 48-52, discussed, *supra*; see *People v. Sohal* (1997) 53 Cal.App.4th 911 [factual statement given by prosecution and agreed to by defendant or counsel is part of the record of conviction].)

In *People v. Munoz* (2010) 155 Cal.App.4th 160, 166-168, the defendant entered into a waiver under *People v. Harvey* (1979) 25 Cal.3d 754, that allowed the trial court to consider the defendant's "prior criminal history and the entire factual background of the case, including any unfiled, dismissed or stricken charges or allegations or cases." The

trial court's imposition of the upper term based on great violence and infliction of great bodily injury was upheld as being included in the waiver.

Bifurcation of proceedings

If requested by the defendant, the court generally must bifurcate the trial on the factors in aggravation from the trial on the charges and enhancements. (§ 1170, subd. (b)(2).) The only exception to bifurcation is "when the evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law. . . ." (*Id.*) Otherwise, "[t]he jury shall not be informed of the bifurcated allegations until there has been a conviction of a felony offense."

3. Enhancements with triads

Section 1170.1, subdivision (d)(1), has been amended to provide a process similar to sentencing of the base term under section 1170 for sentencing enhancements with triads. The court has discretion to impose the middle or lower term of imprisonment for an enhancement. (*Id*.) "The court may impose a sentence exceeding the middle term only when there are circumstances in aggravation that justify the imposition of a term of imprisonment exceeding the middle term, and the facts underlying those circumstances have been stipulated to by the defendant, or have been found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial." (§ 1170.1, sub. (d)(2).)

Unlike section 1170, subdivision (b)(3), section 1170.1, subdivision (d)(1), does not contain a "prior conviction exception" to the imposition of the upper term for enhancements with triads. While such an omission may be a drafting oversight, the plain language of subdivision (d)(1) requires the proof of *any* aggravating factor be stipulated to by the defendant or proved to the trier of fact beyond a reasonable doubt. In the absence of further direction from the Legislature, it seems likely the procedures for proving aggravating factors for the base term under section 1170 are equally applicable to the proof of aggravating factors for an enhancement under section 1170.1. Trial on aggravating factors for an enhancement must be bifurcated if requested by the defendant. "Except where evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law, upon request of a defendant, trial on the circumstances in aggravation alleged in the indictment or information shall be bifurcated from the trial of charges and enhancements." (§ 1170, subd. (b)(2).) Subdivision (b)(2) does not distinguish between circumstances in aggravation of the base term and circumstances in aggravation of an enhancement.

4. Prior conviction exception

Consistent with *Apprendi*, section 1170, subdivision (b)(3), provides for an exception to the proof requirements for aggravating factors based on a prior conviction: "Notwithstanding paragraphs (1) and (2), the court may consider the defendant's prior convictions in determining sentencing based on a certified record of conviction without submitting the prior convictions to a jury. This paragraph does not apply to enhancements imposed on prior convictions."

The legislation specifies the court may aggravate a sentence if based on "a certified record of conviction." Traditionally courts are advised of the defendant's record through a probation report. Such reports are not independently "certified" by any government agency. At least one published case commented in dicta that the statement of the defendant's criminal record in the probation report is not the same as a certified record of conviction. (See *People v. Zabelle* (2022) 80 Cal.App.5th 1098, 1114.)

Section 1170, subdivision (b)(3), specifies its exception does not apply to enhancements imposed on prior convictions. Accordingly, the legislation appears to allow admission of the fact of conviction of a base crime, but not the fact of any enhancement such as the use of a weapon or infliction of great bodily injury. If the prosecution wants the court to consider the enhancements, likely it will be necessary to hold a mini-trial on the existence of the enhancements utilizing the record of conviction, additional witnesses, or other admissible evidence. If the entire circumstances of the crime are otherwise admissible in the trial pursuant to section 1170, subdivision (b)(2), a separate proceeding to prove the enhancement likely will not be necessary.

Aggravating factors included in the prior conviction exception

Prior to the amendment of section 1170 in response to *Cunningham*, whether a particular aggravating factor was or was not included in the prior conviction exception was subject to considerable appellate litigation. The following factors were determined to be within the exception, thus obviating the need to submit the factor to the trier of fact under *Apprendi*. Whether these factors retain their viability under the prior conviction exception of section 1170, subdivision (b)(3), will be a matter for the appellate courts to determine.

a. **The fact the defendant was convicted of a particular prior offense.** (*People v. Cardenas* (2007) 155 Cal.App.4th 1468, 1481-1483 [record must reflect the court actually relied on the existence of the prior convictions in imposing the upper term]; *c.f.*, *People v. Stuart* (2008) 159 Cal.App.4th 312 [the mere existence of the prior conviction is an aggravating factor sufficient to support the imposition of the upper term, even though the trial court did not indicate reliance on the prior conviction].)

b. **Criminal record is of increasing seriousness.** (*Black II*, *supra*, 41 Cal.4th at pp. 819-820 ["The determinations whether a defendant has suffered prior convictions, and whether those convictions are 'numerous or of increasing seriousness' [Citation], require consideration of only the number, dates, and offenses of the prior convictions alleged. The relative seriousness of these alleged convictions may be determined simply by reference to the range of punishment provided by statute for each offense. This type of determination is 'quite different from the resolution of the issues submitted to a jury, and is one more typically and appropriately undertaken by a court.' [Citation.]]

People v. Butler (2023) 89 Cal.App.5th 953, holds that while defendant's prior prison terms could be found from a certified record of conviction, whether the defendant's record was increasing in seriousness was a matter for the jury to determine as an aggravating factor.

People v. Pantaleon (2023) 89 Cal.App.5th 932 (*Pantaleon*), reaches a contrary conclusion. "[T]he fact of a prior conviction includes 'other related issues that may be determined by examining the records of the prior convictions.' [Citation.] As relevant to this appeal, the fact of a prior conviction encompasses a finding that prior convictions are numerous or of increasing seriousness . . . ." (*Pantaleon*, *supra*, 89 Cal.App.5th at p. 938.)

c. Defendant was on parole at the time the crime was committed. *People v. Capistrano* (2014) 59 Cal.4th 830, 882-884 [*Capistrano*][overruled on other grounds by *People v. Hardy* (2018) 5 Cal.5th 56], observed: "Among the reasons given by the trial court for imposing the upper term on count 4 was defendant's criminal history, which included at least one prison term *and the fact he was on parole* when he committed the offenses. Defendant's pattern of recidivism as evidenced by this criminal history constitutes a legally sufficient circumstance in aggravation justifying imposition of the upper term without violating his Sixth Amendment right to a jury trial. [Citation.] [recidivism exception to *Apprendi–Blakely–Cunningham* line of authority include[s] not only the 'fact that a prior conviction occurred, but also other related issues that may be determined by examining the records of the prior convictions' [Citations.]." (*Capistrano*, *supra*, 59 Cal.4th at p. 884; italics added.)

People v. Pantaleon (2023) 89 Cal.App.5th 932 (*Pantaleon*), holds: "[T]he fact of a prior conviction includes 'other related issues that may be determined by examining the records of the prior convictions.' [Citation.] As relevant to this appeal, the fact of a prior conviction encompasses . . . a finding that defendant was on probation or parole at the time the crime was committed." (*Pantaleon*, *supra*, 89 Cal.App.5th at p. 938.)

d. **Prior performance on probation, mandatory supervision, postrelease community supervision, or parole (if based on conviction of a crime).** *People v. Towne* (2008) 44 Cal.4th 63, 82-83 [*Towne*]. "Whether the aggravating circumstance of a defendant's prior unsatisfactory performance on probation or parole comes within the [prior conviction] exception, in contrast, will depend upon the evidence by which that circumstance is established in a particular case. In some instances, the defendant's unsatisfactory performance on probation or parole is proved by evidence demonstrating that, while previously on probation or parole, he committed and was convicted of new offenses. For example, in *People v. Yim* (2007) 152 Cal.App.4th 366, 370, the Court of Appeal upheld the trial court's finding that the defendant had performed unsatisfactorily on parole, based upon evidence establishing that he was on probation or parole at the time he committed two prior offenses and was on parole when he committed the most recent offense. 'Each time appellant has been granted probation or parole, he has reoffended.' (*Ibid.*) The Court of Appeal in *Yim* also concluded that a jury trial on this aggravating factor was not required, because the factor was related to recidivism and could be 'determined by reference to "court records" pertaining to appellant's prior convictions, sentences and paroles. The mere recitation of his dates of conviction and releases on parole [citation] demonstrate[s], as a matter of law, that he committed new offenses while on parole.' [Citation.] Similarly, in the present case, defendant's criminal history, as recited in the probation report, indicates that several of his prior convictions occurred while he was on probation. When a defendant's prior unsatisfactory performance on probation or parole is established by his or her record of prior convictions, it seems beyond debate that the aggravating circumstance is included within the [prior conviction] exception and that the right to a jury trial does not apply." (*Towne*, *supra*, 44 Cal.4th at p. 82.)

Towne also observed, however, if the unsatisfactory performance on probation was other than a new conviction, such as failing to report, failed drug tests, and not participating in counseling as directed, the defendant is entitled to a jury finding on the aggravating facts. (*Towne*, *supra*, 44 Cal.4th at pp. 82-83.)

e. Prior prison terms (aggravating factor v. enhancement for prior prison term.) Based on the assumption that the defendant had certain due process protections when a prior conviction was obtained, *Apprendi* and *Blakely* do not require a jury determination of the existence of a prior conviction. (*Apprendi*, *supra*, 530 U.S. at pp. 488-490; *Blakely*, *supra*, 542 U.S. at p. 490; *People v. Thomas* (2001) 91 Cal.App.4th 212, 220-223.)

The prior conviction authorizing the upper term may be a misdemeanor. (*People v. Stewart* 2008) 159 Cal.App.4th 312, 314.)

The court should distinguish the use of a prior prison term for the purposes of an aggravating factor from the existence of a prior prison term for the purposes of an

enhancement under section 667.5, subdivision (b). In the latter circumstance, the enhancement is imposed only if the prior prison term is for a violent sex crime listed in Welfare and Institutions Code, section 6600. For the purposes of selecting a term on a crime's triad, however, the court is free to consider *any* aggravating factors listed in California Rules of Court. Rule 4.421, subdivision (a), specifies circumstances in aggravation include "[f]actors relating to the crime, whether or not charged or chargeable as an enhancement. . . ." Furthermore, Rule 4.421, subdivision (c), permits the court to consider "any other factors . . . that reasonably relate to the defendant or the circumstances under which the crime was committed." The existence and nature of a prior prison term certainly is a relevant factor for the court to consider in the defendant's sentencing.

f. **Prior juvenile adjudication.** *People v. Nguyen* (1007) 46 Cal.4th 1007 (*Nguyen*), permits the court to consider a defendant's prior juvenile adjudication in imposing the upper term. "[D]efendant claims the *Apprendi* rule barred use of the prior juvenile adjudication to enhance his maximum sentence in the current case because the prior *juvenile proceeding,* though it included most constitutional guarantees attendant upon adult criminal proceedings, did not afford him the right to a jury trial. [Citations.] He bases this claim on language employed by the United States Supreme Court to justify an *exception* to the *Apprendi* rule—i.e., that 'the fact of a prior conviction,' used to enhance the maximum sentence for a later offense, *need not* be proved to a jury beyond reasonable doubt, but may simply be found by the sentencing court." (*Nguyen*, *supra*, 46 Cal.4th at p. 1011; italics in original.) "[W]e find nothing in the *Apprendi* line of cases, or in other Supreme Court jurisprudence, that interferes, under the circumstances here presented, with what the high court deemed a sentencing court's traditional authority to impose increased punishment on the basis of the defendant's recidivism. That authority may properly be exercised, we conclude, when the recidivism is evidenced, as here, by a *constitutionally valid* prior adjudication of criminal conduct. As we explain below, the high court has expressly so held in analogous circumstances. [Citation.]" (*Nguyen*, *supra*, 46 Cal.4th at p. 1012; italics in original.)

g. **Crime committed while out on bail (factor in aggravation v. enhancement).** *People v. Johnson* (2012) 208 Cal.App.4th 1092 (*Johnson*), holds the prior conviction exception to *Apprendi* includes committing a crime while on bail. "The bases for [certain holdings under the prior conviction exception] were, in general, that the aggravating factors were all related to 'the fact of a prior conviction' by their recidivistic nature, rather than to the conduct involved in the charged offense(s), and that such factors could be proven by reliable documentation, such as court records. [Citations.] [¶] Section 12022.1 is a recidivist statute—it enhances punishment based upon the defendant's commission of another offense while on bail for a previous offense. [Citation] ['a section 12022.1 enhancement turns on the status of a defendant as a repeat offender, not on what the defendant did when committing the current crime, i.e., secondary offense'].) [¶] The only difference

between a defendant who commits a felony offense while on probation or parole and a defendant who commits a felony offense while on bail for another felony offense is the timing. In the former circumstance, the prior conviction (primary offense) has already occurred. The distinction is insignificant because in the latter circumstance the defendant cannot be punished until he is convicted of the primary offense. Of course, in both circumstances, additional punishment requires a conviction of the second charged offense. [¶] Because section 12022.1 is an enhancement statute that, like the foregoing examples, penalizes recidivist conduct and does not relate to the commission of either the primary or secondary offense, defendant is not entitled to a jury trial on its truth." (*Johnson*, *supra*, 208 Cal.App.4th at pp. 1099-1100; footnote omitted.)

5. Other circumstances where aggravating factors need not be submitted to a jury

There are several other circumstances where aggravating factors need not be separately submitted to a jury.

a. **Factors submitted to the jury as part of the case.** Facts that prove an aggravating factor that otherwise come into a trial need not be resubmitted to the jury in a separate proceeding. Section 1170, subdivision (b)(2), provides that bifurcation is not required "when the evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law. . . ."

In *Black II*, *supra*, 41 Cal.4th at pp. 816-817, the Supreme Court found it proper for the trial court to deny the defendant a grant of probation and impose the upper prison term because the crime was committed by use of force. "The trial court stated that it imposed the upper term in the present case primarily because of 'the nature, seriousness, and circumstances of the crime.' In describing those circumstances, the court commented that defendant 'forced the victim ... to have sexual intercourse with him on numerous occasions.' The trial court's identification of the defendant's use of force as an aggravating circumstance was supported by the jury's verdict. The information alleged, and the jury found true beyond a reasonable doubt, that defendant committed the offense of continuous sexual abuse by means of 'force, violence, duress, menace, and fear of immediate and unlawful bodily injury.' This finding rendered defendant ineligible for probation. [Citation.] Furthermore, and most significant for the issue presented here, the jury's true finding on this allegation established an aggravating circumstance that rendered defendant eligible for the upper term under section 1170. (See Cal. Rules of Court, rule 4.408(a) [which permits the trial court to consider any criteria 'reasonably related to the decision being made'].)

In a similar case, the trial court was permitted to impose the aggravated term based on the defendant having committed a crime against multiple victims because the

jury convicted the defendant of two counts of gross vehicular manslaughter. (*People v. Calhoun* (2007) 40 Cal.4th 398, 406; *People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1326.)

b. Upper term imposed because of a violation of a *Cruz* waiver. An upper term imposed after a violation of a waver entered under *People v. Cruz* (1988) 44 Cal.3d 1247, does not require a decision by a jury, provided the upper term was included in the plea agreement and the defendant agreed the court could impose the term after a violation of the waiver. (*People v. Vargas* (2007) 148 Cal.App.4th 644.)

c. Imposition of an indeterminate term. *Blakely* holds *Apprendi* has no application to the imposition of an indeterminate sentence. "[T]he Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. Indeterminate sentencing does not do so. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10–year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10–year sentence—and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury." (*Blakely*, *supra*, 542 U.S. at pp 308-309; italics in original.)

d. Facts justifying sex registration. *People v. Presley* (2007) 156 Cal.App.4th 1027, holds the public notification requirement of the sex offender registration law is not punishment. Accordingly, *Apprendi* and *Blakely* are inapplicable to the judicial factfinding necessary to establish the registration requirement.

e. Defendant convicted of other crimes for which a consecutive sentences could have been imposed but for which concurrent sentences are being imposed. (Calif. Rules of Court, rule 4.421, subd. (a)(7).) Although there is no reported case determining whether *Apprendi* applies to this aggravating factor, likely the factor falls exclusively within the discretion of the sentencing court and is not a jury issue.

6. Application to the Three Strikes Law.

The application of *Apprendi* and the amendments to sections 1170 and 1170.1 to sentences imposed under the Three Strikes Law likely will depend on whether the sentence is based on a second or third strike and whether the sentencing court actually uses an aggravating factor in selecting the minimum term of a third strike sentence or the upper term of an enhancement with a triad.

Second strike sentences

Second strike sentences, to the extent the underlying crime is under the Determinate Sentencing Law (DSL) and no exception applies, must comply with the new provisions of sections 1170 and 1170.1 if the court intends to impose the upper term on the base term or an enhancement (although the term imposed for the enhancement is not doubled). Second strike crimes sentenced under the DSL remain in the DSL after the term is doubled under the Three Strikes Law. Just like any other crime punished by a DSL term, the court is selecting from three possible terms, the only difference being that the court is doubling the selected term.

If the term is a second strike sentence of a crime punished under the Indeterminate Sentencing Law (ISL), for the reasons discussed in *Blakely v. Washington* (2004) 542 U.S. 296, 308-309, likely *Apprendi* does not apply. Furthermore, in imposing a base term sentence for a crime punished by an indeterminate term, the court is not selecting between three possible terms as required by sections 1170 and 1170.1. However, if the court is imposing an upper term on an *enhancement* with a triad, the plain meaning of the new provisions of section 1170.1 suggest they will apply to the determination. It is an open question, however, whether sections 1170 and 1170.1, which apply to DSL crimes, will have any application to a DSL enhancement imposed on an underlying crime punished under the ISL.

Third strike sentences

Third strike sentencing is more complicated because although the crime is being sentenced under the ISL, the court must compute the minimum term of the life sentence. Under section 1170.12, subdivision (c)(2)(A), the court is directed to select "the greatest minimum term" from three options:

Option I: a minimum term of three times the term otherwise provided;
Option II: a minimum term of 25 years; or
Option III: a minimum term calculated under section 1170 without the application of the Three Strikes Law.

Option II does not involve any calculation – instead of the term normally specified for the crime, the minimum term is 25 years. With Options I and III, however, the selection

of the term is within the discretion of the court. For example, under Option I, if the ordinary punishment is 2, 4 or 6 years, as a third strike offender, the defendant's calculated term becomes 6, 12 or 18 years. Similarly, under Option III the court selects a term from the normal triad for the crime. Where the court has discretion to select from terms on a triad, the court may exercise that discretion and is not required to impose only the upper term. (*People v. Nguyen* (1999) 21 Cal.4th 197, 205.)

If the court utilizes Option II or uses the middle or low term in selecting a sentence under Options I or III, neither *Apprendi* nor the new provisions of sections 1170 and 1170.1 are implicated. If the court actually selects the upper term as the basis for the calculation of the minimum term of the third strike sentence, however, it seems likely *Apprendi* applies, but it is unclear whether the new provision of section 1170 and 1170.1 will apply.

The calculation of the minimum term of a third strike sentence now has Sixth Amendment implications. *Apprendi* and its progeny, including *Cunningham*, were all cases involving an increase of the maximum punishment that a defendant could receive, based on the existence of certain facts. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." (*Apprendi*, *supra* 530 U.S. at p. 490.) In a case decided two years later, the court held *Apprendi* did not apply to any judicial fact-finding that affected a mandatory minimum sentence. (*Harris v. United States* (2002) 536 U.S. 545 (*Harris*).)

However, *Alleyne v. United States* (2013) 570 U.S. 99 (*Alleyne*), revisited *Harris* and found it inconsistent with *Apprendi*. "In [*Harris*] this Court held that judicial factfinding that increases the mandatory minimum sentence for a crime is permissible under the Sixth Amendment. We granted certiorari to consider whether that decision should be overruled. 568 U.S. ___, 133 S.Ct. 420, 184 L.Ed.2d 252 (2012). ¶ *Harris* drew a distinction between facts that increase the statutory maximum and facts that increase only the mandatory minimum. We conclude that this distinction is inconsistent with our decision in [*Apprendi*], and with the original meaning of the Sixth Amendment. Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt. [Citation.] Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury. Accordingly, *Harris* is overruled." (*Alleyne*, supra, 570 U.S. at p. 103.) "The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' or 'ingredient' of the charged offense. [Citation.] In *Apprendi*, we held that a fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed. [Citation.] While *Harris* declined to extend this principle to facts increasing mandatory minimum sentences, *Apprendi 's* definition of 'elements' necessarily includes not only facts that increase the ceiling, but also those that increase

the floor. Both kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment. [Citation.] Facts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt." (*Alleyne*, *supra*, 570 U.S. at pp. 107-108.) Based on *Alleyne*, therefore, it appears likely that absent an exception, *Apprendi* applies as a matter of *constitutional requirement* to the determination of the minimum term of a third strike sentence if the court is using the upper term as the basis for a sentence calculated under either Options I or III. *Alleyne* also likely applies to the imposition of the upper term of an *enhancement* that is added to the indeterminate base term.

