RECALL OF SENTENCE
Penal Code, § 1172.1

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I. INTRODUCTION

Historically, the authority of the court to recall a sentence and impose a new term was lodged in Penal Code, section 1170, subdivision (d).[1] Senate Bill No. 567 (2021-2022 Reg. Leg. Sess.) (SB 567) deleted 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. Section 1170.03 was subsequently renumbered to section 1172.1 without substantive change. Many of the original provisions of section 1170, subdivision (d), were transferred to section 1172.1. AB 1540 also added provisions assuring that any new ameliorative provisions of the sentencing law may be considered after a sentence is recalled, that certain requests 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.

Assembly Bill No. 600 (2023-2024 Reg. Leg. Sess.)[2] (AB 600) further amended section 1172.1 to permit the court to recall a sentence at any time if the applicable sentencing laws at the time of original sentencing are subsequently changed by new statutory authority or case law. The legislation, among other things, also limits the circumstances under which the prosecution must concur with the disposition proposed by the court; requires the court to consider specified post-sentencing factors; requires the court to consider whether the defendant's constitutional rights were violated in the proceedings related to the conviction or sentencing at issue; and specifies the presumption favoring recall of the sentence may only be overcome if the defendant *currently* poses an unreasonable risk of danger to public safety.

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.

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

[2] Assembly Bill No. 88 (2023-2024 Reg. Leg. Sess.) also made technical changes to section 1172.1 which were incorporated in the provisions of Section 2 of AB 600.

A. 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* (1992) 10 Cal.App.4th 1829, 1835–1836.)

II. AUTHORITY TO RECALL A FELONY SENTENCE

A. Persons having authority

The authority to request the court to recall a felony sentence under section 1172.1, subdivision (a)(1), is with:

- The court on its own motion,
- The Secretary of CDCR or the Board of Parole Hearings for state prison commitments,
- The county correctional administrator for county jail commitments under section 1170, subdivision (h),
- The district attorney of the county in which the defendant was sentenced, and
- The Attorney General for cases originally prosecuted by the Department of Justice.

Recall and resentencing under section 1172.1 "may be initiated by the original sentencing judge, a judge designated by the presiding judge, or any judge with jurisdiction in the case." (§ 1172.1, subd. (a)(1).) The designation of multiple judicial officers was made by AB 600 presumably to assure there will always be a judge with the ability to recall a sentence.

Once the sentence is recalled, the court has the authority to "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." (*Ibid.*)

B. Request of the defendant

Section 1172.1, subdivision (c), added by AB 600, specifies "[a] defendant is not entitled to file a petition seeking relief from the court under this section. If a defendant requests consideration for relief under this section, the court is not required to respond." Subdivision (c) is consistent with longstanding authority that the defendant has no ability to initiate a recall of their 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. Like 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.)

The level of response by the court to a defendant's request for relief under section 1172.1 will be a matter of judicial discretion. While the statute permits the court not to respond, it does not prohibit the court from responding. At a minimum – and as a matter of common courtesy – a summary denial of the defendant's request for consideration should be followed with a minute order so indicating. Whether the court wishes to add further explanation would be a matter within the court's discretion.

Whether the court chooses to grant the defendant's request for recall of the sentence also will be a matter of judicial discretion. It may be that the court clearly recalls the defendant's case and remains satisfied with the appropriateness of the sentence that was imposed, notwithstanding the mitigating circumstances now being offered by the defendant. It may be that the request for recall comes too early in the defendant's custody term. But it also may be that the defendant's request, particularly those requests coming through defense counsel, articulate reasons to believe the original sentence is no longer in the interests of justice. Judges hope their sentencing decisions ultimately will cause a positive change in the lifestyle of the defendant. These changes do not exclusively come at the end of the sentence – some defendants achieve a suitable change long before that time, making the requirement to complete the sentence contrary to the interests of justice. If the defendant has accomplished what has been asked of them by the justice system, the court should be receptive to consideration of a colorable claim for recall of a sentence whether from a prosecuting or custody authority or invited by the defendant or counsel. Good behavior by the defendant may earn them a second look at their sentence.

The court should also keep in mind that the act of recalling the sentence does not necessarily translate into a resentencing. The recall of a sentence, however, gives the court the opportunity to appoint defense counsel pursuant to section 1172.1, subdivision (b)(1), and fully explore the sentencing factors specified in subdivision (a)(4). After due consideration of all the defendant's circumstances the court may determine that the original sentence still serves the interests of justice – in which case the court is free to impose any authorized sentence in the case, including the original sentence, "provided the new sentence, if any, *is no greater than* the initial sentence." (§ 1171.2, subd. (a)(1), italics added.) But the recall of the sentence and appointment of counsel, particularly in a close case, will give the court the ability to take evidence and hear argument of all counsel so as to obtain a far better understanding of the totality of the defendant's circumstances. When in doubt as to the proper action to take, the

prudent court may wish to order the recall,[3] appoint counsel, and seek a more robust review of the interests of justice.

