

The Inquisitive Prosecutor's Guide



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1170(d)(1))

In 2018, the legislature passed two new laws (one that went into effect in June and one going into effect in January) changing the resentencing rules of Penal Code section 1170(d)(1). Most prosecutors are familiar with section 1170(d)(1) as the section that allowed a court to recall and resentence a defendant within 120 days. However, prosecutors may be less familiar with another aspect of section 1170(d)(1) - one that allows a court to recall and resentence **any defendant in state prison at any time** based on a recommendation of the Secretary of the Department of Corrections and Rehabilitation (CDCR) or the Board of Parole Hearings (or the county correctional administrator in the case of county jail inmates). The unfamiliarity is no doubt due to the fact this aspect of section 1170(d) has been rarely used. However, the CDCR is now using this aspect of 1170(d) more frequently – apparently as part of an overall thrust to reduce prison populations. Coupled with the changes enacted by AB 1812 and AB 2942 (respectively allowing resentencing courts **to modify judgments, including judgments entered after a plea agreement**, and allowing **district attorneys** to request resentencing) prosecutors can expect a significant uptick in resentencing requests. Prosecutors can also expect a raft of issues to be raised by these amendments. This IPG attempts to provide some tentative guidance as we enter this new world of resentencing.

***Editor's note:** Section 1170(d)(2) lays out the process for resentencing persons serving LWOP sentences who committed their offenses before the age of 18. This IPG does not discuss this aspect of section 1170(d), which was first added back in 2012.

The podcast features Santa Clara County prosecutors Alex Ellis and Jeff Rubin and provides **45 minutes of (self-study) MCLE general credit**. It may be accessed at: <http://sccdaipg.podbean.com/>

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1. The statutory language of Penal Code section 1170(d)(1) as enacted by AB 1812 and AB 2942

Penal Code section 1170(d)(1) provides: When a defendant subject to this section [governing determinate sentences] or subdivision (b) of Section 1168 [governing indeterminate sentences] has been sentenced to be imprisoned in the state prison or a 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, the county correctional administrator in the case of county jail inmates, *or the district attorney of the county in which the defendant was sentenced,** 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. *The court resentencing under this paragraph may reduce a defendant's term of imprisonment and modify the judgment, including a judgment entered after a plea agreement, if it is in the interest of justice. The court may consider postconviction factors, including, but not limited to, the inmate's disciplinary record and record of rehabilitation while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the inmate's risk for future violence, and evidence that reflects that circumstances have changed since the inmate's original sentencing so that the inmate's continued incarceration is no longer in the interest of justice.*** Credit shall be given for time served.” [Bracketed information added by IPG.]

**Editor's note: Added by AB 2942, effective January 1, 2019.*

***Editor's note: Added by AB 1812, effective June 27, 2018 as urgency legislation.*

2. Should the resentencing court be the same court that originally sentenced the defendant?

In *People v. Jasso* (1994) 25 Cal.App.4th 591, the court observed that Penal Code section 1170(d)(1) “does not specify whether recall and resentencing are reserved exclusively to the original sentencing judge or whether another judge with jurisdiction may make the determination under exceptional circumstances.” (*Id.* at pp. 595-596.) Nevertheless, the court held “section 1170 may be reasonably construed to provide that the original sentencing judge should be assigned a motion for recall and resentencing under section 1170, subdivision (d) **when he or she is available**. However, if unavailable for any reason prescribed in section 1053, then another judge of the court may substitute for the absent or otherwise unavailable sentencing judge.” (*Id.* at p. 596, emphasis added by IPG.)

***Editor’s note:** Penal Code section 1053, in pertinent part, states: “If after the commencement of the trial of a criminal action or proceeding in any court the judge or justice presiding at the trial shall die, become ill, or **for any other reason be unable to proceed with the trial**, any other judge or justice of the court in which the trial is proceeding may proceed with and finish the trial . . .” (Pen. Code, § 1053, emphasis added.)

Nothing in the new language added to section 1170(d)(1) suggests the holding in *Jasso* should not be followed unless the sentence is the result of a plea bargain that implicitly assumed the judge taking the plea would be the judge imposing sentence. And even if the sentence was the result of a plea bargain implicitly assuming the same judge would be taking the plea, the standard for determining whether the sentence can be heard by a different judge *might* be the same as in all other cases.

The requisite showing of unavailability *might* be elevated if the conviction stemmed from a plea that was the result of negotiations **and** neither the defendant nor the prosecutor waived the right to be sentenced by the same judge who took the plea.

The issue arises because “[a]s a general principle ... whenever a judge accepts a plea bargain and retains sentencing discretion under the agreement, **an implied term** of the bargain is that sentence will be imposed by that judge.” (*K.R. v. Superior Court* (2017) 3 Cal.5th 295, 298 citing to *People v. Arbuckle* (1978) 22 Cal.3d 749, 756–757.) “If the original judge is not available for sentencing purposes after a plea bargain, the defendant must be given the option of proceeding before the different judge available or of withdrawing his plea.” (*K.R. v. Superior Court* (2017) 3 Cal.5th 295, 305, fn. 2 citing to *People v. Arbuckle* (1978) 22 Cal.3d 749, 757, fn. 5.)*

***Editor’s note:** IPG has not located a case in which the party objecting to a different judge imposing sentence is the prosecution. But if an implied term of a plea is that the sentencing judge will be the same judge as the judge who took the plea and the rationale behind the rule is that “the propensity in sentencing demonstrated by a particular judge” can be “an inherently significant factor” (*People v. Arbuckle* (1978) 22 C.3d 749, 756), then the rule should apply equally to the defendant and the People.

In *K.R. v. Superior Court* (2017) 3 Cal.5th 295, the California Supreme Court suggested that the standard for determining when a judge should be deemed unavailable to impose sentence is the standard adopted in *People v. Rodriguez* (2016) 1 Cal.5th 676, a case involving what is the standard for determining when a judge is “unavailable” to rehear a motion to suppress under Penal Code section 1538.5(p.) (*K.R.*, at p. 311.)

Applying the standard adopted in *Rodriguez* to the context of a section 1170(d)(1) resentencing, “mere inconvenience” would not be “sufficient to render a judge unavailable” (*id.* at p. 690) and a resentencing court would have to “take reasonable steps in good faith to ensure that the same judge who [imposed the original sentence] is assigned to hear the [resentencing request]” (*id.* at p. 691).

However, even assuming that this standard of unavailability is, in fact, substantially different than the standard for determining unavailability of a judge in the context of section 1053, it would only apply if: (i) the resentencing involved a plea bargain where no waiver of the right to be sentenced by the judge taking the plea was entered; (ii) it is determined that a resentencing involving a plea bargain is governed by the same rules as those governing the original sentencing ; and (iii) the language added by AB 1812 allowing for the modification of a judgement entered after a plea agreement does not render the rules governing plea bargains in general irrelevant (**see** this IPG memo, section 4 at p. 8 [discussing the ramifications of this added language in general].) Indeed, it is not even clear which standard requires the more difficult showing.

3. What is the scope of a resentencing court’s authority under section 1170(d)(1)?

Penal Code section 1170(d)(1) itself provides some guidance to its scope by telling us that the court may “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.” (Pen. Code, § 1170(d)(1).) Moreover, section 1170(d)(1) states: the resentencing court “shall apply the sentencing

rules of the Judicial Council so as to eliminate disparity of sentences and to promote uniformity of sentencing.” (*Ibid.*)*

***Editor’s note:** This directive is a little amorphous in practice. (*Compare People v. Swanson* (1983) 140 Cal.App.3d 571, 574 [“a sentencing judge is required to base his decision on the statutory and rule criteria, on an analysis of legitimate aggravating and mitigating factors, and not on his subjective feeling about whether the sentence thus arrived at seems too long, too short, or just right. He is not permitted to reason backward to justify a particular length sentence which he arbitrarily determines.”] *with People v. Castaneda* (1999) 75 Cal.App.4th 611, 613–614 [“A judge’s subjective determination of the value of a case and the appropriate aggregate sentence, based on the judge’s experiences with prior cases and the record in the defendant’s case, cannot be ignored. A judge’s subjective belief regarding the length of the sentence to be imposed is not improper as long as it is channeled by the guided discretion outlined in the myriad of statutory sentencing criteria.”].)