It is not clear whether the new provisions of sections 1170 and 1170.1 will apply to either the calculation of the base term or the enhancement. If the court is imposing an upper term for the minimum term under Options I or III, or on an enhancement with a triad, the plain meaning of the new provisions of sections 1170 and 1170.1 suggest they may apply to the determination. It is an open question, however, whether sections 1170 and 1170.1, which apply to DSL crimes, will have any application to any aspect of a sentence imposed on a crime punished under the ISL.

Until the issue has been clearly resolved by the appellate courts, prudence suggests that if the court intends to impose the upper term of a third strike sentence based on discretion exercised under Options I or III under section 1170.12, subdivision (c)(2)(A), or an upper term on an enhancement to an indeterminate term, the aggravating factors should be submitted to the trier of fact and proven beyond a reasonable doubt, unless the factors come within an exception such as for prior convictions or the facts are admitted by the defendant. Although there is some question whether sections 1170 and 1170.1 apply to crimes punished under the ISL (as in the case of a third strike sentence), if under *Apprendi/Alleyne* the jury must determine the existence of an aggravating factor, it seems only logical to use the procedures outlined in sections 1170 and 1170.1 until instructed otherwise by an appellate court or the Legislature.

7. Aggravating factors that must be submitted to the trier of fact

The following aggravating factors have been held to come within *Apprendi* and its progeny and, unless admitted by the defendant, must be submitted to the trier of fact and proved beyond a reasonable doubt.

a. **The victim was particularly vulnerable.** (*People v. Boyce* (2014) 59 Cal.4th 672, 725-729; *People v. Curry* (2007) 158 Cal.App.4th 766, 793-794 (*Curry*); *People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1096-1097.)

b. **The crime involved great violence, great bodily injury, or threat of great bodily injury.** (*People v. Sandoval* (2007) 41 Cal.4th 825, 837-838 (*Sandoval*); *People v. Esquibel* (2008) 166 Cal.App.4th 539, 557-558.)

c. Crime committed with extreme cruelty, viciousness, or callousness. (*Sandoval*, *supra*, 41 Cal.4th at p. 837; *Curry*, *supra*, 158 Cal.App.4th at pp. 793-794; *Ybarra*, *supra*, 166 Cal.App.4th at pp. 1096-1097.)

d. Violation of a position of trust. (*People v. French* (2008) 43 Cal.4th 36, 43, 52; *Curry*, *supra*, 158 Cal.App.4th at pp. 793-794.).)

e. Crime involved planning and sophistication. (*Ybarra*, *supra*, 166 Cal.App.4th at pp. 1096-1097; See *People v. Tillotson* (2007) 157 Cal.App.4th 517, 547.)

f. Unsatisfactory performance on probation, mandatory supervision, postrelease community supervision, or parole. If the defendant's unsatisfactory performance on probation is based on factors other than being convicted of a new crime, the factors must be submitted to the trier of fact and proved beyond a reasonable doubt. (*People v. Towne* (2008) 44 Cal.th 63, 82-83.)

g. The defendant induced others to commit the crime (including a minor), or occupied a leadership position in the commission of the crime. (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1469-1473.)

h. Other factors in aggravation. Although there are no reported cases on whether the following aggravating factors must be submitted to the trier of fact, likely the following factors are included within *Apprendi*: defendant was armed with or used a deadly weapon (rule 4.421, subd. (a)(2)); defendant threatened or dissuaded witnesses, or interfered with the judicial process (rule 4.421, subd. (a)(6)); crime involved the taking or attempted taking or damage to property of great monetary value (rule 4.421, subd. (a)(9)); crime involved a large quantity of contraband (rule 4.421, subd. (a)(10)); crime constitutes a hate crime (rule 4.421, subd. (a)(12)); defendant engaged in violent conduct such that he is a danger to society (rule 4.421, subd. (b)(1));

8. Pleading aggravating factors and proof at preliminary hearing

It is not entirely clear whether the aggravating factors must be pled in the accusatory pleadings and established by proof at a preliminary hearing. The two reported cases on this issue are in disagreement.

Barrigan v. Superior Court (2007) 148 Cal.App.4th 1478 (*Barrigan*), holds the aggravating factors may be alleged in the complaint or information, but need not be established at a preliminary hearing. *Barrigan* arose in the context of a demur brought by the defendant when the prosecutor amended the pleadings to allege the aggravating factors. The appellate court observed: "[S]ections 950 and 952 specify only what an accusatory pleading 'must' or 'shall' contain, namely, a sufficient statement of the 'public offense' allegedly committed. [¶] The statutes do not, on their face, preclude allegations other than public offenses. Indeed, because a fact 'other than a prior conviction' used to impose the upper term must first be submitted to a jury and proved beyond a reasonable doubt, unless the accused waives the right to jury trial [citations], it now appears that to satisfy procedural due process, an aggravating fact must be charged in the accusatory pleading. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 476, 494, fn. 19, 120 S.Ct. 2348, 2355, 2365, fn. 19, 147 L.Ed.2d 435, 446, 457, fn. 19; *Jones v. United States* (1999) 526 U.S. 227, 243, fn. 6, 119 S.Ct. 1215, 1224, fn. 6, 143 L.Ed.2d 311, 326, fn. 6 ['any fact (other than prior conviction) that increases the maximum penalty for a crime *must be charged in an indictment,* submitted to a jury, and prove[d] beyond a reasonable doubt' (italics added)].) (*Barrigan*, *supra*, 148 Cal.App.4th at p. 1483.) [¶] So that the statutory scheme governing accusatory pleadings complies with the notice requirements of procedural due process, we construe sections 950 and 952 to permit the People to amend the information to allege aggravating facts for purposes of sentencing. [Citations.) It is feasible to so construe the statutes because their wording and purpose do not limit an accusatory pleading to allegations of public offenses. [¶] Indeed, a contrary construction of the statutes would not only implicate due process concerns, it would create an absurd result, *i.e*., the prosecution would be unable to comply with the *Cunningham* holding that precludes an aggravating fact (other than a prior conviction) from being used to impose the upper term unless the fact has been submitted to a jury and proved beyond a reasonable doubt. Courts do not interpret statutes in a manner that results in absurd consequences that could not have been intended by the Legislature. [Citation.]" (*Barrigan*, *supra*, 148 Cal.App.4th at pp. 1483-1484.)

Barrigan also concluded that because factors in aggravation are not "public offenses," they need not be proved at the preliminary hearing. "[A]n aggravating fact is not an 'offense' within the meaning of section 1009 and the statutes governing accusatory pleadings. [Citation.] Thus, the statutory scheme does not require the prosecution to plead and prove at the preliminary examination the existence of aggravating facts that can be used to impose the upper term in California's determinate sentencing law." (*Barrigan*, *supra*, 148 Cal.App.4th at p. 1484.)

People v. Superior Court (Brooks) (2007) 159 Cal.App.4th 1 (*Brooks*), reached the contrary conclusion. Relying heavily on the California Supreme Court opinion in *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*), *Brooks* found it was the province of the court to determine the existence of the aggravating factors supporting an upper term

sentence. As *Brooks* observed: "Applying *Cunningham,* in *Sandoval,* the California Supreme Court considered the appropriate process for resentencing a criminal defendant where an upper term sentence was found unconstitutional under *Cunningham.* In considering this issue, the court held that resentencing under a discretionary scheme was preferable to permitting a jury trial on aggravating circumstances. [Citation.] [¶] Our high court's reasoning for rejecting the jury trial option is instructive in answering the question before us—whether the prosecution should be permitted to amend an information to allege aggravating circumstances. *Sandoval* explained that, although allowing a jury trial on aggravating circumstances, 'would comply with the constitutional requirements of *Cunningham*, engrafting a jury trial onto the sentencing process established in the former DSL would significantly complicate and distort the sentencing scheme. Neither the DSL nor the Judicial Council's sentencing rules were drafted in contemplation of a jury trial on aggravating circumstances. It is unclear how prosecutors might determine which aggravating circumstances should be charged and tried to a jury, because no comprehensive list of aggravating circumstances exists. [Citation.] [¶] The court further reasoned that the 'Legislature [in enacting amendments to section 1170] authorized the trial court—not the prosecutor—to make the determination "whether there are circumstances that justify imposition of the upper or lower term," and to do so by considering the record of the trial, the probation officer's report, and statements submitted by the defendant, the prosecutor and the victim or victim's family.' [Citation.] 'If the prosecutor were to decide which circumstances of the offense justify an upper term and thereby charge defendant accordingly, the prosecutor would be exercising a form of discretion that the Legislature intended to be exercised by the court. To avoid that problem, a prosecutor might be limited to charging aggravating factors specified in rules or statutes, but that approach would distort the process in a different way—the scope of potentially aggravating circumstances would be severely limited.' [Citation.]" (*Brooks*, *supra*, 159 Cal.App.4th at p. 5; footnote omitted.)

Given the current amendment of section 1170 and 1170.1, it appears *Barrigan* is the better reasoned decision. The court's reasoning in *Brooks* fails because the Legislature has now effectively abrogated *Sandoval* and *Brooks* by amending sections 1170 and 1170.1 to expressly provide the right to a jury determination of aggravating factors, the very right rejected by *Sandoval*. Until there is further appellate resolution of the issue, it would be prudent for the People to allege in the felony complaint and information any factors in aggravation. Likely the court would be prohibited from considering any aggravating factors not pled and proved, unless the factors relate to a prior conviction or are admitted by the defendant.

People v. Pantaleon (2023) 89 Cal.App.5th 932 (*Pantaleon*), holds the defendant has no right to the pleading of aggravating sentencing factors related to the prior conviction exception. "In *In re Varnell* (2003) 30 Cal.4th 1132, our Supreme Court held there is no due process right to notice in the accusatory pleading with respect to sentencing factors. [Citation.] 'A "sentencing factor" is 'a circumstance, which may be either

aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense." ' [Citation.] The court explained that even if it deemed the sentencing factor at issue 'an enhancement, we still could not impose a pleading requirement as a matter of due process, for *Apprendi* does not apply to "sentence enhancement provisions that are based on a defendant's prior conviction." ' [Citations.]" (*Pantaleon*, *supra*, 89 Cal.App.5th at p. 938, italics original.) The court expressed no opinion on the need to plead factors that are not related to the prior conviction exception.

D. Required imposition of the low term of imprisonment

Under specified circumstances, the sentencing court must impose the low term of imprisonment. SB 567 amends section 1170 with the addition of subdivision (b)(6), which states: "Notwithstanding paragraph (1), and unless the court finds that the aggravating circumstances outweigh the mitigating circumstances that imposition of the lower term would be contrary to the interests of justice, *the court shall order imposition of the lower term* if any of the following was a contributing factor in the commission of the offense. . . ." (Italics added.)

1. Sentencing discretion under section 1170, subdivision (b)(1), is limited

Section 1170, subdivision (b)(1), specifies: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall, in its sound discretion, order imposition of a sentence not to exceed the middle term, except as otherwise provided in paragraph (2)." Section 1170, subdivision (b)(6), however, provides "[n]otwithstanding paragraph (1)," the court must impose the low term if the provisions of subdivision (b)(6) apply. By excluding paragraph (1) the Legislature means to limit the court's discretion when the circumstances of sentencing meet the terms of paragraph (6). While the court normally has the discretion to impose a sentence "not to exceed the middle term" (unless the upper term may be imposed pursuant to paragraph (2)), if paragraph (6) applies, the court may only impose the low term of imprisonment.

2. Exception to the required imposition of the low term of imprisonment

The court is not required to impose the low term under paragraph (6) if "the court finds that the aggravating circumstances outweigh the mitigating circumstances that imposition of the lower term would be contrary to the interests of justice. . . ." While the language of the statute is somewhat awkward, the statute seems to say that the court is not required to impose the low term if such a sentence would not be in the interests of justice because the aggravating factors outweigh the mitigating factors.

Interests of justice

"Interests of justice" is not further defined by the statute. Presumably it will have the same meaning as applied by the courts in other contexts. Under section 1385, subdivision (a), for example, the court "in the furtherance of justice" may order an action dismissed. In the context of a motion to dismiss a strike under the Three Strikes Law, *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), observed: "'The trial court's power to dismiss an action under section 1385, while broad, is by no means absolute. Rather, it is limited by the amorphous concept which requires that the dismissal be "in furtherance of justice." As the Legislature has provided no statutory definition of this expression, appellate courts have been faced with the task of establishing the boundaries of the judicial power conferred by the statute as cases have arisen challenging its exercise. Thus, in measuring the propriety of the court's action in the instant case, we are guided by a large body of useful precedent which gives form to the above concept. [¶] 'From the case law, several general principles emerge. Paramount among them is the rule "that the language of [section 1385], 'in furtherance of justice,' requires consideration both of the constitutional rights of the defendant, and *the interests of society represented by the People*, in determining whether there should be a dismissal. [Citations.]" [Citations.] At the very least, the reason for dismissal must be "that which would motivate a reasonable judge." [Citations.]' [Citation.] 'Courts have recognized that society, represented by the People, has a legitimate interest in "the fair prosecution of crimes properly alleged." [Citation.] " ' [A] dismissal which arbitrarily cuts those rights without a showing of detriment to the defendant is an abuse of discretion. ' [Citations.]" ' [Citation]." [¶] From these general principles it follows that a court abuses its discretion if it dismisses a case, or strikes a sentencing allegation, solely 'to accommodate judicial convenience or because of court congestion.' [Citation.] A court also abuses its discretion by dismissing a case, or a sentencing allegation, simply because a defendant pleads guilty. [Citation.] Nor would a court act properly if 'guided solely by a personal antipathy for the effect that the three strikes law would have on [a] defendant,' while ignoring 'defendant's background,' 'the nature of his present offenses,' and other 'individualized considerations.' [Citation.]" (*Romero*, *supra*, 13 Cal.4th at pp. 530-531; italics in original.)

Aggravating and mitigating factors

In determining whether the aggravating factors outweigh the mitigating factors such that the imposition of the low term of custody would not be in the interests of justice, the court should consider the circumstances in aggravation or mitigation listed in California Rules of Court, rules 4.421 and 4.423, including "other factors . . . that reasonably relate to the defendant or circumstances under which the crime was committed." (Rule 4.421, subd. (c), and rule 4.423, subd. (c).)

In the context of identifying aggravating factors and weighing them against any mitigating factors, the court will be exercising its discretion without the right to a jury

determination. As observed in *People v. Black* (2007) 41 Cal.4th 799, 815-816 (*Black II*): "*Cunningham* requires us to recognize that aggravating circumstances serve two analytically distinct functions in California's current determinate sentencing scheme. One function is to raise the maximum permissible sentence from the middle term to the upper term. The other function is to serve as a consideration in the trial court's exercise of its discretion in selecting the appropriate term from among those authorized for the defendant's offense. Although the DSL does not distinguish between these two functions, in light of *Cunningham* it is now clear that we must view the federal Constitution as treating them differently. Federal constitutional principles provide a criminal defendant the right to a jury trial and require the prosecution to prove its case beyond a reasonable doubt as to factual determinations (other than prior convictions) that serve the first function, but leave the trial court free to make factual determinations that serve the second function." (See *People v. Navarro* (2004) 124 Cal.App.4th 1175, 1182 ["*Blakely* does not require that the jury make the decision of whether or not an enhanced sentence should be imposed. *Blakely* requires that the facts underlying an enhanced sentence be found true beyond a reasonable doubt by the jury; it does not require that the jury be given the power to decide if, in fact, an enhanced sentence will be imposed. The trial court makes that decision."].)

The court's determination of the interests of justice

In determining whether imposition of a low term of imprisonment is not in the interests of justice, the court, with the foregoing authorities as a reference, should make its decision after *an individualized consideration* of the following nonexclusive factors:

- The constitutional rights of the defendant, and the interests of society represented by the People.

- The defendant's background and prospects, including the presence or absence of a significant criminal record.

- The nature and circumstances of the crime and the defendant's level of involvement, including the factors in mitigation or aggravation listed in the Rules of Court.

- The factors that would motivate a "reasonable judge" in the exercise of discretion.

- The specific mitigating factors identified by section 1170, subdivision (b)(6), *infra*.

- The court should not consider whether the defendant simply has pled guilty, calendar control, or because the court has an antipathy to the statutory scheme.

Consistent with the provisions of section 1170, subdivision (b)(5), "[t]he court shall set forth on the record the facts and reasons for choosing the sentence imposed."

People v. Bautista-Castanon (2023) 89 Cal.App.5th 922 (*Bautista-Castanon*), holds the defendant is not entitled to a jury determination of aggravating factors considered by the court in determining whether imposition of the low term is "contrary to the interests of justice." "Bautista-Castanon suggests that any aggravating circumstances considered by the court in determining whether the lower term would be 'contrary to the interests of justice' under section 1170, subdivision (b)(6) (thus permitting imposition of the middle term) must be proved beyond a reasonable doubt to a jury (or to the court, if jury is waived), a requirement he suggests should be borrowed from subdivision (b)(2) of the statute. We disagree. Section 1170, subdivision (b)(6) states no such requirement for the equitable balancing determination it entrusts to the trial court. And subdivision (b)(2) of the statute—the provision requiring proof to a jury beyond a reasonable doubt—is directed by its terms solely to the prerequisites for imposing the *upper term*. (§ 1170, subd. (b)(2) ["The court may impose a sentence *exceeding the middle term* only when there are circumstances in aggravation of the crime that justify the imposition of a term of imprisonment *exceeding the middle term*, and the facts underlying those circumstances have been stipulated to by the defendant, or have been found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial." (Italics added [by *Bautista-Castanon*].)].) We decline to import this requirement into section 1170, subdivision (b)(6) as a prerequisite to imposing the middle term." (*Bautista-Castanon*, *supra*, 89 Cal.App.5th at pp. 928-929, italics original.)

3. The factors requiring imposition of the low term of imprisonment

Section 1170, subdivision (b)(6), requires the court to impose the low term of incarceration if any of the following "was a contributing factor in the commission of the offense:"

(a) "The person has experienced psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence." (§ 1170, subd. (b)(6)(A).)

(b) "The person 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." (§ 1170, subd. (b)(6)(B).) Section 1016.7, subdivision (b), specifies "youth" "includes any person under 26 years of age on the date the offense was committed."[3]

[3] Section 1016.7 was added by Assembly Bill No. 124 (2021-2022 Reg. Leg. Sess.)

People v. Fredrickson (2023) 90 Cal.App.5th 984 (*Fredrickson*), addresses the initial showing necessary to trigger the presumption of a low term sentence. "[Section 1170(b)(6)(B)] does not mandate a presumption in favor of the lower term in every case in which the defendant was under age 26 at the time the crime was committed. Instead, the presumption applies only if the defendant's youth was 'a contributing factor' in his or her commission of the offense. [Citations.] Under the reasoning of the above cases, in order to trigger the presumption, there must be some initial showing that the defendant's youth was a contributing factor, and only then must the record affirmatively show compliance with the statute." (*Fredrickson*, supra, 90 Cal.App.5th at p. ___, footnote omitted.)

(c) "Prior to the instant offense, or at the time of the commission of the offense, the person is or was a victim of intimate partner violence or human trafficking." (§ 1170, subd. (b)(6)(C).) "Prior to the instant offense" is not time-qualified; likely it means at *any* time prior to the instant offense.

Other reasons justifying the imposition of the low term of imprisonment

Section 1170, subdivision (b)(7), provides: "Paragraph (6) does not preclude the court from imposing the lower term even if there is no evidence of those circumstances listed in paragraph (6) present."

Proof of the factors specified in section 1170, subdivision (b)(6)

The statute does not specify how the parties are to prove or contest the existence of the specified mitigating factors. Presumably such factors may be established or challenged using traditional sources of information such as the probation report, the defendant's record of conviction, presentation of evidence in a hearing conducted pursuant to section 1204, or offers of proof and argument of counsel.

4. The meaning of "contributing factor"

Section 1170, subdivision (b)(6), requires the imposition of the low term of imprisonment if any of three specified factors were "a contributing factor in the commission of the offense." The statute does not further define the meaning of "contributing factor." Likely it will be necessary for the court to find the factor had some connection, however slight, in the commission or circumstances of the crime.

In other legislation adopted in 2021, the Legislature used the phrase "substantially contributed" to the crime. (See, *e.g.*, § 1385, subdivision (c)(5) [The court may strike an enhancement "if the court concludes that the defendant's mental illness *substantially*

contributed to the defendant's involvement in the commission of the offense]; italics added].) It seems clear the Legislature's use of "contributing factor" implies a factor far less significant than one which "substantially contributed" to the crime.