C. Time limit on recall of sentence

1. On the court's motion

120-day rule

The authority of the court to recall a sentence generally must be exercised within 120 days of commitment to prison or county jail. 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 merits of the request for resentencing are 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*).)

Recall at any time

As a result of the enactment of AB 600 effective January 1, 2024, the court may on its own motion recall a sentence "*at any time* if the applicable sentencing laws at the time of original sentencing are subsequently changed by new statutory authority or case law." (§ 1172.1, subd. (a)(1), italics added.) Although the statutory language is vague, presumably the Legislature intends the court's authority to recall a sentence at least be triggered by any statutory or case law change that increases the court's discretion to favorably structure the defendant's sentence or lowers the penal consequences of a crime committed by the defendant. The changes apply to enactments by the Legislature or by initiative.

See Appendix A for a table of legislative changes that likely will allow the court to recall a sentence at any time. The court has been given the jurisdiction to recall any sentence imposed prior to the effective date of a statutory or case law change applicable to the defendant's case. For example, sentences imposed prior to the 2022 amendments to section 1385 (dismissal of enhancements) and sections 1170 and 1170.1 (restriction on the imposition of the upper term of imprisonment) will make many cases eligible for recall at any time. It even may be argued that AB 600 itself creates a change in the

[3] Rather than issuing an actual order of recall, the court may wish to simply appoint counsel and set an initial status conference. (See section V(G)(5), *infra*.)

sentencing law that is potentially applicable to any case sentenced prior to its effective date on January 1, 2024 – the amendment of subdivision (a)(1) greatly extends the authority of the court to recall a sentence on its own motion which previously had been limited in all circumstances to 120 days.

2. Request of prosecution or custody authorities

If the request for resentencing comes from the Secretary of CDCR or the Board of Parole Hearings, the county correctional administrator, 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, the request may be made at any time. (§ 1172.1, subd. (a)(1).)

D. Reason for recall

The purpose of recalling the sentence must be "rationally related to lawful sentencing." (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 456.) 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* (1993) 20 Cal.App.4th 190, 194–195), or to allow the defendant to withdraw the plea (*People v. Alanis* (2008) 158 Cal.App.4th 1467).

E. Physical delivery of defendant to custodial officer

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 the custody facility 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*, *supra*, 16 Cal.4th 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*, supra, 4 Cal.4th 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*, supra, 4 Cal.4th at p. 353.)

Additional insight is provided by *People v. Superior Court (Cornelius)*(1995) 31 Cal.App.4th 343 (*Cornelius*). There, the defendant was 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." (*Ibid*. at p. 348.)

The most logical interpretation of *Karaman* and *Howard* is that although the defendant must be "committed" to CDCR or county jail prior to the court's exercise of discretion under section 1172.1, the condition is satisfied with the preparation of the Abstract of Judgment and the delivery of the defendant to the sheriff for commitment under section 1170, subdivision (h) or for transfer to state prison – the court would then have the jurisdiction to order a recall of the sentence.

‡ **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 or the sheriff.

F. Recall of sentence at request of CDCR

Letters to the court from CDCR, signed by its secretary, provide: "[Section 1170, 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 when the original sentence is unauthorized, even a sentence longer than the original 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, where 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. 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."

G. 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.

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 specify: "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*, *supra*, 47 Cal.App.4th 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*, *supra*, 47 Cal.App.4th 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 provide 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*, supra, 178 Cal.App.4th 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*, *supra*, 208 Cal.App.4th 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*, *supra*, 208 Cal.App.4th 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 previously imposed terms." (*McCart*, *supra*, 32 Cal.3d at p. 343.) The matter was remanded to the trial court for recomputation of the term for the in-prison crimes. (*McCart*, *supra*, 32 Cal.3d 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 1172.1, subdivision (a)(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. (§ 1172.1, subd. (a)(1).)

III. 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.

A. 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, with the concurrence of the defendant, and then resentence the defendant to a reduced term of imprisonment."

(§ 1172.1, subd. (a)(3).)

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

"If the court has recalled the sentence on its own motion, the court shall not impose a judgment on any necessarily included lesser offense or lesser related offense if the conviction was a result of a plea bargain without 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)(4).)