Thus, like the originally sentencing court, the resentencing court must:

- (1) Determine, under section 1170(b), whether to impose one of the three authorized terms of imprisonment referred to in section 1170(b), or any enhancement, and state on the record the reasons for imposing that term;
- (2) Determine whether any additional term of imprisonment provided for an enhancement charged and found will be stricken;
- (3) Determine whether the sentences will be consecutive or concurrent if the defendant has been convicted of multiple crimes;
- (4) Determine any issues raised by statutory prohibitions on the dual use of facts and statutory limitations on enhancements, as required in rules 4.420(c) and 4.447; and
- (5) Pronounce the court’s judgment and sentence, stating the terms thereof and giving reasons for those matters for which reasons are required by law.” (Cal. Rules of Court, Rule 4.433(c); **see also** Pen. Code, §§ 1170(b) and 1170.1.)

“When a sentence is subject to ‘recall’ under section 1170, subdivision (d), the entire sentence may be reconsidered.” (*In re Guioamar* (2016) 5 Cal.App.5th 265, 274; *People v. Garner* (2016) 244 Cal.App.4th 1113, 1118.) “[T]he resentencing authority conferred by section 1170(d) is as broad as that possessed by the court when the original sentence was pronounced.” (*People v. Johnson* (2004) 32 Cal.4th 260, 266, quoting *Dix v. Superior Court* (1991) 53 Cal.3d 442, 456.)

Accordingly, the resentencing court has the discretion to select a different term or terms than originally imposed. If the defendant was sentenced to the aggravated term, the resentencing court

could choose to resentence the defendant using the mid-term. Conversely, if there are multiple offenses, a resentencing court could even impose an aggravated term where a mid-term had previously been imposed so long as the length of the *entire* sentence does not exceed the initial sentence. (**See *People v. Castaneda*** (1999) 75 Cal.App.4th 611, 614-615 [in resentencing defendant after the original sentence, trial court was not bound by its use in the original sentencing of the middle base term of three years and was free to use the high base term of four years, where the new aggregate term of eight years did not exceed the original aggregate term of 10 years].)

The *pre-existing* language in section 1170(d)(1) already allowed for a sentence that reduced the defendant’s term of imprisonment, but the language added by AB 1812 makes it clear the resentencing court “may reduce a defendant’s term of imprisonment. . .” (Pen. Code, § 1170(d)(1).) Indeed, “[w]here the statute applies, and if such a sentencing option would otherwise be available, section 1170(d) allows the court, among other things, to **grant probation** with or without conditions such as service of time in county jail. (See §§ 1168, subd. (a), 1170, subd. (a)(2), 1203.)” (***Dix v. Superior Court*** (1991) 53 Cal.3d 442, 455, emphasis added by IPG.)

On the other hand, there are some limits on what can be done by the resentencing court. A resentencing court does not have the authority to change the sentence in an otherwise unlawful manner (**see *Dix v. Superior Court*** (1991) 53 Cal.3d 442, 460) nor to tinker with the conviction for a reason that is not “rationally related to lawful sentencing” (**see *People v. Karaman*** (1992) 4 Cal.4th 335, 352). (**See also *People v. Jasso*** (1994) 25 Cal.App.4th 591, 596.)

A. Are there any factors that the resentencing court may take into consideration that the original sentencing court could not?

Under the language added to section 1170(d)(1) by AB 1812, resentencing courts are statutorily authorized to take into account the following information that would not have been considered by the original sentencing court: “postconviction factors, including, but not limited to, the inmate’s disciplinary record and record of rehabilitation while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the inmate’s risk for future violence, and evidence that reflects that circumstances have changed since the inmate’s original sentencing so that the inmate’s continued incarceration is no longer in the interest of justice.” (Pen. Code, § 1170(d)(1).)*

Editor’s note:** Even before the AB 1812, courts resentencing defendants pursuant to Penal Code section 1170(d) could consider circumstances which arose after the original sentencing. (Dix v. Superior Court*** (1991) 53 Cal.3d 442, 460 [and indicating, for example, at p. 463, that a court could consider a defendant’s post-conviction agreement to testify in a non-prison-related criminal case].)

4. Can a court resentence a defendant whose sentence resulted from a plea bargain?

On its face, section 1170(d)(1) now permits the resentencing court to “reduce a defendant’s term of imprisonment and modify the judgment, *including a judgment entered after a plea agreement*, if it is in the interest of justice.” (Pen. Code, § 1170(d)(1).) It is likely that this language was added because the legislature was aware of pre-existing law that limited the power of a judge resentencing a defendant under section 1170(d)(1) to alter the terms of a plea agreement accepted by the parties and the trial court. (**See *People v. Blount*** (2009) 175 Cal. App. 4th 992, 997-998 [soundly rejecting claim section 1170(d) gives trial courts authority to override the terms of the negotiated plea bargain and impose a different sentence than that agreed to by the parties].)

A. If a court alters the terms of a sentence that had been agreed upon by way of plea agreement, can the People request that the sentence be vacated, and the parties returned to their original position?

Section 1170(d) allows a resentencing court to “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 . . .*” (Pen. Code, § 1170(d)(1).)

If, at the time of *original* sentencing, a court that has accepted a plea bargain wishes to sentence the defendant in a manner that departs from a negotiated disposition, the court normally must obtain consent from both parties to the change or allow the plea to be withdrawn. (**See *People v. Woods*** (2017) 12 Cal.App.5th 623, 631 [and cases cited therein]; Pen. Code, § 1192.5; **see also *People v. Segura*** (2008) 44 Cal.4th 921, 931 [“Once the court has accepted the terms of the negotiated plea, [it] lacks jurisdiction to alter the terms of a plea bargain so that it becomes more favorable to a defendant unless, of course, the parties agree.”].)

It stands to reason then that if the resentencing court is stepping into the shoes of the original sentencing court, a change in the agreed-upon sentence by the resentencing court should allow the prosecution to insist that the parties be returned to pre-plea status and any counts dismissed as part of the plea be reinstated.

However, any request for this remedy will have to distinguish the case of ***Harris v. Superior Court*** (2016) 1 Cal.5th 984. In ***Harris***, a defendant charged with robbery pled to a grand theft and admitted a prior conviction in exchange for dismissal of the robbery charge and other

allegations of felony convictions. After sentence was imposed, Proposition 47 was passed. Proposition 47 authorized defendants convicted of felony grand theft to petition the court to have their conviction reduced to a misdemeanor under certain circumstances. “The defendant petitioned the court to have his sentence recalled and to be resentenced as a misdemeanor. In response, the People argued that reducing the sentence would deprive them of the benefit of their plea bargain, and thus they should be permitted to rescind the plea and reinstate the original robbery charge.” (*Id.* at pp. 585-586.)

The California Supreme Court in *Harris* characterized the issue before them as having to decide which of two cases applied: Either *People v. Collins* (1978) 21 Cal.3d 208 (which allowed a party to rescind a plea agreement where a subsequent change in the law had deprived it of the benefit of its bargain) or *Doe v. Harris* (2013) 57 Cal.4th 64 (which held that the general rule in California is that a plea agreement will be “deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy). (*Harris* at p. 990.) The *Harris* court resolved the issue by looking at whether the change in the law was intended to impact plea bargains. The court held language in Penal Code section 1170.18(a) (one of the statutes enacted by Proposition 47) stating that it governs someone “serving a sentence for a conviction, *whether by trial or plea*,” of one of the felonies that Proposition 47 reduced to a misdemeanor was enough to make it “clear that the provision applies to someone like defendant who was convicted by plea.” (*Id.* at p. 991.)