5. Application of section 1170, subdivision (b)(6), to enhancements with triads

Section 1170.1, subdivision (d)(1), specifies "[i]f an enhancement is punishable by one of three terms, the court shall, in its sound discretion, order imposition of a sentence not to exceed the middle term, except as otherwise provided in paragraph (2)." Paragraph 2 of section 1170.1, subdivision (d), specifies the upper term of the enhancement may be imposed only if the aggravating factors have been stipulated to by the defendant or submitted to the trier of fact and proved beyond a reasonable doubt.

It is unlikely the mandatory low term sentencing provisions of section 1170, subdivision (b)(6), are applicable to sentencing of enhancements under section 1170.1. By its express terms, section 1170.1, subdivision (d), limits the discretion of the court in selecting the appliable term only in the context of section 1170.1, subdivisions (d)(1) and (2) – no mention is made of section 1170, subdivision (b)(6). A sentencing court, however, may wish to impose the low term on an enhancement for the reasons outlined in section 1170, subdivision (b)(6), simply as a matter of the exercise of judicial discretion. As made clear in section 1170.1, subdivision (d)(1), "[i]f an enhancement is punishable by one of three terms, the court shall, in its sound discretion, order imposition of a sentence not to exceed the middle term."

E. Place of custody for service of sentence on enhancement follows the base term

People v. Vega (2014) 222 Cal.App.4th 1374 (*Vega*), holds if an enhancement specifies service of its term in state prison, the sentence for the entire crime is to be served in state prison, even though the underlying crime specifies punishment in the county jail under section 1170, subdivision (h). SB 257 adds section 1170, subdivision (h)(9), which provides: "Notwithstanding the separate punishment for any enhancement, any enhancement shall be punishable in county jail or state prison as required by the underlying offense and not as would be required by the enhancement." The legislation declares its intent to abrogate *Vega*. Accordingly, although an enhancement may specify its term is to be served in state prison, the court must look to the place where the base term will be served – it, not the enhancement, will control defendant's placement.

III. SENTENCING OF GANG CRIMES UNDER SECTION 186.22

Law applicable during 2022

Sentencing of gang crimes with triads is governed by section 186.22, subdivision (b)(3), which specifies "[t]he court shall select the sentence enhancement that, in the court's discretion, best

serves the interests of justice and shall state the reasons for its choice on the record at the time of the sentencing in accordance with the provisions of subdivision (d) of Section 1170.1" Under this rule the court may exercise its discretion in imposing an aggravated term without the need to have the aggravating factors either admitted by the defendant or proved to the trier of fact beyond a reasonable doubt. The provision avoids the application of the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), and *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*), when the court intends to impose the aggravated term on the enhancement. The Legislature expressly extended the existing provisions of section 186.22, subdivision (b)(3), to January 1, 2023. Accordingly, the contemporary changes made to sections 1170 and 1170.1 for the proof of the aggravating factors do not apply to gang crimes during 2022.

Law applicable in 2023

Effective January 1, 2023, however, section 186.22, subdivision (b)(3), has been amended to specify that "[t]he court shall order the imposition of the middle term of the sentence enhancement, unless there are circumstances in aggravation or mitigation. The court shall state its choice of sentencing enhancements on the record at the time of sentencing." The change in the statute makes the middle term the presumptive term. It was the fact that under the Determinate Sentencing Law prior to 2007 the middle term was the presumptive term that caused the U.S. Supreme Court in *Cunningham* to find the statute in conflict with *Apprendi*. Accordingly, after January 1, 2023, because of the application of *Apprendi*, the court may not impose an upper term unless the aggravating factors are either admitted by the defendant or pled and proved to a trier of fact beyond a reasonable doubt.

In amending section 186.22, subdivision (b)(3), the Legislature made no specific reference to the procedures outlined in sections 1170 and 1170.1 for the proof of aggravating factors. Likely section 1170, subdivision (b)(2), should be utilized when considering the imposition of the upper term for a gang crime, such as section 186.22, subdivision (a). Similarly, section 1170.1 should be utilized if the court is considering the upper term for a gang enhancement with a triad, such as in section 186.22, subdivision (b)(1)(A). It is not clear whether the upper term of a gang enhancement may be imposed based on the record of conviction without an admission by the defendant or proof to a trier of fact beyond a reasonable doubt. Certainly, there is no *constitutional* violation in using such a factor without the defendant having admitted it or having it proved to a jury beyond a reasonable doubt – the exception was acknowledged in *Apprendi*. But the Legislature is free to allow the exception or not. The issue is whether in not mentioning the exception, the Legislature by *statute* has eliminated the prior record exception to *Apprendi* for gang enhancements - such will be a matter for future appellate determination.

IV. IMPOSITION OF SENTENCE UNDER SECTION 654

Prior to its amendment by Assembly Bill No. 518 (2021-2022 Reg. Leg. Sess.), section 654 provided, in relevant part, that "[a]n act or omission that is punishable in different ways by

different provisions of law shall be punished under the provision that provides for the *longest potential term of imprisonment*, but in no case shall the act or omission be punished under more than one provision." (Italics added.) Section 654 thus required the court to determine the maximum possible sentence for each of the crimes, select and impose a term from the triad for the crime with the longest possible term, then impose and stay the punishment for any other crime.

Section 654 now provides, in relevant part, that "[a]n act or omission that is punishable in different ways by different provisions of law may be punished under either of such provisions, but in no case shall the act or omission be punished under more than one provision." The court is no longer required to impose a sentence based on the longest possible sentence but may impose a sentence on any one of the crimes. The sentence for any crime not selected by the court should have sentence imposed than "stayed under the provisions of section 654."

Application of *Estrada*

The change in section 654 clearly will be applicable to any sentences imposed after January 1, 2022. Because the court is no longer required to impose the sentence on the crime with the longest possible term but has the option to impose sentence on a crime with a lesser punishment, likely *Estrada* will make the new law applicable to all cases not final as of January 1, 2022. To be entitled to reconsideration of a sentence structured by section 654 under the law prior to January 1, 2022, the defendant must show the court imposed a term from the triad for the crime with the longest possible sentence and stayed the punishment for any crime with a lesser term. In absence of any indication to the contrary, it may be presumed the court, in selecting a term from the triad for the crime with the longest possible sentence, was following the requirements of section 654, subdivision (a), as it then existed without consideration of the punishment for any crime with lesser punishment.

People v. Bautista-Castanon (2023) 89 Cal.App.5th 922, held the new provisions of section 654 apply to all cases not final. (*Id*., at p. 926.)

V. STRIKING OF ENHANCEMENTS UNDER SECTION 1385

Senate Bill No. 81 (2021-2022 Reg. Leg. Sess.) (SB 81) amends section 1385 to require the court, subject to certain exceptions, to dismiss pled and proved enhancements under specified circumstances. SB 81 adds subdivision (c) to section 1385.

A. Dismissal of an enhancement under section 1385, subdivision (c)

Section 1385, subdivision (c)(1), provides: "Notwithstanding any other law, the court shall dismiss an enhancement if it is in the furtherance of justice to do so, except if dismissal of that enhancement is prohibited by any initiative statute." Subdivision (c)(1) establishes its

supremacy over any other law, other than an initiative statute,[4] to mandate dismissal of an enhancement if the court finds such dismissal is in "furtherance of justice."

Subdivision (c)(1) requires the court to dismiss *any* enhancement if it is in the furtherance of justice to do so. The subdivision is not limited to the circumstances outlined in subdivisions (c)(2) – (7). As specified in subdivision (c)(4): "The circumstances listed in paragraph (2) are not exclusive and the court maintains authority to dismiss or strike an enhancement in accordance with subdivision (a)." Accordingly, if the court determines it is in the furtherance of justice to dismiss a particular enhancement, the court must strike the enhancement even though the reasons are not based on subdivisions (c)(2) – (7).

No application to "strikes" under the Three Strikes law

People v. Burke (2023) 89 Cal.App.5th 237(*Burke*), holds the provisions of section 1385, subdivision (c), have no application to the process of dismissing strikes under the provisions of section 1385, subdivision (a). The new provisions relate to the dismissal of "enhancements." The Three Strikes law is not an enhancement, but is an alternative sentencing scheme. Accordingly, the provisions of section 1385, subdivision (c), are inapplicable to the dismissal of strikes under the Three Strikes law. (*Burke*, *supra*, 89 Cal.App.5th at pp. 242-244.)

Our Supreme Court has held that the Three Strikes law is not an enhancement, but is an alternative sentencing scheme. (*People v. Superior Court (Romero)* (1996) 13 Cal.App.4th 497, 527.) Because section 1385, subdivision (c)(1), provides that "the court shall dismiss an *enhancement* if it is in the furtherance of justice to do so . . . ," the plain meaning of subdivision (c) suggests it does not apply to the dismissal of strikes. (Italics added.) However, the court may consider the factors listed in section 1385, subdivision (c)(2), in determining whether to dismiss a strike. Many of the factors listed in subdivision (c)(2) have been included as circumstances in mitigation in California Rule of Court, rule 4.423, subdivision (b). Circumstances in aggravation and mitigation are appropriately considered in determining whether to dismiss a strike. (*People v. Thomas* (1992) 4 Cal.4th 206, 211-212.) The court in considering a motion to dismiss a strike should consider the *factors* listed in section 1385, subdivision (c)(2), along with all other aggravating and mitigating factors. However, the court is not bound by the "great weight" requirement in considering the specified mitigating factors.

B. Furtherance of justice

Although certain provisions in subdivision (c) severely limit the exercise of the court's discretion in refusing to strike an enhancement, it is clear the court retains the overarching discretion to determine whether striking of an enhancement will be contrary to the furtherance of justice. That such discretion is retained by the court is made clear in the statute: "I*n exercising its discretion under this subdivision*, the court *shall consider and afford great weight* to evidence offered by the defendant to prove that any of the mitigating circumstances . . . are present.

[4] For a discussion of the initiative exception, see the discussion, *infra*.

Proof of the presence of one or more of these circumstances *weighs greatly* in favor of dismissing the enhancement. . . ." (§ 1385, subd. (c)(2); italics added.)[5]

"Furtherance of justice" in subdivision (c)(1), is not defined by the statute. Presumably it will have the same meaning as applied by the courts in other contexts. Under section 1385, subdivision (a), for example, the court "in the furtherance of justice" may order an action dismissed. In the context of a motion to dismiss a strike under the Three Strikes Law, *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), observed: "'The trial court's power to dismiss an action under section 1385, while broad, is by no means absolute. Rather, it is limited by the amorphous concept which requires that the dismissal be "in furtherance of justice." As the Legislature has provided no statutory definition of this expression, appellate courts have been faced with the task of establishing the boundaries of the judicial power conferred by the statute as cases have arisen challenging its exercise. Thus, in measuring the propriety of the court's action in the instant case, we are guided by a large body of useful precedent which gives form to the above concept. [¶] 'From the case law, several general principles emerge. Paramount among them is the rule "that the language of [section 1385], 'in furtherance of justice,' requires consideration both of the constitutional rights of the defendant, and *the interests of society represented by the People*, in determining whether there should be a dismissal. [Citations.]" [Citations.] At the very least, the reason for dismissal must be "that which would motivate a reasonable judge." [Citations.]' [Citation.] 'Courts have recognized that society, represented by the People, has a legitimate interest in "the fair prosecution of crimes properly alleged." [Citation.] " ' [A] dismissal which arbitrarily cuts those rights without a showing of detriment to the defendant is an abuse of discretion. ' [Citations.]" ' [Citation]." [¶] From these general principles it follows that a court abuses its discretion if it dismisses a case, or strikes a sentencing allegation, solely 'to accommodate judicial convenience or because of court congestion.' [Citation.] A court also abuses its discretion by dismissing a case, or a sentencing allegation, simply because a defendant pleads guilty. [Citation.] Nor would a court act properly if 'guided solely by a personal antipathy for the effect that the three strikes law would have on [a] defendant,' while ignoring 'defendant's background,' 'the nature of his present offenses,' and other 'individualized considerations.' [Citation.]" (*Romero*, *supra*, 13 Cal.4th at pp. 530-531; italics in original.)

People v. Ortiz (2023) 87 Cal.App.5th 1087, 1093, observed: "[T]he specification of mandatory factors [in section 1385, subdivision (c)] did not displace the trial court's obligation to exercise discretion in assessing whether dismissal is 'in furtherance of justice' ([citations] [enactment of

[5] The intent of the Legislature to maintain the traditional discretion of the court is reflected in a letter from Senator Nancy Skinner dated September 10, 2021, to the Secretary of the Senate for placement in the Senate Daily Journal: "As the author of Senate Bill (SB) 81, I wish to provide some clarity on my intent regarding . . . the bill. [¶] {A]mendments taken on August 30, 2021 remove the presumption [in previous versions of the bill] that a judge must rule to dismiss a sentence enhancement if certain circumstances are present, and instead replaces that presumption with a 'great weight' standard where these circumstances are present. The retention of the word 'shall' in Penal Code § 1385(c)(3)(B) and (C) should not be read as a retention of the previous presumption language – *the judge's discretion is preserved Penal Code § 1385(c)(2*)." (Italics added.)

Senate Bill 81 'reinforced' conclusion that 'Legislature intended to confer on trial courts a range of sentencing options and broad discretion to choose among them'].)

The court's determination of the furtherance of justice

In determining whether striking an enhancement is not in the furtherance of justice, the court, with the foregoing authorities as a reference, should make its decision after *an individualized consideration* of the following factors:

- The mitigating factors listed in section 1385, subdivision (c)(3)(A) through (I), including the specific evidence referenced in certain factors. (See discussion of the factors, *infra*.)

- The constitutional rights of the defendant, and the interests of society represented by the People.

- The defendant's background and prospects, including the presence or absence of a significant criminal record.

- The nature and circumstances of the crime and the defendant's level of involvement. , including the factors in mitigation or aggravation in the Rules of Court.

- The factors that would motivate a "reasonable judge" in the exercise of discretion.

The court should not consider whether the defendant simply has pled guilty, calendar control, or because the court has an antipathy to the statutory scheme.

C. Statement of reasons

Although section 1385, subdivision (a), speaks only to granting a motion to dismiss, "[t]he reasons for the [court's ruling] shall be stated orally on the record. The court shall also set forth the reasons in an order entered upon the minutes if requested by either party or in any case in which the proceedings are not being recorded electronically or reported by a court reporter. "

D. Weighing of certain mitigating factors

Section 1385, subdivision (c)(2) specifies: "In exercising its discretion under this subdivision, the court shall consider and afford great weight to evidence offered by the defendant to prove that any of the mitigating circumstances in subparagraphs (A) to (I) are present. Proof of the presence of one or more of these circumstances weighs greatly in favor of dismissing the enhancement, unless the court finds that dismissal of the enhancement would endanger public safety. 'Endanger public safety' means there is a likelihood that the dismissal of the enhancement would result in physical injury or other serious danger to others."

Great weight

"Great weight" is not further defined in the statute. *People v. Martin* (1986) 42 Cal.3d 437 (*Martin*),[6] considered the phrase in the context of whether the Board of Prison Terms properly found a sentence to be disparate. *Martin* directs the trial court to give the Board's conclusions "great weight." In defining the phrase, the court first drew an analogy to the decision of the Youth Authority to recommend a placement in the authority or state prison. "We said that such a recommendation was entitled to 'great weight' [citations] and went on to explain what that meant. Such a recommendation, we said, must be followed in the absence of 'substantial evidence of countervailing considerations of sufficient weight to overcome the recommendation.' [Citations.]" (*Martin*, *supra*, 42 Cal.3d at p. 447.) In the context of considering a recommendation by the Board of Prison Terms, the court observed that " giving 'great weight' to a finding of disparity in the first step of the analysis means that the trial court must accept the board's finding of disparity unless based upon substantial evidence it finds that the board erred in selecting the appropriate comparison group or in determining that defendant's sentence differs significantly from that imposed upon most members of that group. If there are unique elements in the case which render it unsuitable for comparison with other cases, or subjective factors which distinguish it from other cases, such matters can be considered in the second part of the analysis when the court considers whether a disparate sentence is justified. [¶] In the second stage, the trial court must again give great weight to the board's finding of disparity, a finding it upheld in the first stage of the analysis. That finding does not automatically require it to recall its sentence. Under the reasoning of [citations], however, giving great weight to the finding does require the court to recall its sentence unless there is substantial evidence of countervailing considerations which justify a disparate sentence. Such considerations can include subjective factors like those mentioned by the trial court - such as defendant's attitude and demeanor at the time of the crime, and the manner in which he threatened the victim." (*Martin*, *supra*, 42 Cal.3d at pp. 447-448; footnotes omitted.)

It appears the intent of the Legislature is to guide the court's discretion in considering a motion to strike if it is based on one of the factors listed in subdivision (c)(3)(A) through (I). Subdivision (c)(2) still operates under the umbrella provision in section (c)(1) to the extent it requires the dismissal of an enhancement to be in the furtherance of justice. The plain meaning of subdivision (c)(2), however, is that the court is directed to "consider and afford great weight to evidence" offered in support of the specified mitigating circumstances. The presence of one or more of the factors "weighs greatly in favor of dismissing the enhancement," unless public safety is endangered. The court is not directed to give *conclusive* weight to the mitigating factors.

[6] Senator Nancy Skinner in a letter dated September 10, 2021, to the Secretary of the Senate for placement in the Senate Daily Journal, said: "As the author of Senate Bill (SB) 81, I wish to provide some clarity on my intent regarding . . . the bill. [¶] I wish to clarify that in establishing the 'great weight' standard in SB 81 for imposition or dismissal of enhancements [Penal Code § 1385(c)(2)] it was my intent that this great weight standard be consistent with the case law in California Supreme Court in People v. Martin, 42 Cal.3d 437 (1986)."

Public safety exception

Section 1385, subdivision (c)(2), specifies that "[p]roof of the presence of one or more of [the specified circumstances of mitigation] weighs greatly in favor of dismissing the enhancement, unless the court finds that dismissal of the enhancement would endanger public safety." The statutory language affects the weight the mitigating factor is given by the court. In absence of a showing of a danger to public safety, the court is to afford the mitigating factor "great weight." If striking the enhancement would endanger public safety, the court is not to give the mitigating factor "great weight." If public safety would be endangered by the dismissal of the enhancement, the court is free to accord the mitigating factor whatever weight it deserves. Presumably if the court does find that dismissal of the enhancement would endanger public safety, that alone would provide sufficient justification for denying the request for dismissal.

Given the foregoing plain meaning of the statute, the public safety exception also does not mean the court may deny a motion to strike an enhancement *only* if public safety is endangered. The court may still exercise its discretion under the umbrella of "furtherance of justice" required in section 1385, subdivisions (a), (b)(1), and (c)(1).

Subdivision (2) defines "endanger public safety" as "a likelihood that the dismissal of the enhancement would result in physical injury or other serious danger to others." The exception is not based on a generalized concern for public safety as provided in other statutory provisions. (See, *e.g.*, section 1170.126, subd. (f) [The defendant is entitled to resentencing "unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety."].) Rather, it appears the court must find a "likelihood" that the act of dismissing an enhancement "would result in physical injury or other serious danger to others." The causal connection between the dismissal of the enhancement and danger to public safety will be quite difficult to establish, particularly as to the proof of physical injury.

E. Timing of the exercise of discretion under section 1385

Section 1385, subdivision (c)(3) confirms the ability of the court to exercise its discretion under subdivision (c) at the time of sentencing. It also provides "nothing in this subdivision shall prevent a court from exercising its discretion before, during, or after trial or entry of plea." While motions under section 1385 historically could be brought at any time during the criminal proceedings, the Supreme Court cautioned that it may be preferrable to delay action on the motion until after the trial. "[I]t is well established that a court may exercise its power to strike under section 1385 'before, during or after trial,' up to the time judgment is pronounced. [Citations.]. . . . Indeed, to strike a sentencing allegation after trial may in some cases be preferable to striking before trial, because the court after trial has heard the evidence relevant to the defendant's culpability and, thus, is better prepared to decide whether the interests of justice make it advisable to exercise the power to strike under section 1385." (*People v. Superior Court (Romero)* 13 Cal.4th 497, 524, fn. 11.)

When the motion is brought at sentencing, or at any other time during the proceedings, the court should consider all motions brought under section 1385 prior to expressing a tentative sentence. Section 1385 contains no provision directing the order of consideration of the various requests for dismissal. Each ground for dismissal should be considered independently on its merits. Indeed, Section 1385, subdivision (c)(2), directs the court to give great weight to evidence offered "to prove that *any* of the mitigating circumstances" are present. (Italics added.) Certainly, there is no provision limiting the dismissal only to one ground under section 1385 – the factors are non-exclusive. But the court should not grant relief without consideration of the context of the request in light of the ruling on one or more other grounds for dismissal. The court, for example, may find the dismissal under one ground is sufficient to meet the interests of justice without granting relief on other grounds. (See, *e.g.*, discussion of the timing of the decision if the enhancement causes the sentence to be longer than 20 years, *infra*.)