Note the distinction between subdivisions (a)(3)(B) and (a)(4). Where the court has recalled the sentence on its own motion and the original sentence was based on a plea bargain, the court must have the concurrence of both the defendant and the prosecuting authority if the court proposes to resentence the defendant to a term based on a lesser included or lesser related offense. (Subd. (a)(4).) However, if the original sentence was not based on a plea bargain (such as after a trial or unconditional plea) or the request for resentencing is initiated by the prosecuting authority or the custody administrator, the court need only obtain the concurrence of the defendant in resentencing based on a lesser included or lesser related offense – the concurrence of the prosecuting authority is not required. (Subd. (a)(3)(B).)

B. 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.' [Citation.] 'When an illegal sentence is vacated, the court may substitute a proper sentence, even though it is more severe than the sentence imposed originally'. [Citations.]" (*People v. Hunt* (1982) 133 Cal.App.3d 543, 564.) "A trial court that imposes a sentence unauthorized by law retains jurisdiction (or has inherent power) to correct the sentence at any time the error comes to its attention, even if execution of the sentence has commenced or the judgment imposing the sentence has become final and correction requires imposition of a more severe sentence, provided the error is apparent from the face of the record." (*People v. Codinha* (2023) 92 Cal.App.5th 976, 990, footnote omitted.)

In vacating a sentence, a portion of which is unauthorized, 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."

IV. FACTORS AFFECTING THE GRANT OR DENIAL OF RECALL OR RESENTENCING

A. Intent of the Legislature

AB 600 expressed the intent of the Legislature in the application of section 1172.1:

> (a) It is the intent of the Legislature that, in resentencing proceedings pursuant to Section 1172.1 of the Penal Code, all ameliorative laws and court decisions allowing discretionary relief should be applied regardless of the date of the offense or conviction.
>
> (b) It is the further intent of the Legislature that courts have full discretion in resentencing proceedings pursuant to Section 1172.1 of the Penal Code to reconsider past decisions to impose prior strikes. The list of factors considered in *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, is not exhaustive. Courts should consider Section 1385 of the Penal Code, postconviction factors, or any other evidence that continued incarceration is no longer in the interests of justice.
>
> (c) Consistent with the California Racial Justice Act, it is the intent of the Legislature to provide remedies that ameliorate discriminative practices in the criminal justice system, including discrimination in seeking or obtaining convictions or imposing sentences.
>
> (d) It is the intent of the Legislature that, in cases where the judge concludes that recall and resentencing pursuant to Section 1172.1 of the Penal Code is appropriate, the resentencing result in a meaningful modification. "Meaningful modification" means it will cause some actual change in the person's circumstances, including, but not limited to, immediate release, earlier release, and newly acquired entitlement to review by the Board of Parole Hearings or the advancement of eligibility for a parole hearing.
>
> (AB 600, Section 1.)

As a matter of statutory interpretation, the Legislature's statement of intent in AB 600 does not carry the force of law. "Statements of intent, contained in the uncodified section of statutes, ' "do not confer power, determine rights, or enlarge the scope of a measure." ' (*Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 925, 44 Cal.Rptr.3d 223, 135 P.3d 637.)" (*People v. Coddington* (2023) 96 Cal.App.5th 562,___.) But certainly the court should accept the statement of intent as a general guide in the application of section 1172.1 and consider the statement along with all relevant information about the defendant when determining whether to recall a sentence and in resentencing.

It is not clear what the Legislature intended regarding the reference to the California Racial Justice Act (CRJA) in paragraph (c), particularly when considered with the provisions of section 1172.1, subdivision (a)(5), added by AB 600 which require the court to consider "evidence that the defendant's constitutional rights were violated in the proceedings related to the conviction

or sentence at issue, and any other evidence that undermines the integrity of the underlying conviction or sentence." Nothing in the language of section 1172.1 or in the legislative history of AB 600 suggests the Legislature intended section 1172.1 to operate as a procedural exception to the detailed requirements of section 745. Presumably if a violation of the CRJA was found and the defendant was thereafter resentenced based on the violation, the court could later recall the sentence under section 1172.1 and grant further sentencing relief based on the same violation.

B. Preconviction factors

In exercising its resentencing discretion, the court is directed to consider specified pre- and postconviction sentencing factors. "The court *shall consider*[4] 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 preconviction 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.

C. Postconviction factors

The court is directed to consider specified postconviction sentencing factors. "In recalling and resentencing pursuant to this provision, the court *shall consider*[5] 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

[4] Section 1172.1, subd. (a)(5), originally provided the court "may" consider specified preconviction factors; AB 600 changed the statute to a mandatory "shall consider" such factors.