The *Harris* court then went on to state that while its conclusion was based on the unambiguous language of section 1170.18 and the expressed intent of Proposition 47, it also observed that its conclusion derived additional support from the principle established in *Doe v. Harris* that “the Legislature [or here, the electorate], for the public good and in furtherance of public policy, and subject to the limitations imposed by the federal and state Constitutions, has the authority to modify or invalidate the terms of an agreement.” (*Harris* at p. 992.)

The *Harris* court distinguished the case of *Collins* on the ground that, unlike in the case before it, in *Collins* the change in the law had “eviscerated the judgment and the underlying plea bargain entirely, and it did so *before* the judgment.” (*Harris* at p. 993, emphasis added by IPG.)

Since it is clear that AB 1812 was intended to allow resentencing of cases that had been resolved by plea bargain, and did so *after* the initial judgment, it may be difficult to argue that the general rule of *Harris* does not apply equally to the question of whether a plea bargain can be breached with impunity by a judge resentencing a defendant pursuant to section 1170(d)(1).

A successful challenge to the ability of a court to resentence a particular defendant under section 1170(d)(1) *may* hinge on how severely the plea bargain sentence is altered (i.e., eviscerated) and/or on whether the law runs afoul of some constitutional provision. (Cf., **Harris v. Superior Court** (2016) 1 Cal.5th 984, 992 [noting the Legislature’s authority to modify or invalidate the terms of an agreement is “subject to the limitations imposed by the federal and state Constitutions”].)* But a court could not likely refuse to resentence *solely* on the basis that a court lacks statutory authority to resentence a defendant who pled pursuant to a plea bargain.

***Editor’s note:** See this IPG memo, section 11 and 12 at pp. 23-30 for a discussion of whether a constitutional challenge may be brought to a resentencing under the amended version of section 1170(d)(1).

B. Can a resentencing court *consider* the fact the sentence was a result of a plea bargain in deciding whether it is in the “interest of justice” to grant resentencing?

Section 1170(d)(1) provides: “The court resentencing under this paragraph may reduce a defendant’s term of imprisonment and modify the judgment, including a judgment entered after a plea agreement, if it is in the *interest of justice*.” (Emphasis added.) No definition is provided of what it means to be in “the interests of justice” and it is likely that it will be as broadly defined as the term “in furtherance of justice” as used in Penal Code section 1385 is defined. (See this IPG memo, section 5 at pp. 12-13.)

Since justice “requires consideration both of the constitutional rights of the defendant, and the interests of society represented by the People” (see **People v. Superior Court (Romero)** (1996) 13 Cal.4th 497, 530–531), and plea negotiations implicitly reflect a judicial determination that the plea bargain is in the interest of justice (see **People v. Tung** (1994) 30 Cal.App.4th 1607, 1611 [noting a court may reject a plea bargain if, inter alia, it “concludes that the bargain is not in the best interests of society”]), it stands to reason a resentencing court may take into account that the original sentence was the result of a plea bargain when deciding whether imposing a sentence inconsistent with that plea bargain is just.

And it certainly seems unjust to deprive the prosecution (and the victims of the crime) of a bargained-for sentence when the defendant obtained a significant benefit (e.g., dismissal of other, perhaps more severe and more easily provable, crimes) from plea bargaining. It is a classic case of allowing a defendant to have his cake and eat it, too. (Cf. **People v. Hester** (2000) 22 Cal.4th 290, 294 [denying defendant the ability to challenge an unauthorized sentence imposed pursuant

to a plea bargain on appeal because “defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process”].)

C. Going forward, can the prosecution successfully preclude a defendant from obtaining resentencing under section 1170(d)(1) (or any other newly enacted law) by including in the plea agreement a term stating any future resentencing or change in the law voids the plea agreement and returns the parties to pre-plea status?

There is not much law on the question of whether a plea bargain could effectively preclude a defendant from being resentenced if the resentencing is not dependent on a request for resentencing by the defendant or stems from a change in the law.

In *Doe v. Harris* (2013) 57 Cal.4th 64, the California Supreme Court recognized that while “California law does not hold that the law in effect at the time of a plea agreement binds the parties for all time, it is not impossible the parties to a particular plea bargain ***might affirmatively agree or implicitly understand the consequences of a plea will remain fixed despite amendments to the relevant law.***” (*Id.* at p. 71.) Thus, prosecutors concerned that a sentence will be cut short in violation of the plea bargain should consider incorporating into a plea bargain a term that the sentence agreed upon remains binding notwithstanding any future changes in the law. (Cf. *People v. Panizzon* (1996) 13 Cal.4th 68, 80 [a defendant may waive the right to appeal as part of the agreement].) This should, at least, void the plea, if for any reason or change in law, a defendant returns for resentencing and the intended sentence is not adhered to.

However, it may be difficult, if not impossible, to ensure the *length of a sentence is carried out* regardless of the terms of a plea bargain since plea bargains cannot bind third parties such as CDCR. (See *Dix v. Superior Court* (1991) 53 Cal.3d 442, 462 [recognizing that it is within the prison authorities’ administrative discretion to decide when a person initially sentenced to prison should be released].) Moreover, a plea bargain could not prevent the secretary or the Board of Parole Hearings or the county correctional administrator from *recommending* resentencing because those entities are third parties to the plea agreement. (Pen. Code, § 1170(d)(1).)

But once a defendant is returned to the court for resentencing, the determination of what sentence is imposed is **no longer** a decision made by the CDCR. Thus, it may be easier to prevent *resentencing* by crafting a term that would void the plea and return the parties to their original

pre-plea positions in the event resentencing occurs – regardless of who requests resentencing and even if it is the district attorney that requests resentencing. (Alternatively, the terms could be crafted to prevent resentencing *unless* requested by the district attorney.)

5. Can a resentencing court *dismiss or reduce* a charge pursuant to Penal Code section 1385 and/or pursuant to section 1170(d)(1) itself?

Penal Code section 1170(d)(1) now states: “The court resentencing under this paragraph may reduce a defendant’s term of imprisonment and ***modify the judgment***, including a judgment entered after a plea agreement, if it is ***in the interest of justice***.” (Pen. Code, § 1170(d)(1), emphasis added.) Does the authority to “modify the judgment” give the resentencing court the ability to reduce a charge or dismiss charges outright? Probably, yes.

A court has long-standing authority to dismiss or reduce charges in furtherance of justice pursuant to its power under Penal Code section 1385(a) which states: “The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and ***in furtherance of justice***, order an action to be dismissed.” (Pen. Code, § 1385(a), emphasis added by IPG.) “Moreover, “the discretion of a trial judge to dismiss a criminal action under Penal Code section 1385 in the interests of justice ‘may be exercised at any time during the trial, including after a jury verdict of guilty’ . . .” (***People v. Barraza*** (1994) 30 Cal.App.4th 114, 121, fn. 8.)

However, as the California Supreme Court recently pointed out in ***People v. Chavez*** (2018) 4 Cal.5th 771, courts agree “that section 1385 does not allow a trial court to act after a judgment has become final. (*Id.* at p. 781, citing to ***People v. Espinoza*** (2014) 232 Cal.App.4th Supp. 1, 7 [“a trial court lacks postjudgment jurisdiction to dismiss a final conviction under section 1385”]; ***People v. Kim*** (2012) 212 Cal.App.4th 117, 122 [ruling that the “[u]se of section 1385” to vacate “a long since final judgment of conviction” “would be inconsistent with the Supreme Court’s strict focus on the language of the statute”]; ***People v. Barraza*** (1994) 30 Cal.App.4th 114, 121, fn. 8, [stating that section 1385 “has never been held to authorize dismissal of an action after the imposition of sentence and rendition of judgment”]; and ***People v. Orabuena*** (2004) 116 Cal.App.4th 84, 97–98 [finding that the court may exercise its dismissal authority under section 1385 because “the court had not rendered judgment or sentenced defendant”]; **see also *People v. Brown*** (2014) 230 Cal.App.4th 1502, 1511 [“it is well established that a court [may exercise its power to strike under section 1385 “before, during or after trial,” *up to the time judgment is pronounced*” emphasis added by IPG.)