F. Mitigating factors justifying the striking of an enhancement

Section 1385, subdivision (c)(3), lists nine specific factors which, if found by the court, will strongly support the exercise of the court's discretion to dismiss one or more enhancements.

1. "Application of the enhancement would result in a discriminatory racial impact as described in paragraph (4) of subdivision (a) of Section 745." (§ 1385, subd. (c)(3)(A).)

Section 745, subdivision (a)(4), of the Racial Justice Act voids a sentence if "[a] longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense, and longer or more severe sentences were more frequently imposed for that offense on people that share the defendant's race, ethnicity, or national origin than on defendants of other races, ethnicities, or national origins in the county where the sentence was imposed." (§ 745, subd. (a)(4)(A).) This provision seeks to address bias resulting in disparate sentencing based on the defendant's group identity.

The violation has two elements: First, "[a] longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense." (*Ibid*.) Although this provision is somewhat vague, in evaluating whether the element has been established, the court presumably will be required to compare the defendant's sentence, crimes, circumstances and criminal backgrounds against the sentence imposed on defendants with similar crimes, circumstances and criminal backgrounds who are of a different race, ethnicity or national origin. The element will be satisfied if the defendant establishes their sentence is more severe than imposed on persons of other races, ethnicities or national origin who commit similar crimes under similar circumstances. Although not expressly provided in this portion of the act, it appears the comparison will be limited to cases in the county where the crime was sentenced.

Second, "longer or more severe sentences were more frequently imposed for that offense on people that share the defendant's race, ethnicity, or national origin than on defendants of other races, ethnicities, or national origins in the county where the sentence was imposed." (*Ibid*.) The second element involves a county-wide comparison of all persons sentenced for the crime to determine whether persons of the defendant's race, ethnicity or national origin received a more severe sentence than defendants of any other races, ethnicities, or national origin. This element is not confined to the sentences imposed by a particular judge but examines the sentencing practice of the entire court within the county. There is no indication of the relevant timeframe to be examined. Presumably the period must be sufficiently long to be statistically relevant. Because of the reference to sentences "more frequently imposed," the court will be required to compare "similarly situated" defendants, by examining crimes, circumstances, and criminal backgrounds of each defendant, rather than simply doing a gross conviction-offense-to-sentence comparison.

"A defendant may share a race, ethnicity, or national origin with more than one group. A defendant may aggregate data among groups to demonstrate a violation of subdivision (a)." (§ 745, subd. (i).)

" '[M]ore frequently imposed' means that statistical evidence or aggregate data demonstrate a significant difference in . . . imposing sentences comparing individuals who have committed similar offenses and are similarly situated, and the prosecution cannot establish race-neutral reasons for the disparity." (§ 745, subd. (h)(1).) For statistical evidence to serve as a basis for relief under the Act, the data must demonstrate a "significant difference" in imposing sentences. "Significant difference" is not further defined in the statute. Likely the court will have discretion to make that determination, based on testimony of experts and other evidence presented at the sentencing hearing.

"Race-neutral reasons for the disparity" is not further defined. It will be a question of fact whether such information is "race-neutral." The Act does not address how the prosecution establishes "race-neutral reasons for the disparity." It appears clear the prosecution has the initial burden of producing evidence of such reasons. Presumably, the prosecution would offer evidence in support of the reasons, and the defendant would have an opportunity to offer evidence in response. Likely it will be left to the discretion of the court to then determine, after considering the evidence offered by the prosecution, whether the defendant ultimately has met their burden of proof to establish the violation by a preponderance of the evidence.

2. **"Multiple enhancements are alleged in a single case. In this instance, all enhancements beyond a single enhancement shall be dismissed." (§ 1385, subd. (c)(3)(B).)**

Although the subdivision specifies "all enhancements beyond a single enhancement *shall* be dismissed," likely "shall" does not operate independently of the other provisions of section 1385. (Italics added.) The intent of the Legislature appears to require that the court "shall" dismiss excessive enhancements only if it is otherwise appropriate under all the provisions of section 1385.[7]

Nothing in the statute prohibits the court from exercising discretion in choosing the enhancements to be dismissed. The scope of the provision includes both count-specific conduct enhancements and status enhancements.
As discussed, *supra*, section 1385, subdivision (c)(3), permits the motion to dismiss at any time during the proceedings, including before trial. It may be prudent for the court, acting in the furtherance of justice, to defer any request under this subdivision until the exact nature of the defendant's convictions has been determined.

3. "The application of an enhancement could result in a sentence of over 20 years. In this instance, the enhancement shall be dismissed." (§ 1385, subd. (c)(3)(C).)

Likely the 20-year limitation applies to the aggregate sentence, including all base terms imposed for a consecutive sentence and all status and conduct enhancements. The court must determine whether there is any configuration of the sentence that "could result" in a sentence in excess of 20 years.

There will be no entitlement to relief unless it is the application of the term for the enhancement that results in a sentence of longer than 20 years. Accordingly, the right to relief under this provision will not be available to defendant's sentenced under the Indeterminate Sentencing Law (ISL). It is the function of the sentence on the base term that results in the life sentence, not the enhancement.

Mechanics of determining whether the enhancement could result in a sentence in excess of 20 years

In determining whether the application of an enhancement could result in a sentence of over 20 years, the court should first calculate the maximum sentence that could be imposed on the underlying crimes and any enhancements other than the enhancement

[7] Senator Nancy Skinner in a letter dated September 10, 2021, to the Secretary of the Senate for placement in the Senate Daily Journal, said: "As the author of Senate Bill (SB) 81, I wish to provide some clarity on my intent regarding . . . the bill. [¶] {A]mendments taken on August 30, 2021 remove the presumption [in previous versions of the bill] that a judge must rule to dismiss a sentence enhancement if certain circumstances are present, and instead replaces that presumption with a 'great weight' standard where these circumstances are present. The retention of the word 'shall' in Penal Code § 1385(c)(3)(B) and (C) should not be read as a retention of the previous presumption language – the judge's discretion is preserved Penal Code § 1385(c)(2)."

at issue.[8] If the calculation does not exceed 20 years, the court must add the term for the enhancement at issue. If the addition of the term for the enhancement could result in a sentence in excess of 20 years, the defendant may be entitled to relief under this factor. For example, if the defendant is convicted of second degree robbery (§ 211/212.5, subd. (c)) [punishable by 2, 3 or 5 years], with the personal discharge of a firearm (§ 12022.53, subd. (c)) [punishable by an additional term of 20 years], the application of the enhancement could result in a sentence in excess of 20 years. In such circumstances, the court must dismiss the enhancement pursuant to section 1385, subdivision (c)(3)(C), unless to do so would be contrary to the furtherance of justice.

If there are multiple enhancements, any one of which could result in a sentence longer than 20 years, there is nothing in the statute prohibiting the court from exercising discretion in choosing the particular enhancement to be dismissed. (See discussion, *infra*, regarding the consideration of multiple enhancements.)

The phrase "shall be dismissed" does not operate independently of the other provisions of section 1385. The intent of the Legislature is to require that the court "shall" dismiss an enhancement pursuant to this subdivision only if it is otherwise appropriate under all the provisions of section 1385.[9] As observed in *People v. Anderson* (2023) 88 Cal.App.5th 233, 239 (italics original, footnote omitted): "If we were to read section 1385, subdivision (c)(2)(B) and (C), in isolation, then Anderson's argument would appear correct—use of the term 'shall' in a statute is generally mandatory, not permissive. However, 'we are not permitted to pluck this phrase out of its placement in the statute and consider it in isolation; instead, we are required to consider where it fits into the " 'context of the statute as a whole.' " ' [Citation.] Here, the statement that a court 'shall' dismiss certain enhancements appears as a subpart to the general provision that a 'court shall dismiss an enhancement *if* it is in the furtherance of justice to do so.' (§ 1385, subd. (c)(1), italics added [by *Anderson*].) In other words, the dismissal of the enhancement is conditioned on a court's finding dismissal is in the interest of justice. The nature of this condition is further explained by the Legislature's directive that the court, while 'exercising its discretion under this subdivision, ... shall consider and afford great weight' to evidence of certain factors, and proof of one of the factors 'weighs greatly' in favor of dismissal 'unless' the court finds dismissal would endanger public safety. [Citation.] This language, taken together, explicitly and unambiguously establishes: the trial court has discretion to dismiss sentencing enhancements; certain circumstances weigh greatly in favor of dismissal; and a finding of danger to public safety can overcome the circumstances in favor of dismissal."

[8] The existence of multiple enhancements may trigger a request for dismissal of all but one enhancement under section 1385, subd. (c)(3)(B). The existence of multiple enhancements, however, does not determine whether section 1385, subd. (c)(3)(C) applies.

[9] See footnote 7, *supra*.

Enhancement "could" result in a sentence over 20 years

Subdivision (c)(3)(C) requires the dismissal of an enhancement if "application of an enhancement *could* result in a sentence of over 20 years." (Italics added.) Whether an enhancement "could" result in a sentence of over 20 years, at least in part, is a matter of timing – that is, what is the status of the defendant's convictions, if any, when the court is considering the motion to dismiss. If, for example, the motion is considered before trial (as is authorized by section 1385, subdivision (c)(3)), the court must consider all potential sentencing configurations to determine if an enhancement "could" push the sentence over the 20-year mark. Under the plain meaning of subdivision (c)(3)(C), if there exists a configuration where the sentence "could" be longer than 20 years because of the application of the enhancement, unless the court finds the dismissal would not be in the furtherance of justice, the court must dismiss the enhancement. It is important to observe, however, that just because a court *could* dismiss an enhancement under these circumstances does not mean the court *should* grant such a motion. The court may exercise its discretion in the furtherance of justice by denying the motion without prejudice or deferring a ruling until the exact nature of the defendant's convictions has been determined.

If the motion is made at sentencing, whether the enhancement "could" result in a sentence of over 20 years will depend on the crimes and enhancements of which the defendant has been convicted. Likely such a determination must be made after consideration of any other relief granted under section 1385. For example, if the defendant is convicted of second degree robbery (§ 211/212.5, subd. (c)) [punishable by 2, 3 or 5 years], with the personal use of a firearm (§ 12022.53, subd. (b)) [punishable by an additional term of 10 years], with a prior serious felony charged as a strike under the Three Strikes Law and as a prior serious felony conviction under section 667, subdivision (a), [punishable by a term of 5 years], the defendant "could" receive a prison sentence of 10 years for the base term, plus 10 years for the weapons enhancement and 5 years for the prior conviction, for an aggregate term of imprisonment of 25 years, thus triggering the potential application of section 1385, subdivision (c)(3)(C). If prior to ruling on the motion under subdivision (c)(3)(C), however, the court grants the defendant's request to dismiss the strike under section 1385, subdivision (a), pursuant to a *Romero* motion, the application of the enhancements "could not" result in a sentence in excess of 20 years – the maximum sentence would be 5 years for the base term, plus 10 years for the weapons enhancement, and 5 years for the prior serious felony conviction, for a total of 20 years.

If the court bases its decision on the theoretical maximum sentence without consideration of the maximum sentence the court *actually could* impose after granting any other section 1385 relief, it potentially creates an absurd result – it has the court ruling on a request for dismissal based on facts that do not exist because of other decisions by the court regarding the potential sentence. The decision would be based on enhancements that have been dismissed – allegations which don't result in a

conviction. It creates the possibility the court will be required to dismiss an enhancement even though the *actual* potential sentence is not in excess of 20 years.

Failure to consider the results of other motions to dismiss also creates a cumulative effect of section 1385 relief not justified by the statute. For example, if the defendant has been convicted of two enhancements, the application of both of which could result in a sentence in excess of 20 years, the court would be required to dismiss both enhancements, even though the dismissal of only one enhancement would be necessary under subdivision (c)(3)(C). For example, if the maximum base term is 12 years and the defendant has been convicted of two enhancements, each of which has a term of 5 years, if the court is not permitted to consider a motion for dismissal of one of the enhancements before applying subdivision (c)(3)(C) when considering the motion as to the other enhancement, the court would then be required to dismiss both enhancements, even though the dismissal of only one enhancement is necessary to avoid the sentence being longer than 20 years.

The court also should consider how section 654 may affect the calculation of the aggregate term. A finding by the court that section 654 applies requires the court to impose sentence on one crime, then impose and stay the sentence on any other crimes committed with the same intent or objective. (See § 654, subd. (a).) Accordingly, the stayed counts, as a matter of law, cannot factor into the calculation of the aggregate sentence.

Denial of motion to dismiss enhancement

People v. Lipscomb (2022) 87 Cal.App.5th 9 (*Lipscomb*), affirmed the denial of defendant's request to dismiss of an enhancement brought because imposition of the enhancement would result in a sentence longer than 20 years. "The trial court's denial was based on the defendant's dangerousness. Section 1385, subdivision (c)(1) provides that 'the court shall dismiss an enhancement if it is in the furtherance of justice to do so.' 'In exercising its *discretion* under this subdivision, the court shall consider and afford great weight to evidence offered by the defendant to prove that any of the mitigating circumstances in subparagraphs (A) to (I) are present,' including, as here, the circumstance that '[t]he application of the enhancement could result in a sentence of over 20 years,' '*unless the court finds that dismissal of the enhancement would endanger public safety*.' [Citations.] The trial court here repeatedly made an explicit finding that dismissing the enhancement 'would endanger public safety'—a finding that Lipscomb does not challenge on appeal. Because of that finding, the court was not required to 'consider and afford great weight' to evidence that application of the enhancement could produce a sentence of over 20 years, in its exercise of what the statute explicitly acknowledges to be the 'discretion' that it affords." (*Lipscomb*, *supra*, 87 Cal.App.5th at p. 18, italics original.)

Generally in accord with Lipscomb on this issue is *People v. Mendoza* (2023) 88 Cal.App.5th 287 (*Mendoza*). "Section 1385(c)(2) provides that in determining whether to dismiss an enhancement 'under this subdivision,' the court must consider nine listed mitigating circumstances if proven by the defendant [citation], 'unless the court finds that dismissal of the enhancement would endanger public safety' [citation]. That provision means that if the court finds that dismissal of an enhancement 'would endanger public safety,' then the court need not consider the listed mitigating circumstances. [Citation.] The 'shall be dismissed' language in section 1385(c)(2)(C), like the language of all of the listed mitigating circumstances, applies only if the court does *not* find that dismissal of the enhancement would endanger public safety. That interpretation gives meaning to the language in section 1385(c)(2) requiring the court to consider whether dismissal 'would endanger public safety,' and it consequently avoids rendering that language surplusage." (*Mendoza*, *supra*, 88 Cal.App.5th at p. 296, italics original, footnote omitted.)
Review of the court's order under section 1385 is measured by the abuse of discretion standard. (*Mendoza*, *supra*, 88 Cal.App.5th at p. 298.)

Consideration of other sentencing decisions

Although the court may consider the results of other motions for dismissal in determining the actual convictions for the purposes of sentencing, the court should not base its ruling under this mitigating factor on how the court otherwise exercises sentencing discretion, such as selecting the term on the triad or whether multiple terms are to be sentenced consecutively or concurrently. Subdivision (c)(3)(C) requires the court to consider what the sentence on the enhancement "could" do, rather than on what the sentence "would" do.

Sentence imposed as a result of a plea bargain

Whether the defendant will have the right to relief under this subdivision after a plea likely depends on the terms of the plea bargain. If the plea agreement allows the court *discretion* to sentence the defendant to a term in excess of 20 years, likely the defendant may bring a motion to dismiss an enhancement under section 1385, subdivision (c)(3)(C). Subdivision (c)(3) clearly permits the motion after entry of a plea. However, if the plea agreement specifies a particular term in excess of 20 years, likely the court may not grant the motion to dismiss without giving the People the right to withdraw from the plea agreement if the motion is granted.

Dismissal of the enhancement or only the punishment for the enhancement

Subdivision (c)(3)(C) specifies "the *enhancement* shall be dismissed." (Italics added.) Likely the court is required to dismiss the entire enhancement, not just the punishment for the enhancement, although in other instances the court has authority to strike solely the punishment for the enhancement. Section 1385, subdivision (b)(1), provides: "If

the court has the authority pursuant to *subdivision (a)* to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement in the furtherance of justice in compliance with subdivision (a)." (Italics added.) On its face, subdivision (b)(1) relates to dismissals authorized by subdivision (a). The special rules related to the dismissal of an enhancement are outlined in subdivision (c). Indeed, subdivision (c)(2) expressly references exercising of the court's discretion "under this subdivision" – meaning subdivision (c). Thus, for enhancements that come within subdivision (c), the court is required to dismiss the entire enhancement, not just the punishment for the enhancement.

4. "The current offense is connected to mental illness." (§ 1385, subd. (c)(3)(D).)

The defendant's mental illness may be grounds for dismissal of an enhancement if the crime is "connected" to a mental illness. Section 1385, subdivision (c)(4), provides: "For the purposes of subparagraph (D) of paragraph [3],[10] a mental illness is a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress disorder, but excluding antisocial personality disorder, borderline personality disorder, and pedophilia. A court may conclude that a defendant's mental illness was connected to the offense if, after reviewing any relevant and credible evidence, including, but not limited to, police reports, preliminary hearing transcripts, witness statements, statements by the defendant's mental health treatment provider, medical records, records or reports by qualified medical experts, or evidence that the defendant displayed symptoms consistent with the relevant mental disorder at or near the time of the offense, the court concludes that the defendant's mental illness *substantially contributed* to the defendant's involvement in the commission of the offense." (Italics added.)

The use of the phrase "substantially contributed" is unclear. Likely it is the intent of the Legislature that the factor plays some significant role in the commission of the crime or the defendant's involvement. In other circumstances, the Legislature used the phrase "a contributing factor in the commission of the offense." (See, *e.g*., § 1170, subd. (b)(6) [Factor affecting imposition of the low term of imprisonment].) While "contributing factor" suggests the court must find the factor to have some connection, however slight, in the commission or circumstances of the crime, the phrase "substantially contributed" clearly implies a factor more significant in weight from that of "contributing factor."

People v. Ortiz (2023) 87 Cal.App.5th 1087 (*Ortiz*), addresses the mental illness mitigating circumstance under section 1385, subdivision (c)(3)(D). Ortiz rejected defendant's contention that the trial court failed to "give great weight" to his mental

[10] Subdivision (c)(3)(5) erroneously cross-references "subparagraph (d) of paragraph (2);" clearly the Legislature meant to reference subparagraph (d) of paragraph *(3).*

illness. As observed by Ortiz, however: "The trial court acknowledged Ortiz's schizophrenia diagnosis but noted that Ortiz had not provided 'records or reports by qualified medical experts or ... any evidence that [he] displayed symptoms consistent with the relevant mental disorder at or near the time of the offense.' Accordingly, the trial court did not conclude that Ortiz's mental illness 'substantially contributed to the defendant's involvement in the commission of the vandalism offense.' Indeed, there was no evidence identifying potentially relevant symptoms of schizophrenia or depression, nor any evidence (or even reasoned argument) linking those symptoms to Ortiz's commission of the current offense or his reported anger at his mother. By its terms, the statute requires the trial court to consider 'relevant and credible evidence' before it 'may' find that the offense is connected to mental illness. [Citation.] We identify no error in the trial court's determination: the record here did not compel it to reach the opposite conclusion." (*Ortiz*, *supra*, 87 Cal.App.5th at p.1095, footnote omitted.)

Ortiz also rejected the defendant's contention that the mental illness factor created a presumption of granting the dismissal that may be only overcome by a showing of an unreasonable risk to public safety. "The plain language of section 1385(c)(2) contemplates the trial court's exercise of sentencing discretion, even as it mandates that the court give 'great weight' to evidence of enumerated factors." (*Ortiz*, *supra*, 87 Cal.App.5th at p. 1096.) "[A] 'connect[ion] to mental illness' does not, as a practical matter, lend itself to the one-size-fits-all formalism of a presumption that may only be overcome by a danger to public safety. In the universe of cases where a defendant suffers from mental illness, the strength of the connection between the mental condition and the commission of the current offense will vary widely depending on a host of factors such as the character of the mental illness, the nature of the symptoms exhibited near the time of the offense, the defendant's amenability to treatment, and the nature of the particular offense. [¶] The language of section 1385(c)(2) as ultimately enacted also reflects a legislative recognition that a trial court's exercise of sentencing discretion involves more than a strictly binary weighing of mitigation against public safety. '[G]enerally applicable sentencing principles' relevant to a court's determination of whether dismissal is in furtherance of justice 'relat[e] to matters such as the defendant's background, character, and prospects.' [Cittaion.] Those principles require consideration of circumstances in mitigation (and aggravation) in the broader context of the recognized objectives of sentencing, which are not limited to public safety. [Citation.]" (*Ortiz*, *supra*, 87 Cal.App.5th at p. 1097, footnote omitted.)

5. "The current offense is connected to prior victimization or childhood trauma." (§ 1385, subd. (c)(3)(E).)

