

MEMORANDUM

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

RE: Requests by CDCR for Correction of Sentencing Errors and/or Recall of Sentence (P.C. § 1170, subd. (d)(1))

DATED: June 12, 2018

The California Department of Corrections and Rehabilitation (CDCR) has recently identified over 1000 state prison cases where it believes trial courts may have committed some form of sentencing error. CDCR typically has addressed these concerns by a letter identifying the possible error and requesting the court to review its file to determine if correction is required. More recently, in cases where it suspects sentencing error, CDCR has made a specific recommendation that the court recall the sentence pursuant to Penal Code, section 1170, subdivision (d)(1).¹ Section 1170, subdivision (d)(1) allows a judge to recall the sentence and resentence a defendant serving a prison sentence based on a recommendation from the Secretary of CDCR. This memorandum is offered as a resource for determining a proper and efficient response to the requests for resentencing.

Duty of the court

It is the obligation of the court to impose a legally authorized sentence. “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.)

Because correction of an unauthorized sentence may result in a *substantial* reduction in some prison terms and because many inmates are nearing their projected release date, there is an added responsibility for the court to handle these requests expeditiously.

I. Correction of sentencing error

A. Types of sentencing error

The procedure for correction of sentencing error will depend on the nature of the needed correction and the timing of discovery. (See generally, 6 Witkin and Epstein, California Criminal

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

Law 3d, Criminal Judgment §§ 174 et seq., pp. 202-210; Couzens, Bigelow and Prickett, Sentencing California Crimes, Chapter 28, The Rutter Group, 2017.) The jurisdiction of the court to modify a judgment or correct sentencing errors is summarized in *People v. Turrin* (2009) 1765 Cal.App.4th 1200, 1205:

“[G]enerally a trial court lacks jurisdiction to resentence a criminal defendant after execution of sentence has begun. [Citations.]” (*People v. Howard* (1997) 16 Cal.4th 1081, 1089, 68 Cal.Rptr.2d 870, 946 P.2d 828; *People v. Karaman* (1992) 4 Cal.4th 335, 344, 347, 350, 14 Cal.Rptr.2d 801, 842 P.2d 100 [court retains power to modify a sentence “at any time prior to execution of the sentence”]; *Dix v. Superior Court* (1991) 53 Cal.3d 442, 455, 279 Cal.Rptr. 834, 807 P.2d 1063 (*Dix*); *Portillo v. Superior Court* (1992) 10 Cal.App.4th 1829, 1834–1835, 13 Cal.Rptr.2d 709.) There are few exceptions to the rule.

Section 1170, subdivision (d), provides, in relevant part, that a trial court may recall the sentence on its own motion within 120 days after committing a defendant to prison. (*Dix, supra*, 53 Cal.3d at pp. 456, 464, 279 Cal.Rptr. 834, 807 P.2d 1063; *People v. Alanis* (2008) 158 Cal.App.4th 1467, 1475–1476, 71 Cal.Rptr.3d 139.) Section 1170, subdivision (d), does not authorize a defendant to file a motion to recall the sentence. (*People v. Pritchett* (1993) 20 Cal.App.4th 190, 193, 24 Cal.Rptr.2d 391.)

A trial court may correct a clerical error, but not a judicial error, at any time. A clerical error is one that is made in recording the judgment; a judicial error is one that is made in rendering the judgment. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185, 109 Cal.Rptr.2d 303, 26 P.3d 1040; *In re Candelario* (1970) 3 Cal.3d 702, 705, 91 Cal.Rptr. 497, 477 P.2d 729; see *People v. Borja* (2002) 95 Cal.App.4th 481, 483–485, 115 Cal.Rptr.2d 728.)

Also, an unauthorized sentence may be corrected at any time. (*People v. Scott* (1994) 9 Cal.4th 331, 354–355, 36 Cal.Rptr.2d 627, 885 P.2d 1040; *People v. Crooks* (1997) 55 Cal.App.4th 797, 811, 64 Cal.Rptr.2d 236.) “The unauthorized sentence exception is ‘a narrow exception’ to the waiver doctrine that normally applies where the sentence ‘could not lawfully be imposed under any circumstance in the particular case,’ for example, ‘where the court violates mandatory provisions governing the length of confinement.’ [Citations.] The class of nonwaivable claims includes ‘obvious legal errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings.’ ” (*People v. Brach* (2002) 95 Cal.App.4th 571, 578, 115 Cal.Rptr.2d 753.) *People v. Smith* (2001) 24 Cal.4th 849, 102 Cal.Rptr.2d 731, 14 P.3d 942 explained, “We deemed appellate intervention appropriate in these cases because the errors presented ‘pure questions of law’ [citation], and were ‘“clear and correctable” independent of any factual issues presented by the record at sentencing.’ ” (*Id.* at p. 852, 102 Cal.Rptr.2d 731, 14 P.3d 942.) For example, a sentencing court's computational error resulting in an unauthorized sentence can be corrected at any time. (*People v. Guillen* (1994) 25 Cal.App.4th 756, 764, 31 Cal.Rptr.2d 653.) An unauthorized sentence