In *People v. Nelms* (2008) 165 Cal.App.4th 1465, the court held that the section 1170(d) *as it existed at the time* did **not** allow a resentencing court to *dismiss* a charge where the defendant has been convicted of the charge and been sentenced on it – even though both parties consented to it. The *Nelms* court came to that conclusion because “[b]y its express terms, section 1170, subdivision (d), is limited to sentencing and **says nothing about modifying the judgment.**” (*Id.* at p. 1472, emphasis added by IPG.) And in *People v. Espinosa* (2014) 229 Cal.App.4th 1487, the court held section 1170(d) did not allow a resentencing court to “**modify**” a judgment by reducing the degree of crime and then impose a new sentence “based on the modified judgment”. (*Id.* at p. 1497, emphasis added by IPG; **see also** *People v. Blount* (2009) 175 Cal.App.4th 992, 998 [“section 1170 does not provide the trial court with any broader discretion to impose sentence than the court originally possessed at the initial sentencing”].)

Under the new version of section 1170(d), however, the resentencing court **is** expressly given authority to “reduce a defendant’s term of imprisonment and **modify** the judgment, including a judgment entered after a plea agreement, if it is in the interest of justice.” (Pen. Code, § 1170(d)(1), emphasis added.) “Assuming the validity of a final judgment of conviction, any entitlement to postconviction relief, and the form thereof, is governed by statute.” (*People v. Mendez* (1991) 234 Cal.App.3d 1773, 1778.) The legislature can choose to provide authority to resentencing courts to dismiss or reduce a charge. (**See e.g.**, Pen. Code, § 1170.18(a) [authorizing courts to reduce an offense from a felony to a misdemeanor and be resentenced where serving sentence for crime that was previously a felony but would be misdemeanor after the passage of Proposition 47].) Thus, it is likely that the new language of section 1170(d)(1) has either provided its own statutory authority allowing dismissal or reduction of a charge, or it has implicitly imported a court’s section 1385 power to dismiss reduce an offense into the context of a section 1170(d)(1) resentencing hearing.

***Editor’s note:** Whether providing this new authority violates the California Constitution – at least when it is applied to convictions arrived at by way of plea negotiation – is explored in this IPG memo, sections 11 and 12 at pp. 23-30.)

A. What factors may a resentencing court consider in deciding whether to dismiss or reduce a charge?

The language of section 1170(d)(1) expressly permits a court to consider certain factors in deciding whether to resentence a defendant (e.g., “the inmate’s disciplinary record and record of rehabilitation while incarcerated, evidence that reflects whether age, time served, and diminished

physical condition, if any, have reduced the inmate’s risk for future violence, and evidence that reflects that circumstances have changed since the inmate’s original sentencing so that the inmate’s continued incarceration is no longer in the interest of justice”). Nevertheless, with the caveat that the factors mentioned above are somewhat vague, and assuming resentencing includes the power to reduce or dismiss offenses, it is likely the reasons which have been held an improper to consider in deciding whether to dismiss or reduce a charge in “furtherance of justice” pursuant to section 1385 will be held equally improper to consider in deciding whether to modify a judgment in “the interests of justice” under section 1170(d)(1) – due to the similarity in the language used. And such a dismissal or reduction would be reviewable under an abuse of discretion standard. (See ***People v. Superior Court (Romero)*** (1996) 13 Cal.4th 497, 530–531:

“The trial court’s power to dismiss an action under section 1385, while broad, is by no means absolute. Rather, it is limited by the amorphous concept which requires that the dismissal be ‘in furtherance of justice.’ As the Legislature has provided no statutory definition of this expression, appellate courts have been faced with the task of establishing the boundaries of the judicial power conferred by the statute as cases have arisen challenging its exercise. Thus, in measuring the propriety of the court’s action in the instant case, we are guided by a large body of useful precedent which gives form to the above concept. ¶ ‘From the case law, several general principles emerge. Paramount among them is the rule “that the language of [section 1385], ‘in furtherance of justice,’ requires consideration both of the constitutional rights of the defendant, **and the interests of society represented by the People**, in determining whether there should be a dismissal . . .” . . . At the very least, the reason for dismissal must be “that which would motivate a reasonable judge.” . . . ‘Courts have recognized that society, represented by the People, has a legitimate interest in “the fair prosecution of crimes properly alleged.” . . .’ [A] dismissal which arbitrarily cuts those rights without a showing of detriment to the defendant is an abuse of discretion.’ . . .” ¶ A court also abuses its discretion by dismissing a case, or a sentencing allegation, simply because a defendant pleads guilty. . . Nor would a court act properly if ‘guided solely by a personal antipathy for the effect that the three strikes law would have on [a] defendant,’ while ignoring ‘defendant’s background,’ ‘the nature of his present offenses,’ and other ‘individualized considerations.’ . . . ¶ A court’s discretionary decision to dismiss or to strike a sentencing allegation under section 1385 is also reviewable. ‘[W]here the court’s action lacks reason it may be invalidated upon timely challenge.’” (Emphasis added by IPG.)

Accordingly, it would be improper, for example, to dismiss or reduce a charge on resentencing “if guided solely by a personal antipathy for the effect that the [law under which defendant was originally sentenced] would have on [a] defendant,’ while ignoring ‘defendant’s background,’ ‘the nature of his present offenses,’ and other ‘individualized considerations.’” (***People v. Superior Court (Romero)*** (1996) 13 Cal.4th 497, 530 [bracketed information added by IPG].)

***Editor's note:** Do not be surprised if the defense attempts to use section 1170(d)(1) as an avenue to relitigate in the resentencing court claims of injustice rejected by the appellate courts. If that occurs, it might be worthwhile to point out that the amendment to section 1170(d)(1) seems geared to allowing court to look at factors that arose post-conviction and not to create another avenue for relitigating legal issues.

6. May a sentence be recalled under section 1170(d)(1) pursuant to a recommendation by the district attorney?

As of January 1, 2019, a defendant's sentence may be recalled "at any time upon the recommendation of the . . . district attorney of the county in which the defendant was sentenced[.]" (Pen. Code, § 1170(d)(1).) This newly granted power comes with advantages and disadvantages.

***Editor's note:** An earlier version of the bill would have excluded murderers and persons convicted of crimes listed in Penal Code section 290(c) and only allowed recommendations for resentencing after a person has served 15 years or more than half their sentence. (See AB 2942, as introduced February 16, 2018.)

The Upside:

1. A new straightforward avenue for remedying an unjust conviction is now available to prosecutors that might not have been fixable by one of the laws allowing for early release or resentencing, a writ of habeas, a motion to vacate judgement based on newly discovered evidence, a pardon, or a commutation.
2. Prosecutors now have a clear way of encouraging persons serving state prison sentences to cooperate in investigations. Previously, there was no mechanism for reducing or eliminating a state prison sentence of a person for cooperating in the prosecution of a crime *not committed in state prison*. (Cf. Pen. Code, § 2935 [allowing up to 12 additional months of reduction of the sentence to a prisoner who, inter alia, "has provided exceptional assistance in maintaining the safety and security of a prison"].) A prisoner who knows he will have to serve the remainder of his sentence in an environment where he is at risk of being killed by the person he testified against or by persons affiliated with the person he testified against is less likely to be willing to testify than a prisoner whose sentence can be significantly shortened or eliminated. True, prosecutors cannot guarantee their recommendation will be followed by the sentencing court. But, historically, where *both* parties are encouraging a resentencing and there is a reasonable basis for such resentencing, a court is likely to endorse the recommendation of the parties. Plus, even the *chance* at receiving such a benefit can be enough to tilt the scales in favor of cooperation.

3. ***A door is opened to a whole new variety of plea negotiations for sentences that encourage rehabilitation (not just rehabilitation in name only) and safety for the victims.*** Previously, the prosecution had no ability to impact what happened after a defendant was sentenced to state prison. But now, for example, a plea could be crafted that would bind the prosecution to seek and recommend resentencing to a lesser term (or even no term) if the defendant remains free of designated behaviors in state prison. Or, in gang cases, a defendant can be induced to refrain from retaliation against witnesses by crafting a negotiated sentence of 25 years to life, with the understanding that the prosecutor would request resentencing after 20 years only if no harm has come to the testifying witnesses in that period. It truly is a wholly uncharted world as section 1170(d)(1) appears to be the ***only statute in the country*** that permits resentencing at any time upon request of a prosecutor for reasons other than because the sentence is unlawful.