The defendant's prior victimization or childhood trauma may be grounds for dismissal of an enhancement if the crime is "connected" to that experience. Section 1385, subdivision (c)(6)(A), provides that "childhood trauma" means "that as a minor the

person experienced physical, emotional, or sexual abuse, physical or emotional neglect. A court may conclude that a defendant's childhood trauma was connected to the offense if, after reviewing any relevant and credible evidence, including, but not limited to, police reports, preliminary hearing transcripts, witness statements, medical records, or records or reports by qualified medical experts, the court concludes that the defendant's childhood trauma *substantially contributed* to the defendant's involvement in the commission of the offense." (Italics added.)

Section 1385, subdivision (c)(6)(B) provides "prior victimization" means "the person was a victim of intimate partner violence, sexual violence, or human trafficking, or the person has experienced psychological or physical trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence. A court may conclude that a defendant's prior victimization was connected to the offense if, after reviewing any relevant and credible evidence, including, but not limited to, police reports, preliminary hearing transcripts, witness statements, medical records, or records or reports by qualified medical experts, the court concludes that the defendant's prior victimization *substantially contributed* to the defendant's involvement in the commission of the offense." (Italics added.)

The use of the phrase "substantially contributed" is unclear. Likely it is the intent of the Legislature that the factor plays some significant role in the commission of the crime or the defendant's involvement. In other circumstances, the Legislature used the phrase "a contributing factor in the commission of the offense." (See, *e.g.*, § 1170, subd. (b)(6) [Factor affecting imposition of the low term of imprisonment].) While "contributing factor" suggests the court must find the factor to have some connection, however slight, in the commission or circumstances of the crime, the phrase "substantially contributed" clearly implies a factor more significant in weight from that of "contributing factor."

6. "The current offense is not a violent felony as defined in subdivision (c) of Section 667.5." (§ 1385, subd. (c)(3)(F).)

An enhancement may be dismissed simply because the underlying crime is not listed as a violent felony under section 667.5, subdivision (c).

Subdivision (c)(3)(F) does not specify that if the underlying crime *is* a violent felony, the court cannot strike the enhancement. It only means that it if the underlying crime is a violent felony, it is not presumptively proper to dismiss the enhancement.

Violent felonies created by an enhancement

Section 667.5, subdivision (c), lists crimes designated as violent felonies. Included in the list of violent offense are certain crimes which are committed with specified enhancements. (See, *e.g.*, § 667.5, subd. (c)(8) [crime committed with infliction of great

bodily injury or defendant uses a firearm].) Section 1385, subdivision (b)(1), states "[i]f the court has the authority pursuant to subdivision (a) to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement in the furtherance of justice in compliance with subdivision (a)." On its face, subdivision (b)(1) relates to dismissal authorized by subdivision (a). Prior to the enactment of SB 81, if the court struck only the punishment for an enhancement but left the fact of the enhancement, the crime would still constitute a violent felony. (*In re Pacheco* (2007) 155 Cal.App.4th 1439, 1443–1436.)

The status of the violent felony is not clear if the enhancement is dismissed under the provisions of section 1385, subdivision (c). Subdivision (c)(3)(C), for example, specifies "the enhancement shall be dismissed." Likely the court is required to dismiss the entire enhancement, not just the punishment for the enhancement, although in other instances the court has authority to strike solely the punishment for the enhancement. The special rules related to the dismissal of an enhancement are outlined in subdivision (c). Indeed, subdivision (c)(2) expressly references exercising of the court's discretion "under this subdivision" – meaning subdivision (c). Thus, for enhancements that come within subdivision (c), the court is required to dismiss the enhancement, not just the punishment.

7. "The defendant was a juvenile when they committed the current offense or any prior juvenile adjudication that triggers the enhancement or enhancements applied in this case." (§ 1385, subd. (c)(3)(G).)

It is not clear what the Legislature intends by the phrase "any prior juvenile adjudication that triggers the enhancement or enhancements applied in this case." It appears the statute is focused on a juvenile adjudication that thereafter triggers an enhancement if the defendant is later convicted of an offense as an adult. The Legislature may have been considering juvenile adjudications which later constitute strikes under the Three Strikes Law. But one version of the Three Strikes Law was enacted by initiative (§ 1170.12) and the Three Strikes Law is considered an alternative sentencing scheme, not an enhancement. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 527.) SB 81 does not apply to alternative sentencing schemes. (See discussion, *infra*.)

Presumably this factor will be available to the defendant even if the defendant was a juvenile at the time the crime was committed but was certified to the general jurisdiction of the court under Welfare and Institutions Code, section 707.

8. "The enhancement is based on a prior conviction that is over five years old." (§ 1385, subd. (c)(3)(H).)

Presumably the five years is measured from the date the current crime was committed.

9. "Though a firearm was used in the current offense, it was inoperable or unloaded." (§ 1385, subd. (c)(3)(I).)

It seems the intent of the Legislature to authorize the dismissal of a firearm use or arming enhancement provided the weapon is inoperable or unloaded, even if the weapon was used to threaten a victim or used as a club in the commission of the offense.

G. Dismissal of enhancements prohibited by initiatives

Section 1385, subdivision (c)(1), provides: " Notwithstanding any other law, the court shall dismiss an enhancement if it is in the furtherance of justice to do so, *except if dismissal of that enhancement is prohibited by any initiative statute*." (Italics added.) It does not appear there are any enhancements which may not be dismissed under section 1385 because of a statute enacted by an initiative.

In discussing this portion of SB 81, the report of the Senate Committee on Public Safety, dated February 8, 2021, identified two initiatives that prohibited the dismissal of certain enhancements. The first was Proposition 83, enacted in 2006, relating to sex offenses, firearms and infliction of great bodily injury. Proposition 83 prohibits the striking of the factors triggering the application of section 667.61, the One Strike Law for violent sex offenses (§ 667.61, subd. (g)), prior convictions triggering section 667.71, the Two Strikes Law, relating to certain violent crimes (§ 667.71, subd. (d)), and findings that result in the denial of probation when the defendant inflicts great bodily injury for designated violent crimes (§ 1203.075, subd. (a)). The One Strike, Two Strike and Three Strikes Laws, however, are not enhancements, but are considered alternative sentencing schemes if their provisions apply. (*People v. Anderson* (2009) 47 Cal.4th 92, 102 [One Strike Law]; *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 527 [Three Strikes Law]. As acknowledged by the Senate Safety Committee's report, SB 81 concerns enhancements, not alternative sentencing schemes.

The second was Proposition 115, enacted in 1990, relating to special circumstances for murder. The initiative enacted section 1385.1, prohibiting a court from striking special circumstances from death penalty cases. The courts generally have considered special circumstances and enhancements separately. (See *People v. Jones* (2020) 56 Cal.App.5th 474, 493.)

It does not appear an initiative has identified any of the commonly imposed enhancements as a enhancement that may not be dismissed by the court.

H. Application of *Estrada*

Section 1385, subdivision (c)(7), specifies: "This subdivision shall apply to sentencings occurring after the effective date of the act that added this subdivision." The provision makes SB 81

effective only for sentencing proceedings occurring after January 1, 2022. Subdivision (c)(7) constitutes a "savings clause," making *Estrada* inapplicable to the sentencing proceedings occurring prior to that date. (*Estrada*, *supra*, 63 Cal.2d at p. 747; *People v. Conley* (2016) 63 Cal.4th 646, 656.)

Although the provisions of SB 81 are not operative until January 1, 2022, nothing prohibits the court from considering its provisions in exercising its discretion under section 1385 prior to that date.

VI. CONDUCT CREDIT FOR PERSONS COMMITTED UNDER SECTIONS 1368, et seq.

Senate Bill No. 317 (2021-2022 Reg. Leg. Sess.)(SB 317) amends section 4019, subdivision (a)(8), to provide full conduct custody credit "[w]hen a prisoner is confined in or committed to a state hospital or other mental health treatment facility, or to a county jail treatment facility, as defined in Section 1369.1, in proceedings pursuant to Chapter 6 (commencing with Section 1367) of Title 10 of Part 2." Previously conduct credit was allowed only for persons committed to a county jail-based competency program under section 1375.5, subdivision (c). The amendment extends full conduct credits to persons committed to the state hospital or other mental health treatment facility under sections 1367, *et seq*. No longer will the court be required to segregate the award of conduct credits between the time in jail awaiting treatment and the time the defendant is confined in a state hospital. Under the new provisions, presuming the defendant is in custody from arrest to sentencing, there will be a continuous entitlement to full actual custody and conduct credits, even though the defendant was housed in a mental health facility for a portion of that time.

A. Outpatient treatment

It is not clear whether the defendant will be entitled to full conduct credit for any time spent on outpatient status while in a conditional release program (CONREP). Historically, persons committed to a state hospital or placed on outpatient treatment were entitled only to actual time credit. (*In re Banks* (88 Cal.App.3d 864, 868-869.) Since persons previously committed to the state hospital system for restoration of competency were not entitled to conduct credit, there was no issue as to entitlement if the defendant was on outpatient treatment. Now that full actual and conduct credit is being given such persons, the entitlement to conduct credit while on outpatient status may change. Likely the defendant's placement on outpatient status will be considered a function of the original placement in the state hospital, thus entitling the defendant to the award of conduct credits while in CONREP.

B. *Estrada* does not apply

The change to section 4019 clearly will be applicable to any time served in competency treatment after January 1, 2022. Whether the change should apply to any time served prior to January 1, 2022, is a matter of some disagreement between the appellate courts. The

application of *In re Estrada* (1965) 63 Cal.2d 740, was discussed in *People v. Orellana* (2022) 74 Cal.App.5th 319 (*Orellana*). Based primarily on the Supreme Court's decision in *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*), *Orellana* concluded the amendment of section 4019 by SB 317 applies only prospectively to *future* custody periods. "In *Brown*, the Supreme Court considered whether a former version of section 4019 that increased the rate at which local prisoners could earn conduct credits applied retroactively to benefit prisoners who served time in custody before the date on which the former statute became operative. [Citation.] After concluding that neither the terms of the former statute nor any part of its legislative history supported a determination that increased conduct credits were to be awarded retroactively [citation], the court examined whether the rule of *Estrada* required retroactive application of the former statute providing increased conduct credits. [Citation.] [¶] The California Supreme Court answered in the negative. It wrote, 'This brings us to the question whether the rule of *Estrada . . .* , requires us to apply retroactively a statute increasing the rate at which prisoners may earn credit for good behavior. The question can properly be answered only in the negative. The holding in *Estrada* was founded on the premise that " '[a] legislative mitigation of the penalty *for a particular crime* represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law' " [citation; italics in original], italics added) and the corollary inference that the Legislature intended the lesser penalty to apply to crimes already committed. In contrast, a statute increasing the rate at which prisoners may earn credits for good behavior does not represent a judgment about the needs of the criminal law with respect to a particular criminal offense, and thus does not support an analogous inference of retroactive intent.... [A] prisoner who earns no conduct credits serves the full sentence originally imposed. Instead of addressing punishment for past criminal conduct, the statute addresses *future conduct* in a custodial setting by providing increased incentives for good behavior.' [Citation; italics in original.]" (*Orellana*, *supra*, 74 Cal.App.5th at pp. 334-335.]

Orellana also rejected defendant's argument that denial of the credits would violate the Equal Protection clause. The argument was based on the premise that inmates being restored to competency in a jail-based treatment program were being given section 4019 conduct credit. *Brown* was found dispositive of the issue. "The California Supreme Court in *Brown* rejected an equal protection challenge to the denial of custody credits at the increased rate under review for individuals who had served their time before enactment of the changes to section 4019 at issue there. Just as with retroactivity, the forward-looking incentive of custody credits was the decisive factor. The court in *Brown* held that individuals who had already been sentenced were not similarly situated to those who were in custody after the new legislation entered into force." (*Orellana, supra*, 74 Cal.App.5th at p. 339.) "We recognize that Orellana frames his equal protection argument differently from the analysis in *Brown.* He focuses not on any temporal distinction between defendants who received competency treatment in state hospitals prior to and after the passage of legislation extending conduct credits to that group, but instead on the purported absence of any rational basis for distinguishing between defendants whose treatment for restoration to competence takes place in county jails versus state hospitals. Orellana's comparison framework might be persuasive were we writing on a clean slate. However, the Supreme Court's articulation in *Brown* of the operation of section

4019 conduct credits as an incentive to promote good conduct in custody is determinative here. We see nothing in the text of Senate Bill 317 or Senate Bill 1187 or the relevant legislative history that suggests the Legislature rejected the forward-looking nature of the incentive structure of section 4019 articulated by the Supreme Court in *Brown."* (*Orellana*, *supra*, 74 Cal.App.5th at pp. 340-341.) *Orellana* has been denied review by the Supreme Court.

People v. Yang (2022) 78 Cal.App.5th 120, agrees with the conclusion in *Orellana* that the Supreme Court's decision in *Brown* forecloses the application of *Estrada* to cases not final as of January 1, 2022. *Yang*, however, concludes the denial of conduct credit to cases prior to January 1, 2022, is a denial of equal protection of the law. *Yang* concludes persons being held in a state hospital for competency treatment, who are denied conduct credit prior to January 1, 2022, are in the same circumstances as persons who are held in a jail-based competency program who *are* given conduct credit prior to January 1, 2022, under section 1375.5, subdivision (c). No petition for review has been filed and *Yang* is now final.

Even if the conflict in *Orellana* and *Yang* ultimately is resolved as discussed in *Orellana* and defendants are denied section 4019 credit under the new statute prior to January 1, 2022, such defendants nevertheless will be entitled to full conduct credit while in jail pending transfer to the state hospital. (§ 1375.5; *People v. Cowsar* (1974) 40 Cal.App.3d 578, 579.) Once the hospital staff has agreed that the defendant has recovered trial competence and has so stated in a report prepared under section 1370, subdivision (b)(1), the defendant is thereafter entitled to normal conduct credits. If there is some dispute between the treating therapists, the defendant will not be entitled to conduct credits until the certification of competence has been issued under section 1372, subdivision (a)(1). (*People v. Bryant* (2009) 174 Cal.App.4th 175, 184.) If the defendant is in treatment as of January 1, 2022, they will be entitled to full conduct credit under section 4019 only for any period on and after January 1, 2022.

VII. DIVERSION OF MENTALLY INCOMPETENT MISDEMEANOR OFFENDERS (§ 1370.01.)

Senate Bill No. 317 (2021-2022 Reg. Leg. Sess.) first repeals section 1370.01, then reenacts the section to address the treatment of mentally incompetent misdemeanor offenders. "It is the intent of the Legislature that a defendant subject to the terms of this section receive mental health treatment in a treatment facility and not a jail." (§ 1370.01, subd. (d).)

Section 1370.01, subdivision (e), provides that section 1370.01 applies only as specified in section 1367, subdivision (b): "Section 1370.01 applies to a person who is charged with a misdemeanor or misdemeanors only, or a violation of formal or informal probation for a misdemeanor, and the judge finds reason to believe that the defendant has a mental health disorder, and may, as a result of the mental health disorder, be incompetent to stand trial."

A. Defendant found incompetent

If the defendant is found incompetent, the court must suspend the criminal proceedings and may do either of the following:

1. Conduct a hearing pursuant to sections 1001.35, *et seq*., and, if the defendant is eligible, grant diversion pursuant to section 1001.36 "for a period not to exceed one year from the date the individual is accepted into diversion or the maximum term of imprisonment provided by law for the most serious offense charged in the misdemeanor complaint, whichever is shorter." (§ 1370.01, subd. (b)(1)(A).)

   The hearing must be held within 30 days after the finding of incompetence. If the hearing is delayed beyond 30 days, the defendant must be released on their own recognizance pending the hearing. (§ 1370.01, subd. (b)(1)(B).)

   If the defendant performs satisfactorily on diversion, the court must dismiss the criminal charges. (§ 1370.01, subd. (b)(1)(C).)

   If the court finds the defendant ineligible for diversion based on the circumstances set forth in section 1001.36, subdivisions (b) or (d), after notice to the parties, the court must hold a hearing to determine whether to do any of the following:

   - Modify the treatment plan as recommended by the treatment provider. (§ 1370.01, subd. (b)(1)(D)(i).)

   - Refer the defendant to assisted outpatient treatment pursuant to Welfare and Institutions Code, section 5346. Such a referral may be made only in a county where the services are available, and where the agency agrees to accept responsibility for treatment. The hearing to determine eligibility for assisted outpatient treatment must be held within 45 days of the date of the referral. If it is delayed beyond the 45 days, the court must order the defendant released on their own recognizance if the defendant is being held in the county jail. If the defendant is accepted into assisted outpatient treatment, the charges are to be dismissed under section 1385. (§ 1370.01, subd. (b)(1)(D)(ii).)

   - Refer the defendant to the county conservatorship investigator for a possible conservatorship proceedings under Welfare and Institutions Code, sections 5350, *et seq*. The referral is permissible only if a qualified mental health expert has determined the defendant is gravely disabled as defined in Welfare and Institutions Code, section 5008, subdivision (h)(1)(A). If the petition is not filed within 60 days of the referral, the court must order the defendant released on their own recognizance pending the conservatorship proceedings. If the conservatorship proceedings are established, the court must dismiss the criminal charges under section 1385. (§ 1370.01, subd. (b)(1)(D)(iii).)

2. The court may dismiss the criminal charges pursuant to section 1385. A copy of the order is to be sent to the county mental health director. (§ 1370.01, subd. (b)(2).)

B. Persons on misdemeanor probation

If a mentally incompetent defendant is on misdemeanor probation, a petition alleging a violation must be dismissed. The court, however, may modify the terms and conditions of supervision to include mental health treatment. (§ 1370.01, subd. (c).)

C. Custody credits

Section 1370.01, subdivision (d), provides, in relevant part: "A term of four days will be deemed to have been served for every two days spent in actual custody against the maximum term of diversion. A defendant not in actual custody shall otherwise receive day for day credit against the term of diversion from the date the defendant is accepted into diversion. 'Actual custody' has the same meaning as in Section 4019." Although the intent of the first sentence is not entirely clear, it seems to restate the entitlement to actual time and conduct credit required by section 4019. The effect of the statute is to give the defendant ordinary actual time and conduct credit earned under section 4019 while in actual custody pending the acceptance of the defendant into diversion – the credit applies to reduce the term of diversion. Once the defendant is accepted into the diversion program, however, they will be entitled only to actual time (day-for-day) credit against the period of diversion.

D. Application of *Estrada*

The changes to section 1370.01 offer a substantial reduction in how the court may respond to a misdemeanor violation if the defendant is incompetent. Under the reasoning of *Estrada,* the new misdemeanor procedure likely will be available to all cases not final as of January 1, 2022.

VIII. RECALL OF SENTENCE (§ 1172.1)

Historically, the authority of the court to recall a sentence and impose a new sentence was lodged in section 1170, subdivision (d). SB 567 deletes the sentence recall provisions from section 1170, subdivision (d). Assembly Bill No. 1540 (2021-2022 Reg. Leg. Sess.)(AB 1540) added section 1170.03 as a stand-alone provision governing the recall of felony sentences. Many of the original provisions of section 1170, subdivision (d), were transferred to section 1170.03. AB 1540 also added provisions assuring that any new ameliorative provisions of the sentencing law may be considered after a sentence is recalled, that a request for resentencing may not be denied without a hearing, and that requests for resentencing by certain public agencies are presumptively proper unless there is an unreasonable risk of danger to the public.

The provisions of section 1170.03 have been renumbered to section 1172.1.

The primary intent of section 1172.1 is to provide the court with an opportunity to resentence a defendant when the original term no longer serves the interests of justice. Occasionally, however, the Department of Corrections and Rehabilitation (CDCR) has used the procedure for recalling a sentence to correct an unauthorized sentence. For that reason, these materials will also discuss the disposition of an unauthorized sentence.

Exception to loss of jurisdiction after notice of appeal

The filing of a notice of appeal ordinary divests the trial court of any jurisdiction to do anything that may affect the judgment. Section 1172.1, however, is an exception to that rule. The court retains limited jurisdiction under section 1172.1 to recall and modify the sentence. (See *Portillo v. Superior Court*, 10 Cal. App. 4th 1829, 1835–1836, 13 Cal. Rptr. 2d 709 (4th Dist. 1992), reh'g denied, (Dec. 14, 1992).) A trial court may not reduce a first-degree murder conviction to second degree murder and impose a corresponding lower sentence after defendant had already filed his notice of appeal. (*People v. Espinosa*, 229 Cal. App. 4th 1487, 177 Cal. Rptr. 3d 887 (2d Dist. 2014).)

A. Authority to recall a felony sentence

The authority to request a recall of a felony sentence to state prison or under section 1172.1, subdivision (a)(1), is with:

- The court on its own motion,
- The secretary of the Board of Parole Hearings for state prison commitments,
- The county correctional administrator for county jail commitments,
- The district attorney of the county in which the defendant was sentenced, and
- The Attorney General for cases prosecuted by that office.

