

Penal Code (PC) 1170(d) Recall and Resentence



PROGRAM GUIDE

TABLE OF CONTENTS

- I. Overview of Categories
- II. Legal Authorities
- III. Category #1: Exceptional Conduct Referrals
- IV. Category #2: Law Enforcement Agency Referrals
- V. Category #3: Retroactive Change-in-Law Referrals
- VI. Category #4: Sentencing Discrepancy Referrals

I. OVERVIEW OF CATEGORIES

	Category	Responsible Unit	Current Scope
1	Exceptional Conduct Referrals	Classification Services Unit (CSU)	Referrals based on behavior beyond simply complying with all regulations and procedures that demonstrate they have changed as a person and would be a positive asset to the community.
2	Law Enforcement Agency (LEA) Referrals	CSU	Referrals from an outside law enforcement agency (i.e. local or federal law enforcement agency, district attorney's office, etc.).
3	Retroactive Change-in-Law Referrals	Office of Legal Affairs (OLA)	Referrals from the Office of Legal Affairs based on new legislation or case law with retroactive application.
4	Sentencing Discrepancy Referrals	Case Records	Referrals from Case Records for sentencing discrepancies based on statutory or case law authority.

II. LEGAL AUTHORITIES

STATUTES

Penal Code section 1170, subdivision (d)(1)

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.

REGULATIONS

Title 15, Division 3, Section 3076, subdivision (a)

The Secretary, or designee, may recommend at any time to the sentencing court the recall of an inmate's commitment pursuant to Penal Code section 1170(d), if the inmate is not sentenced to death, for one or more of the following reasons:

- (1) It is evident from the inmate's exceptional behavior that is so extraordinary beyond simply complying with all regulations and procedures during incarceration that they have changed as a person and would be a positive asset to the community.
- (2) Information which was not made available to the court in pronouncing the inmate's sentence is brought to the attention of the Secretary, who deems the information would have influenced the sentence imposed by the court.
- (3) The Secretary deems that circumstances have changed to the extent that the inmate's continued incarceration is not in the interest of justice.

III. EXCEPTIONAL CONDUCT REFERRALS

Legal Authority	Title 15, Division 3, Section 3076, subdivision (a)
Description	The department’s regulations specify that that the Secretary may refer an inmate to the court for resentencing under penal code 1170 (d), when it is evident from the inmate’s exceptional behavior that they have changed as a person and would be a positive asset to the community. The court within 120 days of the date of commitment or anytime upon recommendation of the secretary may recall the sentence and commitment previously ordered and resentence the defendant in the same manner, provided the new sentence is no greater than the original sentence.
Population Estimate	154
Sentencing Impact	Potential for inmates with exceptional behavior to have their sentences recalled, resulting in possible reduction in sentence or release.
Screening Criteria Used	<ul style="list-style-type: none"> • No condemned inmates • No LWOP • No 290 registrants • No PED or EPRD date within 18 months • No Serious RVR’s in the past 5 years • No SHU terms in the last 5 years • Must have served 10 years or 50% of sentence • Laudatory Chrono’s • Self-help participation • Education/PIA/Vocational/Work Review • County of commitment will be noted • 3rd Strike Inmates are eligible • Plea agreements may be eligible

IV. LAW ENFORCEMENT AGENCY REFERRALS

Legal Authority	Title 15, Division 3, Section 3076, subdivision (a)
Description	The department’s regulations allow for the Secretary to refer an inmate to the court for resentencing under penal code 1170 (d) upon referral from an outside law enforcement agency (i.e. local or federal law enforcement agency, district attorney’s office, etc.).
Population Estimate	Unknown
Sentencing Impact	Potential for inmates who have been referred by an outside law enforcement agency to have their sentences recalled, resulting in possible reduction in sentence or release.
Screening Criteria Used	Case-by-case

V. RETROACTIVE CHANGE-IN-LAW REFERRALS

Legal Authority	Amendments to Penal Code section 12022.53, subdivision (h)
Description	Penal Code section 12022.53, subdivision (h), previously required sentencing courts impose applicable enhancements under subdivisions (b), (c), or (d) for firearm use in the commission of certain enumerated felonies. Subdivision (b) was imposed for personal use of a firearm, subdivision (c) was imposed for personal use of a firearm with intentional discharge, and subdivision (d) was imposed for personal use of a firearm use intentional discharge proximately causing great bodily injury. Effective January 1, 2018, subdivision (h) was amended to give sentencing courts discretion to strike or dismiss enhancements under (b), (c), or (d) in the interest of justice pursuant to Penal Code section 1385.
Population Estimate	Total: 36,000 Subgroup: 289 Post-Screening: 4
Sentencing Impact	The sentencing impact will depend on which enhancement the court is potentially dismissing. For example, if an enhancement under subdivision (b) is dismissed then an inmate’s sentence could be reduced by up to ten years. There could be an additional impact (which would further shorten the inmate’s sentence) if the dismissal of the enhancement results in the inmate no longer being classified as a violent offender under Penal Code section 667.5, subdivision (c), and thus eligible for additional Good Conduct Credit.
Subgroup Criteria Used	Inmates sentenced to a gun enhancement pursuant to Penal Code section 12022.53, subdivision (b), for a sole count of Penal Code section 211 (robbery) set at the low-term (suggesting that the sentencing court might have issued a more lenient sentence if it had discretion to strike the enhancement at the original sentencing hearing).
Screening Criteria Used	<p><u>Prop 57 nonviolent parole criteria:</u></p> <ol style="list-style-type: none"> 1. Not currently serving a SHU term and ICC has not assessed a SHU term for any STG or disciplinary reason in the past five years. 2. Not found guilty of any serious RVR for a Division A-1 or Division A-2 offense per sections 3323(b) or 3323(c) in the past year. 3. Not placed in Work Group C per section 3044 in the past year. 4. Not found guilty of two or more serious RVRs in the past year. 5. Not found guilty of a drug-related offense per section 3016 or refused to provide a urine sample per section 3290(d) in the past year. 6. Not found guilty of an RVR with an STG nexus in the past year. 7. More than 18 months to release (with the exception of inmate Yoon). 8. Conviction following a trial (jury or court)