The Downside:

1. Because a whole new avenue for crafting sentences that effectively depart from tripartite determinate sentence scheme has been enacted, if courts rely too heavily on the recommendation of the district attorney, and the recommendation is primarily based on the idiosyncratic views of each district attorney regarding proper punishment, there is a real risk of increasing sentence disparities - notwithstanding language in section 1170(d) providing that the resentencing court “shall apply the sentencing rules of the Judicial Council so as to eliminate disparity of sentences and to promote uniformity of sentencing.” (Pen. Code, § 1170(d).)
2. It may significantly add to the workload of prosecutor’s offices because defendants will undoubtedly be sending letters to prosecutor’s offices asking for a recommendation. If these requests are taken seriously, then the prosecutor’s office may need to obtain all the materials that would bear on whether the defendant deserves to be resentenced. Some of these materials may be obtained by way of subpoena (e.g., central files) but other internal administrative files bearing on the inmate’s rehabilitation may not be available to prosecutors – making it both onerous and precarious to make a legitimate recommendation.

3. The possibility of obtaining a resentencing might encourage inmates who would otherwise be willing to, or be persuaded to, testify without consideration to hold off until a promise of a recommendation is made. Under the previous law, prosecutors did not have to worry about negotiating for testimony on this basis. Moreover, while there is no need to contact counsel when the defendant is solely being contacted as a witness, if prosecutors are forced to negotiate with the witness about the possibility of a recall and resentence in exchange for testimony, they will likely need to get the inmate’s attorney on the original sentence involved to avoid running afoul of Rule of Professional Conduct 4.2. (**See** 2018-IPG-37 at pp. 43-46 – available upon request.)
4. Even if a prisoner is willingly testifying without promises, the prospect of resentencing opens the door to defense insinuations that a cooperating prisoner is “in fact” testifying favorably for the prosecution in hopes of later obtaining a recommendation for resentencing. It thus provides the defense another means of attacking and undercutting the testimony of inmates who would agree to testify *regardless of any promise of resentencing*.
5. When the resentencing is not based on defendant’s innocence or because the sentence is unlawful, but on the prosecutor’s individual opinion that a lawfully imposed sentence should be reduced in an individual case, there seems to be an inherent conflict of interest – at least if the victim of the crime originally designated the District Attorney’s office as his or her representative in post-sentencing hearings pursuant to Marsy’s Law (**see** Cal. Const., art. I, § 28(c)(1)) and the victim does not want the defendant’s to be resentenced. (**See** this IPG memo, section 7 at pp. 17-19.)

7. What rights do victims of crime have under Marsy’s Law vis-à-vis section 1170(d)(1) resentencing?

Under the California Constitution, as amended by Marsy’s Law, victims of crimes have both collective and individual rights. (**See** Cal. Const., art. I, § 28(a)(3)&(4)&(f).) Among the pertinent *individual* rights are:

(i) the right to “reasonable notice of all public proceedings . . . upon request . . . of all parole or other post-conviction release proceedings, and to be present at all such proceedings” (Cal. Const., art. I, § 28(b)(7);

(ii) the 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 (Cal. Const., art. I, § 28(b)(8));

(iii) the right “[t]o have the safety of the victim, the victim’s family, and the general public considered before any parole or other post-judgment release decision is made” (Cal. Const., art. I, § 28(b)(16));

(iv) the right to “provide information to a probation department official conducting a pre-sentence investigation concerning the impact of the offense on the victim and the victim's family and any sentencing recommendations before the sentencing of the defendant” (Cal. Const., art. I, § 28(b)(10));

(v) the right “[t]o receive, upon request, the pre-sentence report when available to the defendant, except for those portions made confidential by law” (Cal. Const., art. I, § 28(b)(11)); and

(vi) the right “[t]o be informed, upon request, of the conviction, sentence, place and time of incarceration, or other disposition of the defendant, the scheduled release date of the defendant, and the release of or the escape by the defendant from custody (Cal. Const., art. I, § 28(b)(12)).

There is some question about the enforceability of the “collective” rights. However, several of the individual rights are likely to be found applicable at resentencing hearings and are enforceable. (See Cal. Const., art. I, § 28, subd. (c)(1) [“A victim, the retained attorney of a victim, a lawful representative of the victim, or the prosecuting attorney upon request of the victim, may enforce the rights enumerated in subdivision (b) in any trial or appellate court with jurisdiction over the case as a matter of right. The court shall act promptly on such a request.”]; *People v. Smith* (2011) 198 Cal.App.4th 415, 439.)

For example, it is very likely that the victims of the crimes will have a right to notice and to be heard at the resentencing hearing on the basis that, pursuant to Marsy’s law, victims have the rights to “reasonable **notice** of all public proceedings . . . upon request . . . of all . . . other post-conviction release proceedings, and **to be present** at all such proceedings” (Cal. Const., art. I, § 28(b)(7)) and “[t]o be heard, upon request, at any proceeding . . . involving . . . sentencing, post-conviction release decision, or any proceeding in which a right of the victim is at issue (Cal. Const., art. I, § 28(b)(8)). (Emphasis added by IPG.)

Similarly, it is very likely that the victim will have a right to be informed of any resentencing hearing since Marsy’s law gives victims the right “[t]o be informed, upon request, of the . . . sentence, . . . , or other disposition of the defendant, the scheduled release date of the defendant,

and the release of. . . the defendant from custody” (Cal. Const., art. I, § 28(b)(12)) and a resentencing hearing is still a sentencing hearing. (**See Santos v. Brown** (2015) 238 Cal.App.4th 398, 420 [“the totality of Marsy’s Law’s constitutional and statutory language is directed toward parole and proceedings **such as resentencing requests**”, emphasis added by IPG].)

Whether victims will also have the right to provide information to the entity preparing whatever report is required by the court to determine whether to resentence is debatable. There is a right to “provide information to a probation department official conducting a pre-sentence investigation concerning the impact of the offense on the victim and the victim’s family and any sentencing recommendations before the sentencing of the defendant” (Cal. Const., art. I, § 28(b)(10)) and “[t]o receive, upon request, the pre-sentence report when available to the defendant, except for those portions made confidential by law” (Cal. Const., art. I, § 28(b)(11)). However, section 1170(d)(1) does not, on its face, require either input from the probation department or a “pre-sentence” report.

Because victims are only entitled to receive notification and be heard at a section 1170(d)(1) resentencing hearings “upon request” and resentencing hearings can take place decades after the conviction, it is critical that prosecutors inform victims to fill out the online application for such notification. This is the website where the application is located: https://www.cdcr.ca.gov/Victim_Services/application.html

Prosecutors should also inform victims of Penal Code section 1191.16, which allows “the victim of any crime, or the parents or guardians of the victim if the victim is a minor, or the next of kin of the victim if the victim has died, who choose to exercise their rights with respect to sentencing proceedings as described in Section 1191.1” to have their statements simultaneously recorded and preserved where the defendant is subject to an indeterminate term of imprisonment. (Pen. Code, § 1191.16.) This recording must be “maintained and preserved by the prosecution and used in accordance with the regulations of the Board of Prison Terms at any hearing to review parole suitability or the setting of a parole date.” (**Ibid.**) While section 1191.16 may not *mandate* use of the recording at a section 1170(d)(1) resentencing hearing – because section 1170 is not within the same chapter as section 1191.1, it would likely be admissible at the discretion of the resentencing court.

***Editor’s note:** As to whether a challenge to the new version of section 1170(d)(1) can be challenged as a violation of the rights guaranteed by Marsy’s Law, **see** this IPG memo, section 12 at pp. 25-30.)