Time limit on recall of sentence

The authority of the court to recall a sentence must be exercised within 120 days of commitment to prison or county jail; the authority of the other named agencies to request a recall may be exercised at any time. (§ 1172.1, subd. (a)(1).) The 120-day limitation only applies to the order entered by the court for the purpose of recalling the sentence; it does not apply to the hearing when the request for resentencing is actually considered. (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 464.)

The 120-day clock begins to run when the sentence is executed. "[A] judgment for imprisonment ordinarily is deemed executed when a certified copy of the minute order or abstract of judgment is 'furnished to the officer whose duty it is to execute the probationary

order or judgment.' . . . (§ 1213; see [*People v. Karaman* (1992) 4 Cal.4th 335, 344–345](*Karaman*); *In re Black* (1967) 66 Cal.2d 881, 890 [Black].)" (*People v. Howard* (1997) 16 Cal.4th 1081, 1089–1090 (*Howard*).)

Reason for recall

The purpose of recalling the sentence must be "rationally related to lawful sentencing." (*Dix v. Superior Court*, 53 Cal. 3d 442, 456, 279 Cal. Rptr. 834, 807 P.2d 1063 (1991).) For example, the recall of a sentence may not be for the purpose of allowing the defendant to file a late notice of appeal (*People v. Pritchett*, 20 Cal. App. 4th 190, 194–195, 24 Cal. Rptr. 2d 391 (1st Dist. 1993), reh'g denied, (Dec. 7, 1993) and related reference, 26 Cal. App. 4th 1754, 33 Cal. Rptr. 2d 296 (1st Dist. 1994)), or to allow the defendant to withdraw the plea (*People v. Alanis*, 158 Cal. App. 4th 1467, 71 Cal. Rptr. 3d 139 (6th Dist. 2008)).

Whether the defendant must be physically delivered to the Department of Corrections and Rehabilitation

Howard clearly requires the defendant to be "committed" to CDCR prior to the court having jurisdiction under section [1172.1] to recall the sentence. What is not clear is whether the defendant must be physically delivered to CDCR prior to the court having such jurisdiction.

As explained in *Howard*, the court loses jurisdiction to raise or lower the sentence as a matter of precommitment procedure once the sentence is ordered into execution. (*Howard* at pp. 1089–1090.) *Karaman* discusses the execution of a prison sentence: "If the judgment is for imprisonment, 'the defendant must forthwith be committed to the custody of the proper officer and by him or her detained until the judgment is complied with.' (§ 1215.) The sheriff, upon receipt of the certified abstract of judgment 'or minute order thereof,' is required to deliver the defendant to the warden of the state prison together with the certified abstract of judgment or minute order. (§ 1216.) 'It is clear then that at least upon the receipt of the abstract of the judgment by the sheriff, the execution of the judgment is in progress.' (*Black*, supra, 66 Cal.2d at p. 890; *People v. Heinold* [1971] 16 Cal.App.3d 958, 963; 6 Witkin & Epstein, Cal. Criminal Law, supra, § 3115, p. 3844.)" (*Karaman*, at p. 345.)

As *Karaman* further explains: "As a practical matter, to require a trial judge (who desires to resentence a defendant whose sentence has been stayed) to delay resentencing until the actual commencement of the defendant's prison term generally would entail a considerable waste of time and expense. The Legislature, although limiting the resentencing provisions of section 1170, subdivision (d), to the postcommitment situation, has not otherwise imposed any such requirement, and we likewise decline to do so. Thus, we conclude that where the sentence is to a term of imprisonment, the trial court retains jurisdiction, during the period a stay is in effect and at any time prior to execution of the sentence, to reconsider the sentence and vacate it or impose any new sentence which is not greater than the initial sentence, just as it may do so on its own motion pursuant to section 1170, subdivision (d), within 120 days after the court has committed the defendant to the prison authorities." (*Karaman*, at p. 353.)

Additional insight is provided by *People v. Superior Court* (*Cornelius*), 31 Cal. App. 4th 343, 37 Cal. Rptr. 2d 156 (2d Dist. 1995). There, the defendant had been sentenced to state prison and committed to the custody of the sheriff to be delivered to CDCR. Immediately upon remand the defendant posted bail on appeal. The fact she was not physically delivered to CDCR did not stop the 120-day time period from running. "The fact that she served no time in prison and physically was not delivered to the custody of the Department of Corrections is not determinative. The controlling fact is the trial court's surrender of its jurisdiction to the prison authorities. This was accomplished when the trial court remanded Cornelius forthwith to the Department of Corrections." (*Id*. at p. 348.)

The most logical interpretation of *Karaman* and *Howard* is that although the defendant must be "committed" to CDCR prior to the exercise of discretion under section 1172.1, the condition is satisfied with the preparation of the abstract of conviction and the delivery of the defendant to the sheriff. At such point the court may issue its order of recall.

> ‡ **Practice Tip**: If the parties are agreeable, particularly if the recall and resentencing is part of a negotiated disposition, the court should request a stipulation that the procedure used complies with the provisions of section 1172.1. Such a stipulation likely will negate any issue related to the physical delivery of the defendant into the custody of CDCR.

Invitation by the defendant to recall the sentence

The defendant is not named as a person who has the right to request a recall of the sentence. The defendant has no standing to initiate a recall of his sentence. (*People v. Prichett* (1993) 20 Cal,.App.4th 190, 193-194; *Portillo v. Superior Court* (1992) 10 Cal.App.4th 1829, 1833.) The defendant, however, may be able to "invite" the court's consideration of the recall. Similar to section 1172.1, defendants have no standing to request dismissal of allegations in the furtherance of justice under section 1385. In that context, however, courts have held the defendant may "invite" the court to exercise such discretion. "A defendant has no right to make a motion, and the trial court has no obligation to make a ruling, under section 1385. But he or she does have the right to 'invite the court to exercise its power by an application to strike a count or allegation of an accusatory pleading, and the court must consider evidence offered by the defendant in support of his assertion that the dismissal would be in furtherance of justice.' [Citation.] And '[w]hen the balance falls clearly in favor of the defendant, a trial court not only may *but should* exercise the powers granted to him by the Legislature and grant a dismissal in the interests of justice.' [Citation.]" (*People v. Carmony* (2004) 33 Cal.4th 367, 375; italics in original; *Rockwell v. Superior Court* (1976) 18 Cal.3d 420, 441.) Although the recall of a sentence is initiated by the court, the defendant having no independent right to request recall, the Supreme Court has held the denial of a request for recall made by the defendant is an "order made after judgment, affecting the substantial rights of the party," and, as such, may be appealed. (§ 1237, subd. (b).) (*People v. Loper* (2015) 60 Cal.4th 1155, 1167.)

Recall of sentence at request of CDCR

Letters to the court from CDCR, signed by its secretary, provide: "[Section 1172.1, subdivision (d)] provides that, upon recommendation of the Secretary of the California Department of Corrections and Rehabilitation, the court may recall a previously ordered sentence and commitment, and resentence the defendant in the same manner as if he or she had not previously been sentenced, *provided the new sentence is no greater than the initial sentence*." (Italics added.) In light of the case authority authorizing any legal sentence, the suggestion that the court may not impose a longer sentence than the original term may be misleading. If the letter simply raises equitable factors justifying the reduction of sentence (as, for example, there is a change in the law after the defendant's case became final or the defendant has been an exemplary inmate), the court may not resentence the inmate to a term longer than the original sentence. However, if the original sentence was unauthorized, the court may impose any legal sentence, even if the term is longer than the one originally imposed.

It is immaterial that the unauthorized sentence is discovered as a result of a referral by CDCR under section 1172.1, subdivision (d). As observed in *People v. Hill* (1986) 185 Cal.App.3d 831, 834: "[U]nder other sentencing circumstances the trial court would have the authority to impose the sentence appellant challenges on appeal. When a case is remanded for resentencing by an appellate court, the trial court is entitled to consider the entire sentencing scheme. Not limited to merely striking illegal portions, the trial court may reconsider all sentencing choices. (*People v. Savala* (1983) 147 Cal.App.3d 63, 68–69, disapproved by the same division on another ground in *People v. Foley* (1985) 170 Cal.App.3d 1039, 1044; see *People v. Alvarado* (1982) 133 Cal.App.3d 1003, 1029, and *People v. Gutierrez* (1980) 109 Cal.App.3d 230, 233.) This rule is justified because an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components. The invalidity of one component infects the entire scheme. (*Savala*, *supra*., 147 Cal.App.3d at pp. 68–70.) We see no reason why this reasoning should not apply where, as here, the Department of Corrections rather than the Court of Appeal notifies the trial court of an illegality in the sentence. The trial court is entitled to rethink the entire sentence to achieve its original and presumably unchanged goal. Furthermore, there is no contradiction between viewing an aggregate sentence as a whole and the language of section 1172.1, subdivision (d), which permits resentencing."

Circumstances identified by CDCR for recall of sentence

CDCR has found six cases that identified problems with sentencing sufficient to justify a recall and resentencing under section 1172.1.

1. ***People v. Rodriguez* (2009) 47 Cal.4th 501:** In *Rodriguez*, defendant had been convicted of assault with a firearm. (§ 245, subd. (a)(2).) He was also found to have committed the crime with the personal use of a firearm (§ 12022.5, subd. (a)) and that the crime was a "violent"

felony committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). In sentencing the defendant for the assault, the trial court imposed a sentence under both enhancements. The Supreme Court found the sentence violated the restrictions of section 1170.1, subdivision (f), which specifies: "When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense." (*Rodriguez*, at pp. 508– 509.) The court found the proper remedy is to reverse the trial court's judgment and remand the case for resentencing. "Remand will give the trial court an opportunity to restructure its sentencing choices in light of our conclusion that the sentence imposed here violated section 1170.1's subdivision (f)." (*Rodriguez*, at p. 509.)

Although not expressly stated by *Rodriguez*, because the sentence was imposed in violation of section 1170.1, subdivision (f), it was an unauthorized sentence.

2. ***People v. Le*** **(2015) 61 Cal.4th 416**: The sentencing circumstances in *Le* are substantially similar to those of *Rodriguez*. In *Le*, defendant was convicted of assault with a semiautomatic firearm under section 245, subdivision (b). He was also found to have committed the violation with the personal use of a firearm under section 12022.5, subdivision (a)(1), and that the crime was committed for the benefit of a criminal street gang under section 186.22, subdivision (b)(1). The charging document did not specify whether the crime came within section 186.22, subdivision (b)(1)(B), as a "serious" felony, or section 186.22, subdivision (b)(1)(C), as a "violent" felony. Seeking to avoid the application of Rodriguez, the prosecution urged the court to use the enhancement under section 186.22, subdivision (b)(1)(B). The trial court, for the reasons expressed in Rodriguez, stayed the enhancement under section 186.22, subdivision (b)(1)(B). The Supreme Court agreed with the trial court's analysis and affirmed the judgment.

Although not expressly stated by *Le*, if the sentence had been imposed in violation of section 1170.1, subdivision (f), it would be an unauthorized sentence.

3. ***People v. Gonzalez*** **(2009) 178 Cal.App.4th 1325:** In *Gonzalez*, the defendant was convicted of assault by means of force likely to inflict great bodily injury (§ 245, subd. (a)(1)), and that the crime was committed with the infliction of great bodily injury (§ 12022.7, subd. (a)), and for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). The trial court sentenced the defendant on both enhancements. Based on the reasoning in *Rodriguez*, the court found the imposition of sentence on both enhancements violated the restrictions of section 1170.1, subdivision (g), which provides in relevant part: "[w]hen two or more enhancements may be imposed for the infliction of great bodily injury on the same victim in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense." (*Gonzalez*, at pp. 1331– 1332.) The sentence was reversed and remanded to the trial court for resentencing within the limitations of section 1170.1, subdivision (g).

Although not expressly stated by *Gonzalez*, because the sentence had been imposed in violation of section 1170.1, subdivision (g), it was an unauthorized sentence.

4. ***People v. Lopez*** **(2012) 208 Cal.App.4th 1049:** In *Lopez*, the defendant was convicted of attempting to dissuade a witness (§ 136.1, subd. (a)(2)), and that the crime was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). Pursuant to the gang finding, the defendant was sentenced to an indeterminate term under section 186.22, subdivision (b)(4)(C). Imposition of the life term is permissible under section 186.22, subdivision (b)(4)(C), only if the defendant is convicted of "threats to victims and witnesses, as defined in Section 136.1." Defendant was convicted under section 136.1, subdivision (a)(2), which prohibits "[k]knowingly and maliciously attempt[ing] to prevent or dissuade any witness or victim from attending or giving testimony at any trial . . . ." Section 136.1, subdivision (c)(1), however, applies to dissuasion "[w]here the act is accompanied by force or by an express or implied threat of force or violence, upon a witness or victim . . . ." The court observed that "the information charged Lopez with violating section 136.1, subdivision (b)(2), knowingly and maliciously attempting to dissuade a witness from testifying. The information did not charge Lopez with using an express or implied threat of force. Nor did the instructions inform the jury it must find Lopez used an express or implied threat of force. Nor did the jury make a specific finding that Lopez used an express or implied threat of force." (*Lopez*, at pp. 1064–1065.) "Lopez was not convicted of violating section 136.1, subdivision (c)(1). Nor did the jury find Lopez used an implied or express threat of force in committing the crime. Therefore, the trial court erred in imposing a sentence of seven years to life pursuant to section 186.22, subdivision (b)(4)(C) because the section did not apply to the crime of which Lopez was convicted and because the sentence was based on a fact not found true by the jury. We will vacate the sentence on count 5 and remand the matter to the trial court for resentencing on that count." (*Lopez*, at p. 1065.)

Although not expressly stated by *Lopez*, the sentence imposed by the trial court was unauthorized.

5. **People v. McCart (1982) 32 Cal.3d 338**: In *McCart,* defendant had been sentenced to prison. While in prison, he committed an offense and received a full term consecutive sentence for that crime under section 1170.1, subdivision (b). Thereafter, he committed a second in-prison offense and was sentenced to a full term consecutive sentence for that crime. The Supreme Court, applying the provisions of section 1170.1, subdivision (b), determined that when a defendant is convicted of multiple in-prison offenses, he should receive "a single term of imprisonment for all convictions of felonies committed in prison and sentenced consecutively, whether multiple convictions occur in the same court proceeding or in different proceedings. That this term is to commence when the person would otherwise have been released emphasizes that the new term is to be fully consecutive to the term already being served: i.e., that it must commence at the end of the longest of the prisoner's prevously imposed terms." (*McCart*, at p. 343.) The matter was remanded to the trial court for recomputation of the term for the in-prison crimes. (*McCart*, at p. 346.)

Although not expressly stated by *McCart*, because the sentence was imposed in violation of section 1170.1, subdivision (b), it was an unauthorized sentence.

6. **Recall of sentence for purpose of striking an enhancement:** Effective January 1, 2018, sections 12022.5 and 12022.53 were amended to allow a court to dismiss the designated gun enhancements in the interests of justice under section 1385. (§§ 12022.5, subd. (c); 12022.53, subd. (h).) The amendments apply to all cases not final as of the effective date of the legislation. (*People v. Robbins* (2018) 19 Cal.App.5th 660; *People v. Woods* (2018) 19 Cal.App.5th 1080; *People v. Chavez* (2018) 21 Cal.App.5th 971; and *People v. Almanza* (2018) 21 Cal.App.5th 1308.) CDCR, however, is utilizing its authority under section 1170, subdivision (d)(1), in certain instances to recommend consideration of dismissal of the firearm enhancements for cases final as of January 1, 2018. Recalling of the sentence by the court under these circumstances would not be based on the original sentence being unauthorized; rather, it would be based on equitable considerations. The court has complete discretion as to whether the sentence is recalled and, if it is recalled, whether the sentence will be modified by striking either the enhancement in its entirety or the punishment for the enhancement. (§ 1385, subd. (c)(1).) The court could not impose a sentence longer than the original term. (§ 1170, subd. (d)(1).)

B. Authority of the court in granting relief

The discretion of the court in resentencing a defendant under section 1172.1 will depend, at least in part, on whether the court is exercising its equitable authority to make adjustments to the sentence under subdivision (a)(1), or whether the court is correcting an unauthorized sentence.

Equitable authority under section 1172.1, subdivision (a)(1)

Section 1172.1, subdivision (a)(1), provides the court may "resentence the defendant in the same manner as if they had not previously been sentenced, whether or not the defendant is still in custody, and provided the new sentence, if any, is no greater than the initial sentence."

"The court, in recalling and resentencing under this subdivision, shall apply the sentencing 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." (§ 1172.1, subd. (a)(2).)

"The resentencing court may, in the interest of justice and regardless of whether the original sentence was imposed after a trial or plea agreement, do the following:

(A) Reduce a defendant's term of imprisonment by modifying the sentence.

(B) 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, with the concurrence of both the defendant and the district attorney of

the county in which the defendant was sentenced or the Attorney General if the Department of Justice originally prosecuted the case."

(§ 1172.1, subd. (a)(3).)

Presumably the court's ability to "reduce a defendant's term" includes exercising such sentencing discretion as changing the term on a triad, changing the concurrent/consecutive structure of a multiple count case, and the dismissal of enhancements as now authorized in section 1385.

Unauthorized sentence

Where the sentence is unauthorized the court may reconsider the entire sentence and impose whatever term could be legally imposed at the original sentencing proceedings, even if the resentencing results in a longer term of imprisonment. " 'When a court pronounces a sentence which is unauthorized by the Penal Code, that sentence must be vacated and a proper sentence imposed whenever the mistake is appropriately brought to the attention of the court.' (*People v. Massengale* (1970) 10 Cal.App.3d 689, 693.) 'When an illegal sentence is vacated, the court may substitute a proper sentence, even though it is more severe than the sentence imposed originally'. (*People v. Grimble* (1981) 116 Cal.App.3d 678, 685, citing *People v. Serrato* (1973) 9 Cal.3d 753, and *In re Sandel* (1966) 64 Cal.2d 412.)" (*People v. Hunt* (1982) 133 Cal.App.3d 543, 564.)

In vacating the illegal portion of the sentence, the court is entitled to reconsider the entire sentence. It is immaterial that the unauthorized sentence is discovered as a result of a referral by CDCR under section 1172.1. As observed in *People v. Hill* (1986) 185 Cal.App.3d 831, 834: "[U]nder other sentencing circumstances the trial court would have the authority to impose the sentence appellant challenges on appeal. When a case is remanded for resentencing by an appellate court, the trial court is entitled to consider the entire sentencing scheme. Not limited to merely striking illegal portions, the trial court may reconsider all sentencing choices. [Citations.] This rule is justified because an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components. The invalidity of one component infects the entire scheme. [Citation.] We see no reason why this reasoning should not apply where, as here, the Department of Corrections rather than the Court of Appeal notifies the trial court of an illegality in the sentence. The trial court is entitled to rethink the entire sentence to achieve its original and presumably unchanged goal. Furthermore, there is no contradiction between viewing an aggregate sentence as a whole and the language of section 1170, subdivision (d), which permits resentencing."

C. Factors affecting the grant or denial of recall or resentencing

In exercising its resentencing discretion, the court is directed to consider specified pre- and postconviction sentencing factors.

Pre-conviction factors

"The court *shall consider* 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, or 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); italics added.) Section 1016.7, subdivision (b), specifies "youth" "includes any person under 26 years of age on the date the offense was committed.

Subdivision (a)(4), requires the court to consider whether any of the designated pre-conviction circumstances were "a contributing factor in the commission of the offense." The statute does not further define the meaning of "contributing factor." Likely it will be necessary for the court to find the factor had some connection, however slight, to the commission or circumstances of the crime. In other legislation adopted in 2021, the Legislature used the phrase "substantially contributed" to the crime. (See, *e.g.*, § 1385, subdivision (c)(5) [the court may strike an enhancement "if the court concludes that the defendant's mental illness *substantially contributed* to the defendant's involvement in the commission of the offense; italics added].) It seems clear the Legislature's use of "contributing factor" implies a factor far less significant than one which "substantially contributed" to the crime.

Postconviction factors

The court is given broad discretion to consider postconviction factors. "In recalling and resentencing pursuant to this provision, the court *may consider* postconviction factors, including, but not limited to, the disciplinary record and record of rehabilitation of the defendant while incarcerated, 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 that circumstances have changed since the original sentencing so that continued incarceration is no longer in the interest of justice." (§ 1172.1, subd. (a)(4); italics added.)

D. Credit for time served

If the resentencing is granted, the court is to accord the defendant credit for time served. (§ 1172.1, subd. (a)(5.) Likely the calculation of the custody credit will be in accordance with *People v. Buckhalter* (2001) 26 Cal.4th 20. The trial court has the duty to calculate all presentence actual and conduct credit, the actual time spent in state prison or in county jail under section 1170, subdivision (h), and all actual and conduct credit while housed in the county jail during the resentencing process. The Department of Corrections and Rehabilitation or local custody administrator has the duty to calculate the defendant's conduct credit while under their jurisdiction.

