

**RECOMMENDATION TO RECALL SENTENCE AND RESENTENCE INMATES
PURSUANT TO PENAL CODE SECTION 1170(d)(1)**

**READOPTION OF EMERGENCY REGULATIONS
(Government Code Section 11346.1(h))**

Background

The California Department of Corrections and Rehabilitation (CDCR or the Department) finds that an emergency continues to exist to justify readoption of emergency regulations regarding the recommendation to recall inmate sentences and resentence inmates pursuant to Penal Code Section 1170(d)(1). These regulations may be found in the California Code of Regulations (CCR), Title 15, Division 3, Sections 3076, 3076.1, 3076.2, 3076.3, 3076.4, and 3076.5.

The circumstances that necessitated emergency adoption of these regulations are unchanged since the initial adoption, and prior readoption, of the regulations. The Finding of Emergency initially filed with this emergency rulemaking is incorporated in this notice as it has not yet been provided to the public.

Statement Regarding Notice of Proposed Emergency Action

(California Code of Regulations, Title 1, Section 48, Notice of Proposed Emergency Action)

Government Code Section 11346.1(a)(2) requires that at least five working days prior to submission of the proposed emergency action to the Office of Administrative Law, the adopting agency provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. After submission of the proposed emergency to the Office of Administrative Law, the Office of Administrative Law shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code Section 11349.6.

How to Make a Comment

(California Code of Regulations, Title 1, Section 55, OAL Review of Public Comments)

Any person may submit written comments about this readoption of emergency regulations by mail to the California Department of Corrections and Rehabilitation (CDCR), Regulation and Policy Management Branch (RPMB), P.O. Box 942883, Sacramento, CA 94283-0001, or by e-mail to RPMB@cdcr.ca.gov. In order to receive consideration, any comment submitted regarding this emergency readoption must be submitted to both CDCR and the Office of Administrative Law (OAL), and must contain a notation that they are submitted to OAL for consideration in connection with this emergency readoption and identify the topic of the rulemaking action to which the comment relates. Comments must be received by OAL within five calendar days after the notice of filing of this rulemaking action is posted by OAL on its Internet website. Comments may be submitted to OAL by

e-mail to staff@oal.ca.gov, or by mail to Office of Administrative Law, 300 Capitol Mall, Suite 1250, Sacramento, CA 95814-4339

**Description of the Specific Facts Demonstrating the Existence of an Emergency
(Government Code Section 11346.1(b)(2))**

These emergency regulations initially took effect January 1, 2020. These emergency regulations were initially approved by OAL pursuant to the emergency operational necessity provisions of Penal Code Section 5058.3. The original Certification of Operational Necessity stated that the emergency adoption of the regulations would significantly incentivize inmates to participate in rehabilitative and other programming offered in CDCR institutions. This emergency operational necessity remains in effect.

To date, over 1,700 inmates have been referred to the courts for potential resentencing. Nearly 500 inmates have had their sentences reduced by the courts, and the average reduction has shortened sentences by more than four years. The process of inmate referral, verification of eligibility, review by the Secretary, referral to the sentencing court, scheduling of potential court dates, and resentencing can take months. Many inmates are currently at various stages of this process. Allowing emergency authority for these regulations to expire would negatively affect potentially hundreds of inmates. Court dates that have been scheduled would be called into question, affecting the court system, crime victims who have been notified of court dates, district attorneys preparing for cases, and inmate families planning to attend. Therefore, the Department contends that an emergency continues to exist which requires the readoption of emergency authority for this rulemaking action.

**Finding of Emergency
(Government Code Section 11346.1(b)(2))**

**AUTHORITY AND REFERENCE CITATIONS
(Government Code Section 11346.5(a)(2))**

Pursuant to the authority granted by Government Code Section 12838.5, Penal Code Section 5055, and the rulemaking authority granted by Penal Code Sections 5058 and 5058.3 (in order to implement, interpret and make specific Penal Code section 5054), the Secretary of the Department proposes to amend sections 3076, 3076.1, 3076.2, 3076.3, 3076.4, and 3076.5 of Division 3 of Title 15 concerning Department recommendations to recall sentences and resentence inmates.

Penal Code section 5000 provides that commencing July 1, 2005, any reference to the Department of Corrections, in this or any other code, refers to the California Department of Corrections and Rehabilitation.

Penal Code section 5050 provides that commencing July 1, 2005, any reference to the Director of Corrections, in this or any other code, refers to the Secretary of the California Department of Corrections and Rehabilitation.

Penal Code section 5054 provides that commencing July 1, 2005, the supervision, management, and control of the state prisons, and the responsibility for the care, custody, treatment, training, discipline, and employment of persons confined therein, are vested in the Secretary of the California Department of Corrections and Rehabilitation.

Penal Code section 5058 authorizes the Secretary of the California Department of Corrections and Rehabilitation to prescribe and amend regulations for the administration of prisons.