8. What type of evidence can be considered at the resentencing hearing?

Section 1170(d)(1) itself provides that the defendant may be resentenced “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.” (Pen. Code, § 1170(d)(1).) Section 1170(d)(1) also expressly states: “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.” (**Ibid**, emphasis added.) Thus, the same kinds of evidence deemed relevant and admissible at sentencing hearings in general should be equally relevant and admissible at a resentencing hearing.

However, unlike the original sentencing court, a court resentencing a defendant pursuant to section 1170(d)(1) should also be able to consider evidence bearing on “postconviction factors, including, but not limited to, the inmate’s disciplinary record and record of rehabilitation while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the inmate’s risk for future violence, and evidence that reflects that circumstances have changed since the inmate’s original sentencing so that the inmate’s continued incarceration is no longer in the interest of justice.” (Pen. Code, § 1170(d)(1).)

A. Is hearsay admissible at a section 1170(d)(1) resentencing hearing?

The short answer is that *reliable* hearsay should be admissible at a resentencing hearing.

The admissibility of hearsay evidence *at an original sentencing* hearing is subject to the constraints of Penal Code section 1204, which generally requires that circumstances in aggravation or mitigation “be presented by the testimony of witnesses examined in open court” but authorizes depositions when a witness is so sick or infirm as to be unable to attend.” (Pen. Code, § 1204.) Section 1204 also states: “No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court, or a judge thereof, in aggravation or mitigation of the punishment, except as provided in this and the **preceding** section.”* (**Ibid** [albeit while allowing the defense to file a written report regarding defendant’s background and personality], emphasis added.)

***Editor’s note:** At the time section 1204 was enacted, the “preceding” section was Penal Code section 1203. Section 1204 has not been updated to reflect that numerous sections between 1203 and 1204 have subsequently been enacted so that section 1203 is no longer the “preceding” section. Section 1203 authorizes the creation of a probation report and describes the information that can be included in the report. (Pen. Code, § 1203.) This probation report may be considered at sentencing. (See California Rules of Court, Rules 4.401 through 4.433.) It is “settled that hearsay information may properly be included in a probation officer’s report.” (*People v. Betterton* (1979) 93 Cal.App.3d 406, 414; **see also** *People v. Lamb* (1999) 76 Cal.App.4th 664, 683 [“sentencing judge may consider responsible unsworn or out-of-court statements concerning the convicted person’s life and characteristics” but [f]undamental fairness . . . requires that there be a substantial basis for believing the information is reliable].)

However, whatever the limitations imposed by section 1204, in *People v. Laue* (1982) 130 Cal.App.3d 1055, the court held: “It is clear upon a reading of the two sections (1170, subd. (d) and 1204) that the limitation of section 1204 was not intended to apply in a section 1170, subdivision (d) proceeding. Section 1204 specifies the only communications that can be offered to or received by the court at the sentencing hearing, while section 1170, subdivision (d) applies to a defendant who has already been sentenced to state prison and has been committed to the custody of the Director of Corrections.” (*Id.* at p. 1060.)

It is likely that hearsay (independent of the original probation report) will be admissible at a section 1170(d) resentencing hearing so long as it is reliable hearsay. (**See** *People v. Banda* (2018) 26 Cal.App.5th 349, 357 (rev. filed) [finding trial courts “may consider hearsay if that hearsay is reliable” in determining whether defendant was ineligible for reduction of marijuana offense pursuant to resentencing provisions of Proposition 64 – and finding unreliable hearsay contained in probation report was inadmissible]; *People v. Sledge* (2017) 7 Cal.App.5th 1089, 1095 [eligibility hearing under Proposition 36 is a type of sentencing proceeding, allowing limited use of hearsay from probation reports if shown to be reliable]; **see also** *People v. Perez* (2018) 4 Cal.5th 1055, 1063 [“the Sixth Amendment does not bar a trial court from considering facts not found by a jury beyond a reasonable doubt when determining the applicability of a resentencing ineligibility criterion under Proposition 36”].) Conversely, depending on how it is sought to be used, unreliable hearsay in a probation report may *not* be admissible at a section 1170(d) resentencing hearing.

9. Can a court resentence a defendant while defendant's appeal is pending?

Normally, once an appeal is taken, the trial court loses jurisdiction to take any action in the case. (*People v. Nelms* (2008) 165 Cal.App.4th 1465, 1471.) This is because “[t]he filing of a valid notice of appeal vests jurisdiction of the cause in the appellate court until determination of the appeal and issuance of the remittitur” while simultaneously divest[ing] the trial court of subject matter jurisdiction.” (*Ibid.*) “[E]ven the consent of the parties has been held ineffective to reinvest the trial court with jurisdiction over the subject matter of the appeal and that an order based upon such consent would be a nullity.” (*Ibid.*) However, “under section 1170, subdivision (d), the trial court retains jurisdiction to recall a sentence in a criminal matter and to resentence the defendant notwithstanding the pendency of an appeal.” (*Id.* at p. 1472 citing to *Portillo v. Superior Court* (1992) 10 Cal.App.4th 1829, 183.)

10. Can a defendant or the district attorney appeal denial of a section 1170(d)(1) recommendation for resentencing?

It is almost certain that an inmate denied resentencing by a court after a district attorney's recommendation would have at least a statutory right in some circumstances to challenge that denial on appeal. In *People v. Loper* (2015) 60 Cal.4th 1155, the California Supreme Court held that an inmate had the right to appeal a denial of request for recall of sentence on compassionate release grounds made pursuant to Penal Code section 1170(e) - even though section 1170 does not specifically authorize the *prisoner* to seek recall of his sentence. (*Id.* at p. 1161.) The *Loper* court reasoned that Penal Code section 1237(b) authorized his appeal from any order made after judgment, affecting the substantial rights of the party. (*Id.* at pp. 1159, 1168.) It follows that a defendant denied resentencing under section 1170(d) would also have a right of appeal pursuant to section 1237(b).) The standard of review would likely be an abuse of discretion standard. (See *People v. Powell* (unpublished) 2017 WL 1549909, at p. *6 [upholding denial of section 1170(d) resentencing request because ruling was “a reasonable exercise of the court's discretion”].)

Under similar reasoning, the prosecution should be able to appeal a grant (or even a denial, if the prosecution is the party recommending resentencing) of resentencing pursuant to Penal Code section 1238(a)(5), which allows a People's appeal of “[a]n order made after judgment, affecting the substantial rights of the people.” (Pen. Code, § 1238(a)(5).) Section 1238(a)(6), which allows a People's appeal of “[a]n order modifying the verdict or finding by reducing the degree of the

offense or the punishment imposed or modifying the offense to a lesser offense” is also a potential vehicle for an appeal. (Pen. Code, § 1238(a)(6).)

Moreover, a challenge to the denial based on a claimed violation of due process could also likely be made by way of a habeas petition. (Cf. *In re Powell* (1988) 45 Cal.3d 894, 903 [finding parole rescission subject to abuse of discretion standard on review and noting “habeas corpus is a proper remedy to test the propriety of proceedings before” the Board of Prison Terms”]; **see also** *Superintendent v. Hill* (1985) 472 U.S. 445, 457 [considering standard of review for a prison disciplinary board's revocation of good time credits and holding procedural due process was satisfied as long as there was “some evidence to support the findings made in the disciplinary hearing”].)

11. Can the new provision allowing judges to resentence a defendant who was sentenced *pursuant to a plea bargain* be challenged on the ground it violates the separation of powers clause of the California Constitution?

In certain circumstances, allowing a resentencing court to override a plea bargain that has been judicially approved *may* violate the separation of powers clause of the California Constitution. Below are the arguments, pro and con.

Pro: Giving courts authority to resentence after a plea bargain violates the separation of powers clause

Section 3 of article III of the California Constitution provides: “The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.” (Cal. Const., art. III, § 3.)