[5] Section 1172.1, subd. (a)(5), originally provided the court "may" consider specified postconviction factors; AB 600 changed the statute to a mandatory "shall consider" such factors.

that reflects that circumstances have changed since the original sentencing so that continued incarceration is no longer in the interest of justice. Evidence that the defendant's incarceration is no longer in the interest of justice includes, but is not limited to, evidence that the defendant's constitutional rights were violated in the proceedings related to the conviction or sentence at issue, and any other evidence that undermines the integrity of the underlying conviction or sentence." (§ 1172.1, subd. (a)(4), italics added.)

D. Credit for time served

If 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. CDCR or local custody administrator has the duty to calculate the defendant's conduct credit while they are under their jurisdiction.

V. PROCEDURES FOR RECALL AND RESENTENCING

A. 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.

AB 88, effective January 1, 2024, amended section 1172.1, subdivision (a)(8), to permit the victim to comment on the proposed resentencing: "[I]f a victim of a crime wishes to be heard pursuant to the provisions of Section 28 of Article I of the California Constitution, or pursuant to any other provision of law applicable to the hearing, the victim shall notify the prosecution of their request to be heard within 15 days of being notified that resentencing is being sought and the court shall provide an opportunity for the victim to be heard." (§ 1172.1, subd. (a)(8)(B).)

It is a matter of constitutional right of the victim to express their views at any postsentencing proceeding where the defendant's sentence is being reconsidered. The victim has a right "[t]o be heard, upon request, at any proceeding, including any delinquency proceeding, involving a post-arrest release decision, plea, sentencing, post-conviction release decision, or any proceeding in which a right of the victim is at issue." (California Constitution, Art. I, § 28, subd. (b)(8).) If a victim has properly expressed a desire to be heard on the issue of resentencing, the court must observe the conditions of section 1172.1, subdivision (a)(8)(B) in providing that opportunity.

B. No denial of resentencing without a hearing

Section 1172.1, subdivision (a)(9), 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 creation of the legislative right to have a hearing was 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.) To the extent it suggests there is no right to a hearing on the merits of a request for resentencing, *McCallum* has been abrogated by the enactment of section 1172.1, subdivision (a)(9).

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)(9). Because under section 1172.1, subdivision (c), the defendant is not entitled to file a petition seeking relief and the court is not required to respond to such a request, it is unlikely the provisions of subdivision (a)(9) apply to requests for relief made by the defendant. However, the prudent court may choose to set a status hearing and appoint counsel pursuant to subdivision (b)(1) 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. Furthermore, having all interests represented by counsel likely will enhance the court's ability to consider the interests of justice in the case. 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.

C. Statement on the record

Section 1172.1, subdivision (a)(7), 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.

Note that the requirement to state reasons on the record only applies if the court initiates recall proceedings on its own motion or on the request of the prosecuting or custody authorities. Subdivision (c) expressly relieves the court from any duty to give reasons for the denial of relief requested by the defendant.

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

If the request for recall and resentencing comes from the Secretary of CDCR, 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 *currently poses* an unreasonable risk of danger to public safety, as defined in subdivision (c) of Section 1170.18." (Italics added.) 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 legislative history of AB 600, which adds the element of "current" dangerousness, suggests the Legislature amended subdivision (b)(2) to track the provisions governing the release of a person on parole. The Senate Floor Analysis, Third Reading, September 2, 2023, pp. 5- 6, states that "AB 600 fills in the gaps to create equity and due process in resentencing by : . . . [e]nsuring the standard applied reflects the parole hearing standard—that the person must pose a current unreasonable risk to public safety." Section 3041, subdivision (b)(1), directs the Board of Parole Hearings to consider public safety: "The panel or the board, sitting en banc, shall grant parole to an inmate unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for the individual."