because of an error in restitution must be vacated and the proper sentence imposed whenever the matter is brought to the attention of the trial or reviewing court. (*People v. Zito* (1992) 8 Cal.App.4th 736, 740–742, 10 Cal.Rptr.2d 491 [restitution for \$300,000 violated ex post facto prohibition to the extent victim restitution and the restitution fine exceeded \$10,000 maximum set by pre–1990 law and would constitute an unauthorized sentence].)

B. Scope of court’s discretion at resentencing

Whether a sentencing error constitutes general judicial error or an unauthorized sentence is critical in defining the scope of the court’s discretion in resentencing. If the error is general judicial error, the trial court has no jurisdiction to modify the sentence unless the sentence is reversed by an appellate court, or the court exercises its discretion under section 1170, subdivision (d)(1). If the court reconsiders the sentence after reversal by an appellate court or pursuant to section 1170, subdivision (d)(1), the court may not impose a sentence longer than the original term. (§ 1170, subd. (d)(1); *People v. Henderson* (1963) 60 Cal.2d 482, 495-497.)

Where the sentence is unauthorized, however, 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.)

It is immaterial that the unauthorized sentence is discovered as a result of a referral by CDCR under section 1170, 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. (*People v. 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 1170, subdivision (d), which permits resentencing.”

C. The referral by CDCR

Section 1170, subdivision (d)(1), provides:

“When a defendant subject to this section or subdivision (b) of Section 1168 has been sentenced to be imprisoned in the state prison or county jail pursuant to subdivision (h) and has been committed to the custody of the secretary or the county correctional administrator, the court may, within 120 days of the date of commitment on its own motion, *or at any time upon the recommendation of the secretary or the Board of Parole Hearings in the case of state prison inmates*, or the county correctional administrator in the case of county jail inmates, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence. The court resentencing under this subdivision shall apply the sentencing rules of the Judicial Council so as to eliminate disparity of sentences and to promote uniformity of sentencing. Credit shall be given for time served.”

(Emphasis added.) The only difference between the court’s ability to recall a sentence and CDCR’s ability to recommend recall is that CDCR is not subject to the 120-day limitation – its authority may be exercised at any time during the prison term. In all other respects, however, the process of recalling the sentence and resentencing is the same regardless of who initiated the request for resentencing.

The 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.*” (Emphasis added.) In light of the case authority discussed above, 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.

Although a court is not prohibited from imposing a term longer than the one originally imposed where the original term was unauthorized, the court may nevertheless be restricted in

resentencing if the original sentence was imposed as a result of plea negotiations. Likely the resentencing process will create options either higher or lower than the original term imposed by the court. Under such circumstances, there will be plenty of incentive for the parties to reach a new agreement on the resentencing.

D. Circumstances justifying the CDCR recommendation for recall of sentence

CDCR, in their recommendations for recall of sentences under section 1170, subdivision (d)(1), identified six major groups of defendants:

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]nowingly 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 previously 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).)

E. Appeal by the inmate

The denial of a request for resentencing under section 1170, subdivision (d), is an appealable order. Although the recall of a sentence is initiated by the court, the defendant having no independent right to request recall, our Supreme Court has held the denial of such a request 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.)

II. Suggested procedure for handling CDCR requests for resentencing under § 1170, subdivision (d)(1)

A. 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 recall 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.

B. Review by the court

The judge should review the letter from CDCR and the entire file to determine the nature of the problem and whether there is a proper reason for a correction. Although CDCR staff is well trained in California sentencing law, at times they misinterpret a code section, a case decision, or state of the record. The court should verify the circumstances of the alleged error and determine the proper means for addressing the issue.

Even if there is a prima facie basis stated for modifying the sentence, the court may desire further documentation from CDCR regarding the defendant’s circumstances. For example, whether relief will be granted may depend on the defendant’s disciplinary record while in custody. The court should not hesitate to request further relevant documentation.