VI. SENTENCING DISCREPANCY REFERRALS

Cohort #1

Shorthand Title	Lopez Cohort
Legal Authority	<i>People v Lopez</i> (2012) 208 Cal.App.4th 1049
Description	To be convicted of a Penal Code section 186.22(b)(4)(C) gang enhancement it is necessary to prove "threats to victims and witnesses," but only Penal Code section 136.1(c)(1) includes "threats" as an element when dissuading witnesses; therefore, a life sentence under Penal Code section 186.22(b)(4)(C) cannot be upheld unless the inmate is also convicted of Penal Code section 136.1(c)(1).
Population Estimate	4
Sentencing Impact	Retroactively resentence each inmate to a determinate term instead of an indeterminate term.
Screening Criteria Used	None

VI. SENTENCING DISCREPANCY REFERRALS

Cohort #2

Shorthand Title	Rodriguez Cohort
Legal Authority	<i>People v Rodriguez</i> (2009) 47 Cal.4th 501
Description	In <i>People v. Rodriguez</i> , the California Supreme Court held that the trial court should not have imposed an enhancement for both Penal Code section 12022.5(a) and section 186.22 (b)(1)(C) because both enhancements were imposed for the same underlying act. Rodriguez was convicted of Penal Code section 245(a)(2), assault with a firearm. The trial court imposed a sentencing enhancement for personal use of a firearm under Penal section 12022.5. This enhancement made defendant’s crime violent per Penal Code section 667.5. In addition, the trial court imposed an enhancement for Penal Code section 186.22(b)(1)(C); defendant qualified for this enhancement because he committed a violent felony. The court held that both enhancements were based on Defendant’s firearm use during the commission of a single offense, therefore under Penal Code section 1170.1, only the greater of the two enhancements should have been imposed.
Population Estimate	1,830 (<i>Rodriguez</i> and <i>Le</i> combined)
Sentencing Impact	Potential for a 3 to 10 year reduction in sentence.
Screening Criteria Used	<ul style="list-style-type: none"> • More than 18 months to release • Processed in reverse release date order

VI. SENTENCING DISCREPANCY REFERRALS

Cohort #3

Shorthand Title	McCart Cohort
Legal Authority	<i>People v McCart</i> (1982) 32 Cal.3d 338
Description	Penal Code section 1170.1(c) governs sentencing when an inmate has been convicted of multiple in-prison crimes that are required to be served consecutively. One of the in-prison crimes must be designated the principle term (to be served fully) and each of the other in-prison crimes must be designated subordinate terms (to be served at 1/3 the statutory midterm); however, many courts erroneously order the subordinate terms be served fully consecutive.
Population Estimate	1,060
Sentencing Impact	Varied, depending on the sentence for the subsequent in prison offenses. Those sentences would be 1/3 rd the middle term instead of the full term.
Screening Criteria Used	<ul style="list-style-type: none"> • More than 18 months to release • Processed in reverse release date order

VI. SENTENCING DISCREPANCY REFERRALS

Cohort #4

Shorthand Title	Le Cohort
Legal Authority	<i>People v. Le</i> (2015) 61 Cal.4 th 416
Description	The court in <i>People v. Le</i> held that imposing an enhancement for both Penal Code section 186.22(b)(1)(B) and Penal Code section 12022.5 based on defendant's firearm use was a violation of Penal Code section 1170.1. In <i>People v. Le</i> , the defendant was convicted of assault with a firearm (Penal Code section 245(b)). The court reasoned that the defendant's firearm use was what elevated his 245(b) offense to the serious felony level, and in turn qualified him for the five year enhancement under 186.22(b)(1)(B). His firearm use also qualified him for the 12022.5 enhancement. Therefore under Penal Code section 1170.1, only the greatest of these enhancements should have been imposed on the single Penal Code section 245(b) count.
Population Estimate	1,830 (<i>Rodriguez</i> and <i>Le</i> combined)
Sentencing Impact	Potential for a 3 to 10 year reduction in sentence.
Screening Criteria Used	<ul style="list-style-type: none"> • More than 18 months to release • Processed in reverse release date order

VI. SENTENCING DISCREPANCY REFERRALS

Cohort #5

Shorthand Title	Gonzalez Cohort
Legal Authority	<i>People v. Gonzalez</i> (2009) 178 Cal.App.4 th 1325
Description	Trial court should not have imposed sentence enhancements under section 12022.7, subdivision (a), and section 186.22, subdivision (b)(1)(C), because both sentence enhancements were based on the great bodily injury the defendant caused while committing the underlying offense. (<i>Id.</i> at p. 1332.) In <i>People v. Gonzalez</i> , a jury convicted the defendant of one count of assault by means likely to produce great bodily injury. (Pen. Code, § 245, subd. (a)(1).)
Population Estimate	365
Sentencing Impact	Potential for a 7 to 10 year reduction in sentence.
Screening Criteria Used	<ul style="list-style-type: none"> • More than 18 months to release • Processed in reverse release date order