Our Supreme Court discussed the determination of current dangerousness for the purposes of parole consideration in *In re Shaputis* (2008) 44 Cal.4th 1241, 1254-1255: " '[T]he determination whether an inmate poses a current danger is not dependent upon whether his or her commitment offense is more or less egregious than other, similar crimes. [Citation.] Nor is it dependent solely upon whether the circumstances of the offense exhibit viciousness above the minimum elements required for conviction of that offense. Rather, the relevant inquiry is whether the circumstances of the commitment offense, when considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years after commission of the offense. This inquiry is, by necessity and by statutory mandate, an individualized one, and cannot be undertaken simply by examining the circumstances of the crime in isolation, without consideration of the passage of time or the attendant changes in the inmate's psychological or mental attitude. [Citation.]' [¶] Thus, 'the Board or the Governor may base a denial-of-parole decision upon the circumstances of the offense, or upon other immutable facts such as an inmate's criminal history, but some evidence will support such reliance *only* if those facts support the ultimate conclusion that an inmate *continues* to pose an

unreasonable risk to public safety. [Citation.] Accordingly, the relevant inquiry for a reviewing court is not merely whether an inmate's crime was especially callous, or shockingly vicious or lethal, but whether the identified facts are *probative* to the central issue of *current* dangerousness when considered in light of the full record before the Board or the Governor.' [Citation.]" (Italics in original.)

The presumption created in section 1172.1, subdivision (b)(2), applies to the court's order of recall and resentencing, not to the particular sentencing recommendation made by the prosecuting or custody authority. "Former section 1170.03 and current section 1172.1 provide that where the Secretary has requested resentencing, '[t]here 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 ....' (Former § 1170.03, subd. (b)(2), renumbered as § 1172.1, subd. (b)(2), italics added.) The court in this case in fact *recalled* defendant's sentence and resentenced him. Defendant was therefore not prejudiced by any purported failure of the court to apply the presumption or the purported lack of evidence to support a finding overcoming the presumption. Although on resentencing, the court did not strike the prior serious felony enhancement as discussed in the Secretary's letter, nothing 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, italics in original.)

E. 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." (§ 1172.1, subd. (b)(1).) 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 CDCR. (*Frazier*, *supra*, 55 Cal.App.5th at pp. 865-866.)

Withdrawal of district attorney's request for resentencing

Once it has submitted a request for recall of a defendant's sentence and resentencing, the prosecuting authority has only a limited ability to withdraw the motion. "[A] district attorney's ability to request resentencing does not imply an unfettered authority to withdraw the request.

Accordingly, and consistent with [citation], we conclude that termination of a section 1172.1 proceeding is not mandatory if the district attorney no longer supports resentencing. In other words, the mere fact that the district attorney withdraws a request does not preclude a trial court from concluding that recall and resentencing is nonetheless appropriate. Rather, once a request is made, the court has jurisdiction to resentence the defendant if it chooses to do so. [Citation.]" (*People v. Vaesau* (2023) 94 Cal.App.5th 132, 148 (*Vaesau*).) "[A] trial court may, but is not required to, allow a district attorney to withdraw a resentencing request before the court reaches the merits, thereby terminating a section 1172.1 proceeding without prejudice. Although this is a discretionary choice, it must be guided by section 1172.1's objectives and the defendant's due process rights. In particular, the motion to withdraw the request must be based on a legitimate reason. Here, a remand for reconsideration is warranted, because it is unclear whether the trial court appreciated the full scope of its discretion to deny the district attorney's motion to withdraw—particularly given the district attorney's failure to explain the change in course." (*Vaesau*, *supra*, 94 Cal.App.5th at p. 151, footnote omitted.)

F. 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 recall and resentencing.

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

- The court should first review the request for resentencing against the factors listed in section 1172.1, subdivision (a)(5), 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 recall and 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 favoring relief 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.

G. 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. Note that under section 1172.1, subdivision (a)(1), these motions may be initiated by the "original sentencing judge, a judge designated by the presiding judge, or any judge with jurisdiction in the case."

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.

3. 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.

4. 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*.

5. 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. If the court intends to proceed with a request for recall and resentencing initiated by invitation of the defendant, the court likely will find the status hearing a good place to start the process of review and resentencing.

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 they must be returned to the court (and local county jail) pending further proceedings. Consequently, the defendant likely will forfeit their 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 them in the physical custody of the facility pending the procedure for resentencing, unless the defendant actually requests their personal appearance in the proceedings. It may be possible for the defendant to appear by remote communication as provided by subdivision (a)(9). A suggested form of order setting the matter for a status hearing is attached as Attachment B, *infra*.

6. 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. Counsel also should be appointed for the defendant if the court is proceeding on an invitation for consideration from the defendant.

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.

7. 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, subdivision (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 paragraph 10, *infra*.

The concurrence of the prosecution with any disposition where the court is imposing judgment on a lesser included or related crime is required if the original sentence was based on a plea bargain and the court has brought the motion to recall and resentence on its own motion (or upon invitation of the defendant). The concurrence of the prosecution is not required if the request for recall was initiated by the prosecution or custody authorities, or if it is made after the defendant was convicted and sentenced after a trial or by unconditional plea.