E. Statement on the record

Section 1172.1, subdivision (a)(6), requires the court to state its reasons for granting or denying the request for resentencing on the record. The statement can be made orally or in writing. Although not required by the statute, the proper procedure would be to serve the statement on the parties if they were not present in court to hear it.

F. Granting of resentencing without a hearing

"Resentencing may be granted without a hearing upon stipulation by the parties." (§ 1172.1, subd. (a)(7).) Where the parties have resolved the resentencing by mutual agreement, there is no need to conduct a formal hearing. The court should reflect the agreement of the parties in a stipulated order and assure that the order is served on the appropriate custody authority.

G. No denial of resentencing without a hearing

Section 1172.1, subdivision (a)(8), prohibits the denial of a request for resentencing without a hearing: "Resentencing shall not be denied, nor a stipulation rejected, without a hearing where the parties have an opportunity to address the basis for the intended denial or rejection. If a hearing is held, the defendant may appear remotely and the court may conduct the hearing through the use of remote technology, unless counsel requests their physical presence in court."

Clearly the court is not permitted to summarily reject any request for resentencing made by the correctional administrators or the prosecuting attorney. The legislative right to have a hearing is in response to *People v. McCallum* (2020) 55 Cal.App.4th 202 (*McCallum*). "We conclude the statutory language of section 1170, subdivision (d)(1), read in the context of section 1170 as a whole, shows the Legislature did not intend to require a trial court to hold a hearing before acting on a recommendation by the Secretary for recall and resentencing. It is up to the Legislature to address in the first instance whether an inmate should be afforded a hearing in response to a recommendation by the Secretary for recall and resentencing. [¶] However, in light of McCallum's substantial right to liberty implicated by the Secretary's recommendation to recall McCallum's sentence [citation], the trial court abused its discretion in denying McCallum an opportunity to present information relevant to the Secretary's recommendation. . . . We reverse and remand for the trial court to allow McCallum and the People an opportunity to present additional information relevant to the Secretary's recommendation, and for the trial court in light of this information and any briefing provided by the parties to exercise its discretion whether to recall McCallum's sentence. If the court recalls McCallum's sentence, he would have a right to be present at a resentencing hearing." (*McCallum*, *supra*, 55 Cal.App.5th at pp. 206-207.)

What is not clear from the statute is whether the court is required to hold a hearing before summarily denying a request for resentencing made by the defendant. The issue is whether a request by a defendant "inviting" the court's consideration of resentencing is a request contemplated by section 1172.1, subdivision (a)(8). The prudent court may choose to grant a hearing when the request comes from counsel for the defendant. A request made by counsel presumes a level of seriousness and appropriateness that certainly fits within the spirit of section 1172.1 if not its letter. However, even a request written by the defendant outlining legitimate sentencing concerns may warrant the appointment of counsel and an initial hearing on the request.

H. Presumption favoring resentencing if requested by custody administrator or prosecuting attorney

If the request for recall and resentencing comes from the Secretary of the Department of Corrections and Rehabilitation, the Board of Parole Hearings, a county correctional administrator, a district attorney, or the Attorney General, there is as strong presumption favoring the granting of the request. Section 1172.1, subdivision (b)(2) provides: "There shall be a presumption favoring recall and resentencing of the defendant, which may only be overcome if a court finds the defendant is an unreasonable risk of danger to public safety, as defined in subdivision (c) of Section 1170.18." Section 1170.18, subdivision (c), defines "unreasonable risk of danger to public safety" as "an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667."

The list of crimes in section 667, subdivision (e)(2)(C), commonly referred to as the "super strikes," includes:

- A "sexually violent offense" as defined in Welfare and Institutions Code, section 6600(b) [Sexually Violent Predator Law]: " 'Sexually violent offense' means the following acts when committed by force, violence, duress, menace, fear of immediate and unlawful bodily injury on the victim or another person, or threatening to retaliate in the future against the victim or any other person, and that are committed on, before, or after the effective date of this article and result in a conviction or a finding of not guilty by reason of insanity, as defined in subdivision (a): a felony violation of Section 261, 262, 264.1, 269, 286, 288, 288a, 288.5, or 289 of the Penal Code, or any felony violation of Section 207, 209, or 220 of the Penal Code, committed with the intent to commit a violation of Section 261, 262, 264.1, 286, 288, 288a, or 289 of the Penal Code."

- Oral copulation under section 288a, sodomy under section 286, or sexual penetration under section 289, if these offenses are committed with a person who is under 14 years of age, and who is more than 10 years younger than the defendant.

- A lewd or lascivious act involving a child under 14 years of age, in violation of section 288.

- Any homicide offense, including any attempted homicide offense, defined in sections 187 to 191.5, inclusive.

- Solicitation to commit murder as defined in section 653f.

- Assault with a machine gun on a peace officer or firefighter, as defined in section 245(d)(3).
- Possession of a weapon of mass destruction, as defined in section 11418(a)(1).

- Any serious or violent offense punishable in California by life imprisonment or death.

The presumption of recall under section 1172.1, subd. (b)(2), applies only to the recall of the sentence, not as to the particular sentence being requested by CDCR or the defendant. "[N]othing in former section 1170.03 or current section 1172.1 provides for a presumption in favor of the Secretary's particular recommended sentence. Rather, the statute provides for a presumption regarding recalling and resentencing a defendant, but not a presumption as to a particular sentence recommended by the Secretary." (*People v. Braggs* (2022) 85 Cal.App.5th 809, 819.)

Procedure if section 1172.1, subdivision (b), applies

If the request for recall of a sentence comes from the persons specified in subdivision (b)(a custody administrator or prosecuting attorney), "[t]he court shall provide notice to the defendant and set a status conference within 30 days after the date that the court received the request. The court's order setting the conference shall also appoint counsel to represent the defendant." It clearly is the intent of the Legislature that if the court receives a request for resentencing from the custody facility or prosecutor that the court treat it seriously and expeditiously. The 30-day requirement for the status conference is to assure the matter gets into the court system within a reasonable time.

The statutory obligation to appoint counsel appears to be at least partially in response to *People v. Frazier* (2020) 55 Cal.App.5th 858 (*Frazier*), which held the defendant is not entitled as a matter of due process to appointed counsel simply upon the filing of a request for resentencing by the Department of Corrections and Rehabilitation. (*Frazier*, *supra*, 55 Cal.App.5th at pp. 865-866.)

Sequence of analysis if section 1172.1, subdivision (b), applies

The intent of section 1172.1, subdivision (b), is not entirely clear. On the one hand, it certainly is the intent of the Legislature that if the request for resentencing comes from the correctional

institutions or the prosecution, the court should grant the request absent serious overriding circumstances. On the other hand, merely because the correctional institution or the prosecution is requesting a sentence modification does not mean the court must automatically grant it – the court must still review the request under the overarching principle of "interests of justice." (§ 1172.1, subd. (a)(3).) Subdivision (b)(2) specifies "[t]here shall be a presumption *favoring* recall and resentencing" [italics added] – it does not say that if the presumption exists, the court *shall*, without exception, grant the recall and resentencing. Merely because the presumption of subdivision (b)(2) applies does not end the court's duty to find that it is in the interests of justice to grant the resentencing.

It is suggested the following sequence of analysis be used in determining whether to grant resentencing when the request is made pursuant to section 1172.1, subdivision (b):

- The court should first review the request for resentencing against the factors listed in section 1172.1, subdivision (a)(4), and any other relevant factors presented by the parties. The purpose of the review is to determine whether it is in the interests of justice to resentence the defendant.

- If the request for resentencing comes from one of the entities listed in subdivision (b), the court should apply the presumption in section 1172.1, subdivision (b)(2), favoring the granting of the resentencing; *i.e*., to the extent possible, the court should weigh the factors in a manner favorable to the granting of the resentencing. If the court finds the defendant is an unreasonable risk to public safety as defined in section 1170.18, subdivision (c), the court may disregard the presumption – under such circumstances there is no presumption. However, merely because the defendant is an unreasonable risk of danger does not mean the request for resentencing must be denied – it merely means there is no presumption under section 1172.1, subdivision (b)(2).

- Whether or not the presumption of subdivision (b)(2) applies, in its final analysis the court must determine whether granting the motion for resentencing is in the interests of justice.

I. Suggested procedure for handling a request for resentencing by specified persons

Based on the requirements of section 1172.1, it is suggested the following procedure may be used by the court in addressing a request for resentencing.

1. Identify the proper judge for ruling on the request

In most circumstances the original sentencing judge should handle the request for resentencing. (See, generally, *People v. Jacobs* (2007) 156 Cal.App.4th 728, 737, and *People v. Arbuckle* (1978) 22 Cal.3d 749, 756.) There is at least a possibility the sentencing judge will remember the case, understand some of its complexities, and be

in the best position to assist in resolving any sentencing issues. If the original judge is not reasonably available, however, the matter may be referred to any judge for review.

2. Review by the court

The judge should review the request for resentencing and the entire file to determine the nature of the request and how best it may be resolved. The court should verify the circumstances of any alleged error and determine the proper means for addressing the issue.

Clerical error

If the problem is merely clerical error, such as a mathematical mistake in the calculation of custody credits or an error in the preparation of the abstract of judgment, the court should prepare a tentative response, with copies of all correspondence to counsel for comment within a designated number of days. If no objection is received to the tentative response, the court should send the custody facility an amended abstract of judgment, as may be appropriate. If there is an objection to the tentative response, the matter should be set for hearing.

Request for recall and resentencing on grounds other than clerical error

If the request involves a request for substantive resentencing, the court should not handle the matter administratively, but proceed as outlined, *infra*.

3. Setting the matter for a status hearing

If the request for recall and resentencing comes from the custody facility or the prosecution, section 1172.1, subdivision (b)(1), requires the setting of a status hearing within 30 days of the court's receipt of the request.

Some care should be exercised in crafting the court's order setting the status conference. At this initial stage of the process the court should *not recall* the sentence but should merely set the matter for a hearing to determine whether the court *should recall* the sentence. If the court actually recalls the sentence, there will be no existing commitment of the defendant to the custody facility, and he must be returned to the court pending further proceedings. Consequently, the defendant likely will forfeit his existing housing status and opportunities for participation in programs. Since in some cases the resentencing will not result in the defendant's actual release from custody, the proper course is to keep him in the physical custody of the facility pending the procedure for resentencing, unless the defendant actually requests his personal appearance in the proceedings. It may be possible for the defendant to appear by remote communication as provided by subdivision (a)(8). A suggested form of order

setting the matter for a status hearing is attached as Attachment A at the end of this section.

4. Appointment of counsel and notice to the parties

Section 1172.1, subdivision (b)(1), requires the court to appoint counsel for the defendant if the request for resentencing comes from the custody facility or the prosecution.

The court should send notice of the application, appointment of counsel, and the setting of the status conference to the defendant (as required by subdivision (b)(1)) and all counsel.

5. Conducting the status conference

The initial appearance at the status conference is an opportunity for the court and counsel to discuss the sentencing problem and for consideration of any proposed disposition. Section 1172.1, subd. (a)(3), provides: "The resentencing court may, in the interest of justice and *regardless of whether the original sentence was imposed after a trial or plea agreement*," grant specified relief. (Italics added.) Sentences imposed after jury trials likely will be easier to resolve because the court has total control over the structure of the final sentence. Sentences imposed as a result of a plea, however, may raise additional concerns because either or both of the parties likely will end up with something different than their bargain. The negotiations likely will involve a discussion of the resentencing authority under subdivision (a)(3), including the charges (dismissed, admitted, lesser included or lesser related), available custody credits, and the potential revision of the consecutive/concurrent structure of the sentence. The discussion also may involve the waiver of certain sentencing limitations, such as the prohibition against double punishment under section 654. If the status conference produces an agreed modification, the court should follow the applicable procedures outlined in paragraphs 8 and 9, infra.

6. Setting the matter for formal hearing

If the parties cannot reach an informal resolution, the court should set the matter for a contested hearing. Defense counsel will be required to determine whether the defendant wants to be present for the hearing. The defendant has the due process right to be present at the resentencing hearing. (*People v. McCallum* (2020) 55 Cal.App.5th 202, 215.) The defendant may choose to appear remotely as authorized by subdivision (a)(8). Unless there are any major factual questions, likely the defendant will waive his presence because absence from prison may cost him a place in a program or a particular housing unit. If the defendant's appearance is to be waived, a formal written waiver should be filed in the general format as provided by section 977.

In determining whether to reduce the sentence under the general authority of section 1172.1, subdivision (a), and not because of an unauthorized sentence, "[t]he court may consider postconviction factors, including, but not limited to, the disciplinary record and record of rehabilitation of the defendant while incarcerated, 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 that circumstances have changed since the original sentencing so that continued incarceration is no longer in the interest of justice. . . ." (§ 1172.1, subd. (a)(4).) In any event, for proceedings under subdivision (a)(1), "the new sentence, if any, [may be] no greater than the initial sentence."

Such factors would be irrelevant in determining whether to vacate an unauthorized sentence – if the sentence is unauthorized, it must be vacated regardless of any mitigating or aggravating factors. However, once the court determines the original sentence is unauthorized, such factors would be relevant in determining the length of the new sentence. The court also may consider factors that existed at the time of the original sentencing.

If the resentencing is being done to correct an unauthorized sentence, the court may impose any authorized sentence, even if the new sentence is longer than the term originally imposed. (*People v. Hunt* (1982) 133 Cal.App.3d 543, 564, discussed, *supra*.) The court is not bound by the terms of any plea agreement. Section 1172.1, subdivision (a)(3), clearly authorizes the court to grant relief by altering a sentence based on a plea agreement. "Indeed, section 1170, subdivision (d)(10) [now § 1172.1, subd. (a)(4)] expressly contemplates that the trial court may take into account postconviction factors such as a prisoner's record of rehabilitation, age, diminished physical condition, or other factors suggesting that the prisoner's term of imprisonment should be reduced or 'the inmate's continued incarceration is no longer in the interest of justice.' [Citation.] Such considerations would prove meaningless if the trial court were constrained by the dictates of an earlier plea agreement." (*People v. Arias* (2020) 52 Cal.App.5th 213, 221.)

If the request for resentencing comes from the custody facility or the prosecution, the court must observe the presumption specified in subdivision (b)(2): "There shall be a presumption favoring recall and resentencing of the defendant, which may only be overcome if a court finds the defendant is an unreasonable risk of danger to public safety, as defined in subdivision (c) of Section 1170.18." (See discussion of the presumption, *supra*.)

Regardless of the source of the request for resentencing, the court should ask the custody facility for additional information about the defendant, if such information is needed. The admission of such information in the resentencing proceeding should be discussed with counsel if the court is initiating the request.

Previously there was a question whether the trial court, in granting a resentencing, must consider changes in the law occurring between the finality of the case and the resentencing proceeding. (See, *e.g., People v. Federico* (2020) 50 Cal.App.5th 318, granted review.) Section 1172.1, subdivision (a)(2), resolves the issue: "The court, in recalling and resentencing under this subdivision, shall apply the sentencing 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." (Italics added.)

7. No change in the sentence

If the court determines to make no change in the sentence, an order should be made to that effect and entered in the minutes. A copy of the order should be sent to all counsel. A copy of the order and a copy of the original request for recall of the sentence should be sent to the requesting agency and custody facility. The entry of the order is necessary to clearly trigger any appeal period.

8. Modification of the sentence

If the court determines modification of the sentence is appropriate, the form of order will depend on the nature of the change. If the change is being made because the original sentence was not authorized, the court should not utilize the provisions of section 1172.1. The suggested order should state:

> The court finds the sentence imposed by this court on ____ (date) is not authorized and is hereby vacated. The reason the court finds the sentence is unauthorized is [state the reasons – the court may draw its reasons from the letter requesting resentencing, if appropriate]. The following sentence is hereby imposed by the court: [the new sentence may be any sentence authorized at the time of the original sentencing, even if the term is longer than the original sentence].

If the change is being made for equitable reasons such as a change in the law after the defendant's conviction became final or defendant's exemplary conduct in prison, the court should order the recall of the sentence under section 1172.1, subdivision (a):

> Upon recommendation of [name of agency], the court hereby recalls the sentence ordered on ____ (date) under the provisions of Penal Code, section 1172.1, subdivision (a), for the following reasons: [state the reasons]. The following sentence is hereby imposed by the court: [the new sentence may not be longer than the original sentence].

The forgoing orders should be stated verbally on the record and included in the minutes.

The court should impose the new sentence, observing all of the appropriate formalities of an original sentence to state prison or county jail. If reasons are required for a particular sentencing choice, they should be expressed on the record.

9. Documentation to CDCR or custody facility

If the court modifies the sentence, it must send CDCR or other custody facility an amended abstract of judgment and a copy of the original letter requesting modification. The custody credits must be updated to the date of the new sentence. Since the court is correcting only the sentence, the defendant remains under the jurisdiction of CDCR or other custody facility, even though he may be temporarily housed in the county jail. The responsibility to calculate the custody credits is governed by *People v. Buckhalter* (2001) 26 Cal.4th 20 – the court must calculate the actual time in jail and the actual time in prison from the date of arrest to the date of resentencing, and all of the conduct credits while in county jail. The custody facility is responsible for calculating conduct credits earned in the facility.

10. Appeal of the denial of relief

The denial of resentencing is reviewable on appeal, applying an abuse of discretion standard. (*People v. Arias* (2020) 52 Cal.App.5th 213 218-220 (*Arias*).)

Because the denial of relief is based on post-sentencing conduct by the trial court, the defendant need not obtain a certificate of probable cause to appeal the trial court's decision. (*Arias, supra,* 52 Cal.App.4th at pp. 218-220.)

11. Retroactive application of section 1172.1

People v. McMurray (2022) 76 Cal.App.5th 1035 (*McMurray*), holds the new procedure for recall of a sentence in section 1172.1 applies to crimes committed prior to January 1, 2022. Avoiding the need to address the application of *Estrada*, *McMurray* observed AB 1540 simply was a clarification of applicable law. "[T]he Legislature repeatedly indicated that Assembly Bill 1540 was intended to 'make clarifying changes' to former section 1170(d)(1), including specifying the required procedure and guidelines when the CDCR recommends recall and resentencing. [Citation.] These changes were adopted in 2021, thereby promptly addressing appellate decisions from 2020 that had interpreted the Legislature's intent regarding former section 1170(d)(1). Under the circumstances, the appropriate remedy is to reverse and remand the matter, so that the trial court can consider the CDCR's recommendation to recall and resentence defendant under the new and clarified procedure and guidelines of section 1170.03. [Citation.] This is especially true here, given that the trial court failed to provide defendant with notice of

the recommendation from the CDCR, appoint counsel for defendant, hold a hearing, or state its reasons for declining to recall and resentence defendant." (*McMurray*, *supra*, 76 Cal.App.5th at p. 1041.)

ATTACHMENT A: FORM OF ORDER SETTING MATTER FOR STATUS CONFERENCE

PEOPLE OF THE STATE OF CALIFORNIA **Plaintiff,** **vs.** **JOHN DOE,** **Defendant.**	**No.** **SETTING OF STATUS CONFERENCE TO DETERMINE WHETHER SENTENCE SHOULD BE RECALLED; APPOINTMENT OF COUNSEL (Pen. Code, § 1172.1(a)(1))**

The court has received a request dated _____from [name of agency] recommending that defendant's sentence imposed on _____ be recalled pursuant to Penal Code, section 1172.1, subdivision (a)(1). A copy of such recommendation is attached hereto as Exhibit A.

The court hereby sets this matter for an initial status conference to determine whether the court should exercise its discretion to recall defendant's sentence, such conference to be held on _____ (date) at _____ (time) in Department ___ of this court. The court expressly declines to recall the sentence until further hearing. The defendant is not to be transferred from state prison to county jail and shall not be produced for future hearings unless expressly so ordered by this court.

[If needed] _____ (counsel) is hereby appointed to represent the defendant in connection with the potential recall of sentence and any resentencing.

Dated: _____ _____

JUDGE OF THE SUPERIOR COURT

IX. REMOVAL OF INVALID SENTENCE ENHANCEMENTS (§§ 1171 and 1172.75)

Senate Bill No. 483 (20021-2022 Reg. Leg. Sess.) (SB 483) adds sections 1171 and 1172.75[11] to authorize and require the court to resentence a defendant if he is currently serving a sentence based on specified enhancements that are no longer valid.

Prior to January 1, 2018, Health and Safety Code, section 11370.2, required the court to impose an enhancement of three years on certain narcotics offenses because of prior convictions of specified controlled substances crimes. Effective January 1, 2018, the statute was amended to eliminate this enhancement in most circumstances. (Senate Bill 180 [Stats. 2017, ch. 677].) Prior to January 1, 2020, section 667.5, subdivision (b), required the imposition of an enhancement of one year for any prior prison term given the defendant. Effective January 1, 2020, the statute was amended to limit the prior prison term enhancement to specific violent sex crime prior convictions. (Senate Bill 136 [Stats. 2019, ch 590].) Sections 1171 and 1172.75 are parallel provisions declaring the excluded enhancements invalid and requiring the court, within a prescribed period, to resentence the defendant without the enhancements.