C. Summary disposition

If the court finds the CDCR comments facially wrong, or if the court is being invited to exercise its equitable power to modify the sentence, but declines to exercise such authority, the court should feel free to respond accordingly by letter, with copies of all correspondence being sent to counsel of record. There is no need to formally recall the sentence under section 1170, subdivision (d)(1). If one or both of the attorneys disagree with the court’s assessment, they

may invite further consideration by the court at a noticed hearing. In such circumstances, the court should follow the procedures outlined for a formal disposition, *infra*.

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 forward the response to CDCR with 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. If the matter is resolved by summary disposition, the court should enter a minute order denying the CDCR request for recall of the sentence.

Any informal response to CDCR should include a copy of their original request for correction of the sentence.

D. Formal disposition by hearing

If the problem identified by CDCR presents a significant issue with the sentencing, such as with an unauthorized sentence, or if either party objects to the proposed summary disposition, the matter should be set for a hearing.

1. *Order setting the matter for a status hearing:* The court should enter an order setting the matter for a status hearing on the request for resentencing. Some care should be exercised in crafting the court's order. 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 CDCR and he must be returned to the court pending further proceedings. As a consequence, the defendant likely will forfeit his existing housing status and opportunities for participation in programs. Since in many 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 CDCR pending the procedure for resentencing, unless the defendant actually requests his personal appearance in the proceedings. It may even be possible for the defendant to appear by remote communication under section 977, subdivision (c)(2)(A). A suggested form of order setting the matter for consideration of resentencing is attached as Attachment A.
2. *Counsel and the defendant must be notified:* The notice of hearing should be sent to all counsel of record and to the defendant. If counsel is no longer involved with the case, the court will need to appoint or reappoint the public defender.
3. *The initial setting should address potential resolution:* The court should set the initial appearance as an opportunity for the court and counsel to discuss the sentencing

problem and for consideration of any proposed disposition. 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, will 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 all the charges, dismissed or admitted, 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 disposition, the court should follow the applicable procedures outlined in paragraphs 5 and 6, *infra*.

4. *Setting of formal hearing*: If the parties cannot reach an informal resolution, the court likely has no option but to set the matter for a contested hearing. Defense counsel will be required to determine whether the defendant wants to be present for the hearing. 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 as required by section 977. The potential issues at the hearing may involve whether any error occurred, whether the original sentence was unauthorized, and the sentencing options available to the court. If the original sentence was based on a plea bargain, it will be for the court to determine whether any available resentencing strikes at the heart of the terms of the plea, in which case the plea must be set aside; or whether each side retains the substantial benefits of the bargain, in which case the plea can remain.
5. *No change in the sentence*: If the court determines no change in the sentence is to be made, 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 CDCR. The entry of the minute order is necessary to clearly trigger any appeal period.
6. *Correction of the sentence*: If the court determines correction of the sentence is necessary, the form of order will depend on the nature of the correction. If the correction is being made because the original sentence was not authorized, the court should not utilize the provisions of section 1170, subdivision (d)(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 – reference may be made to the letter from CDCR, if the court agrees]. The following sentence is hereby imposed by the

court: [may be any sentence authorized at the time of the original sentencing, even if the term is longer than the original sentence].

If the correction 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 1170, subdivision (d)(1):

The court hereby recalls the sentence ordered on ____ (date) under the provisions of Penal Code, section 1170, subdivision (d)(1), for the following reasons: [state the reasons]. The following sentence is hereby imposed by the court: [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. If reasons are required for a particular sentencing choice, they should be expressed on the record.

7. *Documentation to CDCR*: If the court corrects the sentence, it must send CDCR an amended abstract of judgment and a copy of the original letter from CDCR. 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, 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 up to the date of resentencing, and all of the conduct credits while in jail. CDCR is responsible for calculating conduct credits earned in prison.

III. Questions

If there are questions about the procedure for recall of a sentence under section 1170, subdivision (d)(1), and any required resentencing, Judge Couzens may be reached at: richardcouzens@gmail.com.

ATTACHMENT A: FORM OF ORDER SETTING MATTER FOR HEARING

PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff,

vs.

JOHN DOE,
Defendant.

No.

**SETTING OF STATUS CONFERENCE TO
DETERMINE WHETHER SENTENCE SHOULD
BE RECALLED (Pen. Code, § 1170(d)(1))**

The court has received a request dated _____ from the secretary of the California Department of Corrections and Rehabilitation recommending that defendant’s sentence imposed on _____ be recalled pursuant to Penal Code, section 1170, subdivision (d)(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