8. 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)(9). Unless there are any major factual questions, it is 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, "the court shall 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. Evidence that the defendant's incarceration is no longer in the interest of justice includes, but is not limited to, evidence that the defendant's

constitutional rights were violated in the proceedings related to the conviction or sentence at issue, and any other evidence that undermines the integrity of the underlying conviction or sentence. 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)(5).) In any event, for proceedings under subdivision (a)(1), "the new sentence, if any, [may be] no greater than the initial sentence."

Consideration of 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)(5)] 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 currently poses 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.)

The concurrence of the prosecution with any disposition where the court is imposing judgment on a lesser included or related crime is required if the original sentence was based on a plea bargain and the court has brought the motion to recall and resentence on its own motion (or upon invitation of the defendant). The concurrence of the prosecution is not required if the request for recall was initiated by the prosecution or custody authorities, or if it is made after the defendant was convicted and sentenced after a trial or by unconditional plea.

Statement of reasons on the record

Section 1172.1, subdivision (a)(7), specifies "[t]he court shall state on the record the reasons for its decision to grant or deny recall and resentencing." The statement can be made orally or in writing.

9. 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.

10. 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 a 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.

11. 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 any 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 they 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.

H. Appeal of the denial of relief

1. Right to appeal, generally

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.)

The decision of the court granting the district attorney's motion to withdraw its request for recall of a defendant's sentence is appealable. (*People v. V*aesau (2023) 94 Cal.App.5th 132, 144.)

2. Advisement of appellate rights

Subdivision (d), added by AB 600, provides that "[a]fter ruling on a referral authorized by this section, the court shall advise the defendant of their right to appeal and the necessary steps and time for taking an appeal." Although such an advisement likely is unnecessary when the resentencing is a product of a stipulation between the parties, the advisement likely is necessary in any other circumstances where the court resentences the defendant under section 1172.1 after consideration of the merits, even when the court grants the request for recall and resentencing.

The advisement likely is unnecessary if the court enters a summary denial of an application for consideration made by the defendant, the denial being based on the provisions of section 1172.1, subdivision (c). The notice of appeal and advisement of appellate rights is only required if the court enters a "ruling *on a referral authorized by this section*." (§ 1172.1, subd. (d), italics added.) Likely "referral authorized by this section" means requests for recall made by the prosecuting and custody authorities – and possibly by the court on its own motion – but not requests for consideration initiated by the defendant, which are expressly prohibited by subdivision (c).

See Attachment C, *infra*, for a form outlining the defendant's right to appeal as required by subdivision (d).

3. Right of defendant to appeal denial of invitation to recall sentence

It is unclear whether the defendant has a right to appeal the denial of an "invitation" to recall the defendant's sentence. 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.) *Loper*, however, predates the amendment of subdivision (c) by AB 600: "A defendant is not entitled to file a petition seeking relief from the court under this section. If a defendant requests consideration for relief under this section, *the court is not required to respond*." (Italics added.) It is clear from the amendment not only that the defendant has no right to initiate a recall of the sentence, but if the defendant does request consideration for relief the court may give *no reason at all* for the denial of the defendant's request. Under such circumstances, it seems unlikely the defendant has a right to appeal a denial of relief.

Even if there somehow is a right to appeal, in the absence of a response by the trial court, the appellate court is left with a silent record and the presumption that the trial court properly exercised its discretion. "[N]othing in section 1170, subdivision (d)(1) [the predecessor to section 1172.1, subd. (a)], requires the court to state its reasoning when declining to exercise its discretion in response to the Secretary's recommendation.[6] It is a fundamental tenet of appellate review that we presume on a silent record the court properly exercised its discretion. (See *People v. Fuhrman* (1997) 16 Cal.4th 930, 944, 67 Cal.Rptr.2d 1, 941 P.2d 1189; *People v. Lee* (2017) 16 Cal.App.5th 861, 867, 224 Cal.Rptr.3d 706 ['if the record is silent' on the court's awareness of its discretionary authority in sentencing, we must presume the court understood the scope of its discretion and affirm]; *People v. Gutierrez* (2009) 174 Cal.App.4th 515, 527, 94 Cal.Rptr.3d 228 ['in light of the presumption on a silent record that the trial court is aware of the applicable law, including statutory discretion at sentencing, [the reviewing court] cannot presume error where the record does not establish on its face that the trial court misunderstood the scope of [its] discretion'].) (*People v. Frazier* (2020) 55 Cal.App.5th 858, 868-869.)

I. Retroactive application of section 1172.1

People v. McMurray (2022) 76 Cal.App.5th 1035 (*McMurray*), holds the 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 [1172.1]. [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.)