Section 1 of SB 483 states the intent of the Legislature: "The Legislature finds and declares that in order to ensure equal justice and address systemic racial bias in sentencing, it is the intent of the Legislature to retroactively apply Senate Bill 180 of the 2017–18 Regular Session and Senate Bill 136 of the 2019–20 Regular Session to all persons currently serving a term of incarceration in jail or prison for these repealed sentence enhancements. It is the intent of the Legislature that any changes to a sentence as a result of the act that added this section shall not be a basis for a prosecutor or court to rescind a plea agreement."[12]

A. Applicable code sections

Section 1171 applies to "[a]ny sentence enhancement that was imposed prior to January 1, 2018, pursuant to Section 11370.2 of the Health and Safety Code, except for any enhancement imposed for a prior conviction of violating or conspiring to violate Section 11380 of the Health and Safety Code." (§ 1171, subd. (a).) Such enhancements are now legally invalid. (*Ibid*.)

Section 1172.75 applies to "[a]ny sentence enhancement that was imposed prior to January 1, 2020, pursuant to subdivision (b) of Section 667.5, except for any enhancement imposed for a prior conviction for a sexually violent offense as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code." (§ 1172.75, subd. (a).) Such enhancements are now legally invalid. (*Ibid*.)

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[11] SB 483 originally enacted the resentencing provisions concerning prior prison terms as section 1171.1. Effective June 30, 2022, the number was changed to section 1172.75.

[12] The intent to prevent the court or prosecution from rescinding a plea agreement based on the resentencing pursuant to SB 483 is not expressly stated in either of the new sections.

B. Identification of eligible inmates

The Department of Corrections and Rehabilitation and the county correctional administrator "shall identify those persons in their custody currently serving a term for a judgment that includes an enhancement described in subdivision (a) and shall provide the name of each person, along with the person's date of birth and the relevant case number or docket number, to the sentencing court that imposed the enhancement." (§§ 1171, subd. (b), and 1172.75, subd. (b).) The information must be provided to the court in accordance with the following timeline:

- "By March 1, 2022, for individuals who have served their base term and any other enhancements and are currently serving a sentence based on the enhancement. For purposes of this paragraph, all other enhancements shall be considered to have been served first." (§§ 1171, subd. (b)(1), and 1172.75, subd. (b)(1).)

  The meaning of the phrase "all other enhancements shall be considered to have been served first" is ambiguous. Likely it means that in determining whether the defendant is then serving the term for the enhancement, the custody facility is to first apply all custody credit to the base term and other enhancements, leaving any remaining time for service of the enhancement at issue. Such a method of calculation will assure the maximum amount of custody time will be charged against the invalid enhancement, thus giving the defendant the benefit of a greater reduction in the remaining sentence.

- By July 1, 2022, for all other individuals. (§§ 1171, subd. (b)(2), and 1172.75, subd. (b)(2).)

C. Review and resentencing by the court

"Upon receiving the information described in subdivision (b), the court shall review the judgment and verify that the current judgment includes a sentence enhancement described in subdivision (a). If the court determines that the current judgment includes an enhancement described in subdivision (a), the court shall recall the sentence and resentence the defendant." (§§ 1171, subd. (c), and 1172.75, subd. (c).)

The review and resentencing by the court are to be completed as follows:

- "By October 1, 2022, for individuals who have served their base term and any other enhancement and are currently serving a sentence based on the enhancement." (§§ 1171, subd. (c)(1), and 1172.75, subd. (c)(1).) Presumably the court is to consider that the defendant first serves the base term and any other enhancements when considering whether a defendant is then serving the sentence on the enhancement at issue.

- By December 31, 2023, for all other individuals. (§§ 1171, subd. (c)(2), and 1172.75, subd. (c)(2).)

D. Mechanics of resentencing

Sentencing hearing

Although not expressly so stated, it may be implied from the structure of the statute that the defendant will be entitled to a hearing on the resentencing. The court must provide counsel for the defendant ((§§ 1171, subd. (d)(5), and 1172.75, subd. (d)(5).) As a matter of due process, the defendant is entitled to be present at the hearing. (See *People v. McCallum* (2020) 55 Cal.App.5th 202, 215.) The hearing, however, may be waived by stipulation of the parties. (§§ 1171, subd. (e), and 1172.75, subd. (e).) Such a stipulation may be appropriate when the parties have come to an uncontested resolution of the resentencing. "If the hearing is not waived, the resentencing hearing may be conducted remotely through the use of remote technology, if the defendant agrees." (*Ibid.*)

Rules governing resentencing

In resentencing the defendant, the court is to observe a number of conditions:

- "Resentencing pursuant to this section shall result in a lesser sentence than the one originally imposed as a result of the elimination of the repealed enhancement, unless the court finds by clear and convincing evidence that imposing a lesser sentence would endanger public safety." (§§ 1171, subd. (d)(1), and 1172.75, subd. (d)(1).) The intent of the statute is to give the defendant an actual benefit from the elimination of the enhancement. The court may not adjust the sentence on the base term or other enhancements to re-impose the original length of the sentence unless the court finds by clear and convincing evidence that a lesser sentence would endanger public safety.

- "Resentencing pursuant to this section shall not result in a longer sentence than the one originally imposed." (§§ 1171, subd. (d)(1), and 1172.75, subd. (d)(1).)

- "The court shall apply the sentencing rules of the Judicial Council and apply any other changes in law that reduce sentences or provide for judicial discretion so as to eliminate disparity of sentences and to promote uniformity of sentencing." (§§ 1171, subd. (d)(2), and 1172.75, subd. (d)(2).) Based on this provision, *People v. Monroe* (2022) 85 Cal.App.5th 393, 402, found the defendant was entitled to a full resentencing hearing, including consideration of striking the firearms and prior serious felony enhancements.

- "The court may consider postconviction factors, including, but not limited to, the disciplinary record and record of rehabilitation of the defendant while incarcerated,

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 that circumstances have changed since the original sentencing so that continued incarceration is no longer in the interest of justice." (§§ 1171, subd. (d)(3), and 1172.75, subd. (d)(3).) This list of postconviction factors is the same as for the court's consideration of a recall of a sentence pursuant to section 1172.1, subdivision (a)(4), discussed, *supra*.

- "Unless the court originally imposed the upper term, the court may not impose a sentence exceeding the middle term unless there are circumstances in aggravation that justify the imposition of a term of imprisonment exceeding the middle term, and those facts have been stipulated to by the defendant, or have been found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial." (§§ 1171, subd. (d)(4), and 1172.75, subd. (d)(4).) The addition of this requirement clearly is intended to bring the resentencing into compliance with *Apprendi* and its progeny, including the changes made to sections 1170 and 1170.1, *supra*. Unlike section 1170, sections 1171 and 1172.75 do not provide for a prior conviction exception to the requirement that aggravating factors be submitted to the trier of fact and proven beyond a reasonable doubt. Because of the difficulties attendant to the retrial of an aggravating sentencing factor, this provision will have the general effect of shortening the length of the sentence.

X. RESENTENCING BASED ON ACCOMPLICE LIABILITY (§ 1170.95)

Senate Bill No. 775 (2021-2022 Reg. Leg. Sess.) (SB 775), amends section 1170.95 regarding the procedure for resolving motions requesting resentencing based on the change of the law relating to accomplice liability. Section 1 of SB 775 states the Legislature's intent:

"The Legislature finds and declares that this legislation does all of the following:

(a) Clarifies that persons who were convicted of attempted murder or manslaughter under a theory of felony murder and the natural probable consequences doctrine are permitted the same relief as those persons convicted of murder under the same theories.

(b) Codifies the holdings of *People v. Lewis* (2021) 11 Cal.5th 952, 961-970, regarding petitioners' right to counsel and the standard for determining the existence of a prima facie case.

(c) Reaffirms that the proper burden of proof at a resentencing hearing under this section is proof beyond a reasonable doubt.

(d) Addresses what evidence a court may consider at a resentencing hearing (clarifying the discussion in *People v. Lewis*, *supra*, at pp. 970-972)."

A. Application of section 1170.95 to persons convicted of attempted murder and manslaughter

As originally enacted by Senate Bill No. 1437 (2017-2018 Reg. Leg. Sess.)(SB 1437), section 1170.95 provided that persons "convicted of felony murder or murder under a natural and probable consequences theory may file a petition" for resentencing if their conviction was based on the old law of accomplice liability. Whether the provision was sufficiently broad to include attempted murder was a matter of disagreement between the appellate courts. (See, e.g., *People v. Harris* (2021) 60 Cal.App.5th 557, 565-566 [granted review][§ 1170.95 is not available to persons convicted only of attempted murder]; *People v. Medrano* (2019) 42 Cal.App.5th 1001, 1008 [granted review] [persons convicted of attempted murder may petition for relief].) Appellate courts, however, agreed resentencing was not available to persons convicted of voluntary manslaughter, even if the conviction resulted from a plea after reduction of a murder charge. (See, *e.g.*, *People v. Cervantes* (2020) 44 Cal.App.5th 884.)

SB 775 amends section 1170.95, subdivision (a), to expressly provide relief for persons convicted of attempted murder and manslaughter: "A person convicted of felony murder or murder under the natural and probable consequences doctrine or other theory under which malice is imputed to a person based solely on that person's participation in a crime, *attempted murder under the natural and probable consequences doctrine, or manslaughter* may file a petition with the court that sentenced the petitioner to have the petitioner's *murder, attempted murder, or manslaughter conviction* vacated and to be resentenced on any remaining counts. . . ." (Italics added.)

Note the requirement that to be entitled to relief, a person convicted of attempted murder must show the conviction was obtained under the doctrine of "natural and probable consequences" (NPC). Whether SB 1437 eliminated the NPC doctrine as to attempted murder has been a matter of some disagreement in the appellate courts. As observed in *People v. Love* (2020) 55 Cal.App.5th 273 (*Love*) [granted review], appellate courts are divided on the issue. "So far, the Courts of Appeal have split three ways on the question. The first group has held that Senate Bill 1437 did not eliminate the natural and probable consequences theory for attempted murder at all—either prospectively or retroactively. [Citations.] The second group has held that Senate Bill 1437 eliminated the natural and probable consequences theory for attempted murder prospectively, but not retroactively. [Citations.] The last group has held that Senate Bill 1437 eliminated the natural and probable consequences theory for attempted murder prospectively and retroactively as to nonfinal convictions, but not retroactively as to final convictions. [Citation.]" (*Love*, *supra*, 55 Cal.App.5th at pp. 278-279.) *Love* holds SB 1437 does not eliminate the natural and probable consequences theory for attempted murder on *any* basis—either prospectively or retroactively. (*Ibid.*) *Love* has been granted review. How

the amendment to section 1170.95, subdivision (a), relates to the continued viability of the NPC doctrine for attempted murder will be a matter for further appellate determination.

B. Right to counsel

People v. Lewis (2021) 11 Cal.5th 952 (*Lewis*), in interpreting section 1170.95, subdivision (b)(1)(C), held: "Notably, whether a petitioner 'requests the appointment of counsel' is part of the information that must be included in a petition for it to satisfy the court's subdivision (b)(2) review. [Citation.] Subdivision (c)'s language regarding the appointment of counsel is mandatory: 'If the petitioner has requested counsel, the court *shall* appoint counsel to represent the petitioner.' [Citation.] The combined meaning is clear: petitioners who file a complying petition requesting counsel are to receive counsel upon the filing of a compliant petition." (*Lewis*, *supra*, 11 Cal.5th at pp. 962-963; italics in original.)

SB 775 codifies *Lewis* by adding section 1170.95, subdivision (b)(3): "Upon receiving a petition in which the information required by this subdivision is set forth or a petition where any missing information can readily be ascertained by the court, if the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner." The amendment makes the court's obligation clear: if the petition is facially sufficient as delineated in subdivision (b)(1), the court must appoint counsel if requested by the petitioner.

C. Determining the prima facie basis for relief

Section 1170.95, subdivision (c), as originally enacted, provided: "The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause."

In interpreting subdivision (c), *Lewis* rejected the argument that the two references to "prima facie showing" created "two distinct, sequential inquiries: one 'that petitioner "falls within the provisions"' of the statute,' and a second ' "that he or she is entitled to relief." [Citation.]' " (*Lewis*, *supra*, 11 Cal.5th at p. 961.) The court observed: "[W]e read subdivision (c) to describe only a single prima facie showing. [Citations.] Considering subdivision (c)'s language in the context of section 1170.95 as a whole [citation], subdivision (c) clearly describes a single process. More specifically, the first sentence of subdivision (c) does not require a distinct prima facie showing before the appointment of counsel. Under its natural reading, ' "[t]he first sentence [of subdivision (c)] states the rule" ' and ' "[t]he rest of the subdivision establishes the process for complying with that rule." ' [Citations.]" (*Lewis*, *supra*, 11 Cal.5th at p. 962.)

SB 775 amends section 1170.95, subdivision (c), to conform the statutory language to *Lewis*. Subdivision (c) now provides: "Within 60 days after service of a petition that meets the requirements set forth in subdivision (b), the prosecutor shall file and serve a response. The petitioner may file and serve a reply within 30 days after the prosecutor's response is served. These deadlines shall be extended for good cause. After the parties have had an opportunity to submit briefings, the court shall hold a hearing to determine whether the petitioner has made a prima facie case for relief. If the petitioner makes a prima facie showing that the petitioner is entitled to relief, the court shall issue an order to show cause. If the court declines to make an order to show cause, it shall provide a statement fully setting forth its reasons for doing so." The amendment of subdivision (c) clarifies a number of points:

- The amendment eliminated the two references to establishing a prima facie basis for relief. Now there is only one required showing, to be made after briefing by the parties and a hearing conducted by the court.

- The prosecutor "shall" file a response within 60 days of service of the petition if the petitioner has filed a petition in facial compliance with subdivision (b). The petitioner thereafter "may" file a reply within 30 days after the prosecution's response is served.

- If the petition is in compliance with subdivision (b), the court may not summarily deny the petition without an opportunity for briefing by the parties and a hearing conducted by the court.[13]

- If the petitioner makes the prima facie showing for relief, the court must issue an order to show cause. Although the court is not required to give its reasons for issuing an order to show cause, such a statement may nevertheless provide guidance for the parties and the court in conducting the hearing on the merits and may assist in any appellate review. If the court declines to issue the order to show cause, "it shall provide a statement fully setting forth its reasons for doing so." The statement may be given orally or in writing.

D. Burden of proof at hearing on order to show cause

Prior to its amendment by SB 775, section 1170.95, subdivision (d)(3), provided, in relevant part: "At the hearing to determine whether the petitioner is entitled to relief, the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for relief." Appellate courts disagreed over what had to be proved beyond a reasonable doubt. (See, *e.g.*, *People v. Duke* (2020) 55 Cal.App.5th 113 [granted review] [The

[13] Even if the petition fails to allege the matters required by subdivision (b)(1), the court should consider denying the petition without prejudice and advising the petitioner of any deficiency as authorized by subdivision (b)(2).

prosecution must prove beyond a reasonable doubt that the petitioner *could* be convicted under the new law of accomplice liability]; *People v. Lopez* (2020) 56y Cal.App.5th 936 [granted review] [Each element of the murder conviction must be proved beyond a reasonable doubt under the new law].)

As amended by SB 775, subdivision (d)(3), now provides, in relevant part: "At the hearing to determine whether the petitioner is entitled to relief, the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is guilty of murder or attempted murder under California law as amended by the changes to Section 188 or 189 made effective January 1, 2019. . . . A finding that there is substantial evidence to support a conviction for murder, attempted murder, or manslaughter is insufficient to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing." As made clear by the amendment, to prevail at the hearing on the merits of the petition the prosecution must convince the court, beyond a reasonable doubt, that the petitioner, in fact, is guilty of the crime of conviction.[14]

E. Evidence admissible at the hearing on the merits of the petition

As originally enacted, section 1170.95 did not fully address the evidence admissible at the hearing on the merits of the petition. Section 1170.95, subdivision (d)(3), provided: "The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens." *Lewis* held the court may rely on the record of conviction in determining whether the petitioner has made a prima facie showing for relief. "The record of conviction will necessarily inform the trial court's prima facie inquiry under section 1170.95, allowing the court to distinguish petitions with potential merit from those that are clearly meritless. This is consistent with the statute's overall purpose: to ensure that murder culpability is commensurate with a person's actions, while also ensuring that clearly meritless petitions can be efficiently addressed as part of a single-step prima facie review process. [Citation.]" (*Lewis*, *supra*, 11 Cal.5th at p. 971.)

What constitutes the "record of conviction" is well established. The "record of conviction" consists of "those record documents reliably reflecting the facts of the offense for which the defendant has been convicted." (*People v. Reed* (1996) 13 Cal.4th 217, 223.) Depending on the circumstances, the record of conviction can include the abstract of judgment, the section 969b prison packet, the charging document and plea form, transcripts of the petitioner's plea, the factual basis given for the plea, preliminary hearing and trial transcripts, and appellate opinions. (For a full discussion of the law related to the record of conviction, see Couzens & Bigelow, "California Three Strikes Sentencing," The Rutter Group 2018, § 4:5, pp. 4-20 - 4-42 (2019).)

[14] Subdivision (d)(3) requires the prosecution is to prove, beyond a reasonable doubt, that the petitioner is guilty of "murder or attempted murder" under the new law of accomplice liability. There is no mention of a manslaughter conviction. Presumably the omission is a drafting error; likely the prosecution has the same burden of proof as to murder, attempted murder, and manslaughter.

Taking an approach that is different than *Lewis*, SB 775 amended subdivision (d)(3) by adding: "The admission of evidence in the hearing shall be governed by the Evidence Code, except that the court may consider evidence previously admitted at any prior hearing or trial that is admissible under current law, including witness testimony, stipulated evidence, and matters judicially noticed. The court may also consider the procedural history of the case recited in any prior appellate opinion. However, hearsay evidence that was admitted in a preliminary hearing pursuant to subdivision (b) of Section 872 shall be excluded from the hearing as hearsay, unless the evidence is admissible pursuant to another exception to the hearsay rule. The prosecutor and the petitioner may also offer new or additional evidence to meet their respective burdens."

The role of the record of conviction is now unclear. As observed by an analysis of SB 567 by the Assembly Committee on Public Safety: "[SB 775] would specify that the rules of evidence apply at the hearing on eligibility. It is not entirely clear whether this means a statement in the record of conviction that is offered to prove the truth of the matter stated would have to fall within an exception to the hearsay rule in order to be admissible at the hearing. This raises a concern that parties would be required to recall witnesses from the trial to testify again at the Evidence Code section 1170.95 evidentiary hearing, even where there is a prior transcript of the trial testimony as part of the record of conviction; this may not be possible in older cases in which witnesses are no longer available." (Report of Assembly Committee on Public Safety, SB 775 (Becker), July 13, 2021, page 10.)

F. Parole period upon resentencing

As originally enacted, section 1170.95 allowed the court, after resentencing, to place the petitioner on parole for up to three years. (§ 1170.95, subd. (g).) SB 775 amended section 1170.95, subdivision (h), to provide for a parole period of up to two years.

G. Application of *Estrada*

In anticipation of litigation over the application of *Estrada* to cases not final as of January 1, 2022, the effective date of SB 775, section 1170.95, subdivision (g), provides: "A person convicted of murder, attempted murder, or manslaughter whose conviction is not final may challenge on direct appeal the validity of that conviction based on the changes made to Sections 188 and 189 by Senate Bill 1437 (Chapter 1015 of the Statutes of 2018)." Thus, the change to section 1170.95 clearly will be applicable to any sentence imposed after January 1, 2022, and to any case not final as of January 1, 2022.

Without reference to subdivision (g), *People v. Montes* (2021) 71 Cal.App.5th 1001 (*Montes*], applied the provisions of SB 775 to a case pending appeal. "The first question before us is whether the new legislation—Senate Bill No. 775—applies to appellant's pending appeal. New legislation generally applies to all judgments which are not final as of the effective date of the

new statute. [Citations.] Where it is unlikely that a judgment will be final by the effective date of new legislation, courts have remanded matters to the trial courts so that the new statute can be applied after its effective date. [Citation.] [¶] Both parties acknowledge in their supplemental briefs that the order here will not be final until after the effective date of Senate Bill No. 775. To promote judicial economy and efficiency, we opt to apply the revised provisions set forth in Senate Bill No. 775 to appellant's case now. Doing so means that appellant is eligible for resentencing relief under section 1170.95 by virtue of his attempted murder conviction so long as appellant was convicted under a natural and probable consequences theory." (*Montes*, *supra*, 71 Cal.App.5th at p. 1006.)