“The charging function is the sole province of the executive. The executive also decides whether to engage in negotiations with the defense by which a more lenient disposition of the charges can be secured without trial—a bargain that must ultimately be approved by a court.” (*People v. Clancey* (2013) 56 Cal.4th 562, 574 [and noting a court “has no authority to substitute itself as the representative of the People in the negotiation process”].) “The imposition of sentence within the legislatively determined limits, on the other hand, is exclusively a judicial function.” (*Ibid.*)

Thus, in a case where the prosecution has determined to engage in negotiations and, pursuant to those negotiations has chosen to dismiss a charge or charges on the understanding that the

defendant will plead guilty to a remaining charge, the judicial authority is limited to either approving the plea bargain or rejecting it and returning the parties to their pre-plea status. It does not have the authority to accept the plea bargain and then change the terms of the plea bargain. (See *People v. Mancheno* (1982) 32 Cal.3d 855, 866 [noting that the “usual remedies for violation of a plea bargain are to allow defendant to withdraw the plea and go to trial on the original charges, or to specifically enforce the plea bargain” and directing trial court to order a diagnostic study as promised in the plea bargain].) Were it otherwise, the court would, in effect, be “substitut[ing] itself as the representative of the People in the negotiation process[.]” (*Ibid.*) And a violation of the separation of powers would occur.

A resentencing court should not be able to interfere with the powers of the executive branch any more than the original sentencing court could. Thus, if a court resentences a defendant pursuant to section 1170(d)(1) in a way that departs from the terms of the plea bargain, a violation of the separation of powers would occur unless (i) the People agree to the change, (ii) the resentencing court does not change the terms of the plea, or (iii) the plea is held withdrawn and the parties are restored to pre-plea status.

It is true that the California Supreme Court in *Harris v. Superior Court* (2016) 1 Cal.5th 984 held that resentencing of a defendant pursuant to Proposition 47, regardless of the fact that reducing sentence departed from the terms of the plea bargain was permissible, because “the Legislature [or here, the electorate], for the public good and in furtherance of public policy, and subject to the limitations imposed by the federal and state Constitutions, has the authority to modify or invalidate the terms of an agreement.” (*Id.* at p. 992; see also this IPG memo, section 4-A at pp. 8-9.) However, the *Harris* court recognized that modifications to, or invalidation of an agreement, is still subject to “the limitation imposed by the federal and state Constitutions” and no argument was made in *Harris* that Proposition 47 would result in a violation of the separation of powers clause.

Con: Giving courts authority to resentence after a plea bargain does *not* violate the separation of powers clause

It seems unlikely that the California Supreme Court in *Harris v. Superior Court* (2016) 1 Cal.5th 984 would have held that it is permissible to enact laws that modify or invalidate the terms of a plea agreement by giving judges the authority to resentence defendants under Proposition 47 if it would be a violation of the separation of powers clause to grant judges this authority.

As pointed out in the very case relied upon to make the “pro” argument, “[t]he imposition of sentence within the legislatively determined limits . . . is exclusively a judicial function.” (*People v. Clancey* (2013) 56 Cal.4th 562, 574 citing to *People v. Navarro* (1972) 7 Cal.3d 248, 258.) And “[i]n general, the ‘power to dispose’ of criminal charges belongs to the judiciary.” (*People v. Bunn* (2002) 27 Cal.4th 1, 16.) All that is occurring during a resentencing is a disposition of criminal charges.

Moreover, it is clear a court may choose not to accept a plea bargain. (*People v. Orin* (1975) 13 Cal.3d 937, 942-943.) Refusing to allow a plea bargain to go through seems to be a much greater interference with the “powers of the executive branch” than simply modifying the terms. Yet, exercise of the judicial power to put the kibosh on a plea bargain has never been held to violate the separation of powers doctrine. Indeed, it may even be a violation of the separation of powers doctrine *when the prosecution is given authority to bind the hands of the court after sentencing has occurred.* (See e.g., *People v. Tenorio* (1970) 3 Cal.3d 89 [statute giving district attorney “veto” power to prevent dismissal of allegations at the sentencing phase of the criminal proceeding, well after the filing of the charges, improperly compromised the judicial function and violated the separation-of-powers doctrine].)

12. Can the new provision allowing judges to resentence a defendant who was sentenced pursuant to a plea bargain be challenged on the ground it violates Marsy’s Law?

As mentioned earlier in this IPG, section 7 at pp. 17-19, under the California Constitution, as amended by Marsy’s Law, victims of crimes have both collective and individual rights. (See Cal. Const., art. I, § 28(a)(3)&(4).)

Among the pertinent *collectively* shared rights:

(i) the right to expect “that persons who commit felonious acts causing injury to innocent victims will be appropriately . . . and sufficiently punished so that the public safety is protected and encouraged as a goal of highest importance” (Cal. Const., art. I, § 28(a)(4));

(ii) the right to expect “that persons convicted of committing criminal acts are sufficiently punished in both the manner and the length of the sentences imposed by the courts of the State of California. This right includes the right to expect that the punitive and deterrent effect of custodial sentences imposed by the courts will not be undercut or diminished by the granting of rights and privileges to

prisoners that are not required by any provision of the United States Constitution or by the laws of this State to be granted to any person incarcerated in a penal or other custodial facility in this State as a punishment or correction for the commission of a crime” (Cal. Const., art. I, § 28(a)(5));

(iii) that “[v]ictims of crime *are entitled to finality* in their criminal cases. Lengthy appeals and other post-judgment proceedings that challenge criminal convictions, frequent and difficult parole hearings that threaten to release criminal offenders, *and the ongoing threat that the sentences of criminal wrongdoers will be reduced, prolong the suffering of crime victims for many years after the crimes themselves have been perpetrated.* This prolonged suffering of crime victims and their families must come to an end” (Cal. Const., art. I, § 28(a)(5), emphasis added); and

(iv) That “[s]entences that are individually imposed upon convicted criminal wrongdoers based upon the facts and circumstances surrounding their cases shall be carried out in compliance with the courts’ sentencing orders, and shall not be substantially diminished by early release policies intended to alleviate overcrowding in custodial facilities. The legislative branch shall ensure sufficient funding to adequately house inmates for the full terms of their sentences, except for statutorily authorized credits which reduce those sentences.” (Cal. Const., art. I, § 28(f)(5).)

This is the argument for why Marsy’s Law would preclude a section 1170(d)(1) resentencing that would reduce a defendant’s sentence (as crafted by Santa Clara County DDA David Boyd)

“The rights of victims . . . include broader shared collective rights that are held in common with all of the People of the State of California and that are enforceable through the enactment of laws and through good-faith efforts and actions of California’s elected, appointed, and publicly employed officials.” (Cal. Const. art. I, § 28(a)(4)). “Marsy’s Law clearly demands a broad interpretation protective of victims’ rights.” (***Santos v. Brown*** (2015) 238 Cal.App.4th 398, 418.)

As noted above, one of the collective rights of the People to “*expect* that the punitive and deterrent effect of custodial sentences imposed by the courts will not be undercut or diminished by the granting of rights and privileges to prisoners that are not *required* by any provision of the United States Constitution or by the laws of this State . . .” (Cal. Const. art. I, § 28(a)(5) (emphasis added)). Because a recall of sentence under the recent amendments to Penal Code section 1170(d) are discretionary (**see *Dix v. Superior Court*** (1991) 53 Cal.3d 442, 460) and therefore only *permit* a reduction in sentence when in the interest of justice – despite the presence of a plea agreement – they are not *required* by federal constitutional principle or State law. As a result, any reduction in sentence violates the collectively shared rights of victims found in Marsy’s Law.

Another collective right of the People is the right to “to **finality** in their criminal cases. Lengthy appeals and other post-judgment proceedings that challenge criminal convictions . . . and the ongoing threat that the sentences of criminal wrongdoers will be reduced, prolong the suffering of crime victims for many years after the crimes themselves have been perpetrated. (Cal. Const. art. I, § 28(a)(6) (emphasis added)). Moreover, an individual right of the victim provided by Marsy’s Law guarantees, inter alia, “a prompt and final conclusion of the case and any related post-judgment proceedings.” (Cal. Const. art. I, § 28(b)(9).) Permitting sentences, long ago determined to be in the interest of justice when the trial court accepted the plea bargain as required under Penal Code section 1192.5, would frustrate the individual and collective right of the People to a final conclusion of the case.