[6] Section 1172.1, subd. (a)(7), now requires the court to state its reasons on the record for granting or denying a request for recall and resentencing if the request is on the court's own motion, or on motion of the prosecuting or custody authority. Subdivision (c) expressly relieves the court of any duty to respond to a request for relief made by the defendant.

ATTACHMENT A: STATUTORY CHANGES TRIGGERING COURT'S AUTHORITY TO RECALL SENTENCE[7]

The following is a list of statutory changes that may authorize the court to recall a defendant's sentence at any time under section 1172.1, subd. (a)(1); the list may not be exhaustive or definitive.

Date Effective	Bill/Prop	Code Citations	Summary
Jan. 1, 2017	Prop 57	Welf. & Inst. Code §§ 602. 707 Art. 1, Sec. 32 of California Constitution	Deleted authority of prosecutors to direct file charges against juvenile defendants in adult court; established more youth friendly transfer criteria and put burden on government rather than the youth
Jan. 1, 2018	SB 394	§§ 3051, 4801	Ensured compliance with U.S. Supreme Court decisions by allowing children sentenced to life without the possibility of parole to be eligible for a parole hearing after 25 years
Jan. 1, 2018	AB 1448	§§ 3041, 3046, 3055	Allows the Board of Parole hearings to consider the possibility of granting parole to elderly people who are incarcerated and who have served at least 25 years in prison
Jan. 1, 2018	AB 1308	§§ 3051, 4801	Expanded the youth offender parole process for persons sentenced to lengthy prison terms for crimes committed before age 23 to include those age 25 or younger
Jan. 1, 2018	SB 180	Health & Safety Code § 11370.2	Repealed the three-year enhancement for prior drug-related felonies (HS § 11370.2); the repeal does not apply to prior convictions involving a minor (HS § 11380)
Jan. 1, 2018	SB 620	§§ 12022.5, 12022.53	Authorizes judges to strike, dismiss, or tailor the duration of a firearm enhancement depending on each individual's circumstances (See *People v. Tirado* (2022) 12 Cal.5th 688, 289)

[7] Attachment A has been prepared by Jennifer Hansen, Office of the State Public Defender, and Alisa Hoban, Stanford Law School.

Date Effective	Bill/Prop	Code Citations	Summary
Jan. 1, 2019	SB 439	Welf. & Inst. §§ 601, 602, 602.1	Keeps children younger than 12 out of the juvenile court system
Jan. 1, 2019	AB 2942	§ 1170	Expanded prosecutors' discretion to recommend recall and resentencing in the interests of justice
Jan. 1, 2019	SB 1393	§ 667(a)(1), 1385	Makes discretionary the requirement that judges add a 5-year sentence enhancement for each prior serious felony on a person's record
Jan. 1, 2019	SB 1391	Welf. & Inst. Code § 707	Raised the age for adult court jurisdiction to 16
Jan. 1, 2019	SB 865	§ 1170.91(b)	Allows people who were sentenced prior to Jan. 1, 2015, to seek a resentencing to take into account mitigation related to their military service
Jan. 1, 2019	SB 1437	§§ 188, 189 1172.6	Limits accomplice liability for felony murder and murder under the natural and probable consequences theory, and provides for a petition procedure through which qualifying defendants can petition to vacate their murder conviction
Jan. 1, 2020	SB 394	§ 1001.83	Authorized creation of pretrial diversion programs for those who are caregivers for children under 18

Date Effective	Bill/Prop	Code Citations	Summary
Jan. 1, 2020	AB 1793	Health & Safety § 11361.9	Facilitates review and dismissal of past marijuana convictions
Jan. 1, 2020	AB 1618	§ 1016.8	Prohibited district attorneys from requiring as a condition of a plea bargain that the defendant give up their rights that may come from future changes in the law
Jan. 1, 2020	SB 136	§ 667.5(b)	Eliminated the mandatory one-year enhancement for prior felonies that resulted in a prison or jail term; does not apply to prior convictions involving a sexually violent offense (WIC § 6600 (b).)
Jan. 1, 2021	AB 3234	§§ 3055, 1001.95	Gave judges discretion to grant diversion to anyone charged with a misdemeanor and expanded eligibility for elder parole to over 50 years old and 20 years served.
Jan. 1, 2021	SB 145	§§ 290, 290.006	Ended a discriminatory practice in which young people convicted of consensual underage sex are required to register as a sex offender only if they are gay.

Date Effective	Bill/Prop	Code Citations	Summary
Jan. 1, 2021	AB 2542	§§ 1473, 1473.7, 745	Prohibits the state from seeking or obtaining a criminal conviction or imposing a sentence, based upon race, ethnicity or national origin
Jan. 1, 2022	SB 73	Health & Safety Code §§ 11370, 11370.07, 29820	Allows a court to grant probation for drug offenses that had previously been mandatory prison offenses
Jan. 1, 2022	AB 1540	§ 1170.03	Reformed the second-look resentencing process to make it more robust, ensuring appointment of counsel, imposing timelines, creating a presumption in favor of resentencing, requiring application of all laws, and allowing for reduction of charges
Jan. 1, 2022	SB 483	§§ 1171, 1171.1	Authorizes courts to retroactively remove 1-year prison prior and 3-year drug prior enhancements from the sentences of currently or formerly incarcerated people; makes SB 180 and 136 retroactive

Date Effective	Bill/Prop	Code Citations	Summary
Jan. 1, 2022	AB 333	§ 186.22, 1109	Changed the definitions of gang enhancements and crimes including: - removes certain crimes (looting, felony vandalism, certain identify fraud violations) from list of crimes eligible for gang enhancement charge - redefines "pattern of criminal gang activity" - allows separate proceeding for gang enhancement if requested by defense
Jan. 1, 2022	SB 775	§§ 189, 1172.6	Clarifies SB 1437; allows certain people convicted of aiding and abetting attempted murder (under the natural and probable consequences doctrine) or manslaughter to petition for resentencing
Jan. 1, 2022	SB 81	§ 1385	Creates presumption of dismissing enhancements if it is in the furtherance of justice. Courts will take into consideration factors such as: racial impact; charging multiple enhancements; sentences over 20 years; mental health issues; the offense is connected to prior victimization or childhood trauma; nonviolent offenses; if the defendant was a juvenile when they committed the offense or prior offenses; enhancement is based on prior conviction that is over five years old; the firearm used in the offense was inoperable or unloaded

Date Effective	Bill/Prop	Code Citations	Summary
Jan. 1, 2022	SB 567	§§ 1170, 1170.1	Requires court to impose no greater than the middle term of imprisonment unless there are aggravating circumstances that have been admitted or proven; if requested, aggravating circumstances must be a separate proceeding from the trial of charges
Jan. 1, 2022	AB 124	§§ 236.23, 236.15, 236.24, 1170, 1016.7	Created a presumption of the low term if: (A) The person has experienced psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence;(B) The person is a youth, or was under 26 at the time of the offense;(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
Jan. 1, 2022	AB 518	§ 654	Removed the mandatory imposition of the longest possible term of imprisonment as the base term.
Jan. 1, 2023	SB 1209	§ 1170.91	Allows qualifying people who have served in the military to ask a court to resentence them to less time (must have trauma or condition related to military service)

ATTACHMENT B: 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(b)(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.] [[Name of defendant] is inviting the court to recall and resentence the defendant pursuant to Penal Code, section 1172.1, subdivision (a)(1). A copy of the defendant's invitation 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

ATTACHMENT C: NOTICE OF APPELLATE RIGHTS (Pen. Code, § 1172.1(d))

PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff,

vs. **No.**

JOHN DOE, **NOTICE OF APPELLATE RIGHTS**
Defendant. **(Pen. Code, § 1172.1(d))**

NOTICE IS HEREBY GIVEN TO THE NAMED DEFENDANT CONCERNING THE RIGHT TO APPEAL THE DECISION OF THE TRIAL COURT ON THE PETITION TO RECALL AND RESENTENCE THE DEFENDANT:

1. On _____ (date) the above-referenced court entered its ruling on the application to recall the sentence imposed on the defendant and impose a new sentence, and, if authorized, imposed a new sentence.

2. The defendant has a right to obtain an appellate review of the court's ruling and new sentence, if any, by filing a notice of appeal on or before 60 days from the date specified in paragraph 1. The defendant may not request appellate review of the court's ruling if the notice of appeal is not filed on or before the specified date.

3. The notice of appeal must be in writing and specify that the defendant is appealing the ruling of this court on the application to recall defendant's sentence and impose a new sentence, and, if applicable, the new sentence imposed by the court.

4. The notice of appeal must be filed with this court, not the appellate court.

5. Unless the defendant's attorney agrees to file the notice of appeal, the defendant must file their own notice of appeal.

6. The defendant is entitled to an appointed attorney and a free transcript on appeal if the defendant cannot afford to pay for their own attorney and transcript.

7. The defendant must always keep the appellate court advised of their current address.