It is unreasonable to suggest that Marsy’s Law is unenforceable because it does not provide an express enforcement mechanism. The Fourth, Fifth and Sixth Amendments to the United States Constitution provide for no remedies, yet the courts have crafted remedies to enforce their dictates by excluding evidence or reversing convictions if these constitutional provisions have been violated. Marsy’s Law specifically states that a victim “may enforce the rights enumerated in subdivision (b) in any trial or appellate court with jurisdiction over the case as a matter of right.” And in **People v. Harmon** (2016) 5 Cal.App.5th 94, the court held, pursuant to section 28(b)(8), the victim had a right to file a victim impact statement in the Court of Appeal. (**Id.** at p. 101.) The Harmon court said: “The only reasonable interpretation of Section 28, subdivision (b)(8) is that it obligated this court to grant the victim's request to file a victim impact statement, such a written submission being an appropriate way for the victim to be heard on appeal.” (**Ibid.**) There is no reason to believe the other rights listed in subdivision (b) are a nullity, or merely aspirational.

The fact that the voters specifically stated that the rights found in section 28(b) were enforceable in the court with jurisdiction over the case makes clear that the rights were expected to be *vindicated* in the courts. The right to “a speedy trial and a prompt and final conclusion of the case and any related post-judgment proceedings” (Cal. Const. art. I, § 28(b)(9)) is no more vague than the right to a speedy trial for the accused found in the United States and California constitutions, or the “good cause” requirement for the continuance of a hearing under Penal Code section 1050. It is obvious that victims have an enforceable right to be heard (Cal. Const. art. I, § 28(b)(8)), to reasonable notice (Cal. Const. art. I, § 28(b)(7), and to restitution (Cal. Const. art. I, § 28(b)(13)). It is no less obvious they have an enforceable right to a prompt and **final** resolution to the case and any related post-judgment proceedings,” found in section 28(b)(9). And it is also obvious these rights would be violated by provisions that permit, *at any time*, the Board of Parole Hearings

or the Secretary of the Department of Corrections to send back to the court for resentencing a case resolved by way of a plea bargain. Any contrary interpretation would frustrate the explanatory language found in section 28(a)(6) because the amendment to Penal Code section 1170(d)(1) does not end the victims' prolonged suffering, it provides yet another avenue to lengthen it.

It is axiomatic that the California Constitution controls over a statute. But even if *Marsy's Law* did not amend the Constitution and was simply an initiative statute, "amendments which may conflict with the subject matter of initiative measures must be accomplished by popular vote, as opposed to legislative[] enact[ment]...." (**Proposition 103 Enforcement Project v. Quackenbush** (1998) 64 Cal.App.4th 1473, 1486. *Marsy's Law* permits the Legislature to "amend the statutory provisions of this act to expand the scope of their application, to recognize additional rights of victims of crime, or to further the rights of victims of crime by a statute passed by a majority vote of the membership of each house." (Victim's Bill of Rights Act of 2008: *Marsy's Law*, 2008 Prop. 9, § 9.) Thus, to the extent that the amendments to section 1170(d) do not expand the scope of victims' rights but actually interfere with "a prompt and final resolution to the case and any related post-judgment proceedings," amendment of its provisions by the Legislature would not be permitted even if *Marsy's Law* were not an initiative-derived statute. Because the amendments to section 1170(d) do not ensure a prompt and final resolution, but rather ensure further potential for reduction and uncertainty as to when such a recall recommendation may come from CDCR, they conflict with *Marsy's Law* and may not be carried out.

Moreover, a reduction in sentences of approved plea bargains years after the fact, whether by the original sentencing judge or another one, violates the "Truth-in-Sentencing provision of **Marsy's Law** requiring that a sentence "shall be carried out in compliance with the courts' sentencing orders." (Cal. Const., art. I, § 28(f)(5).) Any other reading (i.e., that there is no violation because the resentencing court's order is being carried out) would render the constitutional right at issue mere surplusage, especially when considered in conjunction with the right to a prompt and final resolution of the case. A right without a right to its enforcement when issued, because the legislature has given the court the ability to change its mind years later, is no right at all.

The California Constitution gives the Governor the right to commute (or pardon) a deserving defendant and the power is unencumbered by the existence of a plea bargain or *Marsy's Law*. If the Legislature desires to achieve its policy preferences, in contradiction of the intent of the voters as stated in *Marsy's Law*, they are free to encourage the Governor to exercise that power.

This is the argument for why Marsy's Law would *not* preclude a section 1170(d)(1) resentencing that would reduce a defendant's sentence (as crafted by Santa Clara County DDA David Boyd)

The recall provisions of Penal Code section 1170(d) allowing the CDCR to recommend resentencing have been around in nearly the same form for decades. No court has ever held that Marsy's Law (Victim's Bill of Rights Act of 2008: Marsy's Law, 2008 Prop. 9 [amending Cal. Const. art. I, § 28]) prevents the executive branch, the courts, or the legislature, from embracing a policy of discretionary review of sentences after the imposition of judgment. ***Dix v. Superior Court*** (1991) 53 Cal.3d 442 clearly held that the discretionary resentencing process embraced by section 1170(d) permits the court to consider post-commitment conduct. (*Id.* at p. 463.) Nor, for that matter, has Marsy's Law ever been held to prevent the application of any new laws allowing for dismissal or alteration of a defendant's conviction or sentence. In fact, in ***Santos v. Brown*** (2015) 238 Cal.App.4th 398, the court held that Marsy's Law did not place implied conditions on the Governor's commutation and pardon power (Cal. Const. art. V, § 8(a)). (*Id.* at pp. 418-419.)

Moreover, while ***People v. Segura*** (2008) 44 Cal.4th 921 held that using Penal Code section 1170(d) to break a plea deal between the People and the defendant was improper, the court's ruling was based, in part, on the fact that no statute permitted such a thing and because Penal Code section 1192.5 required a court to "proceed as specified in the plea" once accepted by the court. (*Id.* at 931-936.) The newly amended section 1170(d), on the other hand, expressly contemplates a reduced sentence upon recall in the interests of justice, whether there was a plea bargain or not. Marsy's Law was passed soon after ***Segura*** issued, and it is assumed that the voters were aware of it, as well as the longstanding recall provisions of section 1170(d), at the time Marsy's Law was approved. (***See People v. Gonzales*** (2017) 2 Cal.5th 858, 869 [presumption that the electorate is aware of existing laws and their judicial construction].)

Finally, Marsy's Law itself provides no express remedy for any alleged violation. While Marsy's Law did provide that a "victim, the retained attorney of a victim, a lawful representative of the victim, or the prosecuting attorney upon request of the victim, may enforce the rights enumerated in subdivision (b) in any trial or appellate court with jurisdiction over the case as a matter of right" and that "court shall act promptly on such a request," (Cal. Const. art. I, § 28(c)), it does not specify a remedy or range of remedies. The text of Marsy's Law reflects it is aspirational and too vague to provide an enforceable constitutional right. Marsy's Law has provisions such as the victim has the right to "expect that persons convicted of committing criminal acts are sufficiently punished" (Cal. Const. art. I, § 28(a)(4)), "be treated with fairness and respect" (§ 28(b)(1)), and "a

prompt and final conclusion of the case” (§ 28(b)(9)). Such rights, including the right that crimes “will be appropriately and thoroughly investigated” (§ 28(a)(3)], and “the right to expect that the punitive and deterrent effect of custodial sentences imposed by the courts will not be undercut or diminished” [§ 28(a)(4)] are too vague to be enforceable.

-END-

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NEXT EDITION: A DISCUSSION OF THE CHANGES TO THE FELONY-MURDER RULE ENACTED BY SB 1437.

Suggestions for future topics to be covered by the Inquisitive Prosecutor’s Guide, as well as any other comments or criticisms, should be directed to Jeff Rubin at (408) 792-1065. 🐕