INFORMATIVE DIGEST (Government Code Section 11346.5(a)(3))

Penal Code Section 1170(d)(1) authorizes the Secretary to recommend to a sentencing court that the sentence and commitment previously imposed on an inmate be recalled and that the court resentence the inmate provided the new sentence is no greater than the initial sentence. Currently, CDCR only uses the provision under Penal Code Section 1170(d)(1) for the recall and resentencing of inmates who demonstrate exemplary behavior during incarceration. However, this approach does not make full use of the authority provided under the law. Therefore, with these regulations CDCR proposes to use Penal Code Section 1170(d) to its full potential by establishing specific criteria for such recommendations under the following circumstances: (1) when an inmate demonstrates exceptional conduct, (2) when there is the substantial likelihood of a sentencing error, (3) when there is a change in sentencing law, or (4) when a referral is received from the head of a law enforcement agency, the head of a prosecutorial agency, or a judicial officer. Such a change would expand the ability of CDCR to consider inmates for recall and resentencing.

The exceptional conduct referral is an existing provision that has been amended to add additional eligibility criteria. The referral based on a sentencing error is necessary to correct an error of the courts that may cause an inmate to serve a longer sentence than he or she should be required to serve under the law. The referral based on a change in sentencing law is necessary to allow resentencing consideration when the legislature or courts have decided that a particular crime no longer warrants the sentence imposed. The referral based on a referral from another agency will allow for resentencing consideration when these agencies determine that inmates have been helpful in resolving criminal cases or investigations.

Public safety eligibility criteria are adopted (except in the case of sentencing errors) to help CDCR identify which inmates should be considered for resentencing and potential release pursuant to Penal Code Section 1170(d)(1). Such screening criteria provide safeguards to the public by ensuring that inmates referred by CDCR for resentencing have demonstrated pro-social behavior while in custody and thus are more likely to succeed outside of prison. The use of public safety criteria is necessary to avoid inundating the courts with referrals that are not likely to be approved because of the inmates' recent misconduct or failure to pursue rehabilitative programming. Thus, the

proposed public safety screening criteria will help balance the practical necessity of administering the referral process so that it will have the maximum impact on the affected population of inmates while mitigating risks to public safety.

Eligibility criteria are adopted to establish that inmates who may otherwise be eligible for a recommendation based on exceptional conduct or a change in sentencing law must have served a specified minimum portion of their sentence, to ensure these inmates have had sufficient time to demonstrate sustained compliance with rules and regulations and a commitment to rehabilitation. Additional provisions establish that such inmates are ineligible if they have a pending parole hearing or have already been afforded parole consideration or a parole hearing. These provisions are necessary because the parole consideration process takes into account many of the same factors regarding inmate behavior and rehabilitation as the recall and resentencing process. Lastly, such inmates must have enough time remaining to serve to allow for the completion of the recall and resentencing process.

POLICY STATEMENT OVERVIEW (Government Code Section 11346.5(a)(3)(C))

This rulemaking action will:

- Establish eligibility criteria for inmates to be considered by the Secretary for possible recommendation to a sentencing court.
- Establish procedures and timeframes for the Department to process eligible inmates for consideration by the Secretary.
- Establish procedures and timeframes for the Department to notify the sentencing court, counsel of record, and registered victims of a recommendation by the Secretary.

Documents Incorporated By Reference CDC 128-B General Chrono (Rev. 4/74)

Specific Benefits Anticipated By the Proposed Regulations (Government Code section 11346.5(a)(3)(C))

These regulations will significantly incentivize inmates to participate in educational, vocational, and other rehabilitative programming offered by the Department.

Evaluation of Consistency and Compatibility with Existing State Regulations (Government Code Section 11346.5(a)(3)(D))

The Department has determined that these proposed regulations are not inconsistent or incompatible with existing regulations or other state laws.

**STATUTORY REQUIREMENTS, IF ANY, SPECIFIC TO AGENCY
(Government Code Section 1346.5(a)(4))**

Not applicable.

**LOCAL MANDATE DETERMINATION
(Government Code Section 11346.5(a)(5))**

This action imposes no mandates on local agencies or school districts, nor a mandate which requires reimbursement of costs or savings pursuant to Government Code sections 17500 through 17630.

**FISCAL IMPACT STATEMENTS OF COST OR SAVINGS
(Government Code Section 11346.5(a)(6))**

- Cost to any local agency or school district requiring reimbursement: *None*
- Cost to any state agency:
 - \$1,641,729 in fiscal year 2019-20
 - \$1,069,443 in fiscal year 2020-21
 - \$785,535 in fiscal year 2021-22
 - \$730,492 in fiscal year 2022-23
- Cost or savings in federal funding to the state: *None*
- Other nondiscretionary cost or savings imposed on local agencies: *None*

Technical, Theoretical, or Empirical Studies, Reports, or Documents Relied Upon

Not applicable

**Statement Demonstrating Substantial Progress to Comply with
Government Code Section 11346.1(e)**

(California Code of Regulations, Title 1, Section 52, Readoption of Emergency Regulations)

This emergency regulation was initially approved by the Office of Administrative Law (OAL) pursuant to Penal Code 5058.3 on December 10, 2019, with an effective date of January 1, 2020. The original expiration date of emergency authority for this rulemaking action was June 10, 2020. This date was extended twice by 60 days as a result of the Governor's Executive Orders N-40-20 and N-71-20 related to the COVID-19 public health emergency.

The Department submitted a request for readoption of the emergency regulations pursuant to Penal Code section 5058.3 to OAL on September 14, 2020. This request was approved and took effect on October 10, 2020. Due to the two automatic 60-day extensions authorized by the Governor's Executive Orders, the regulation will remain in emergency effect until May 11, 2021.

On March 9, 2021, the Department submitted notice of proposed permanent regulations to OAL. These regulations were published in the California Regulatory Notice Register on March 19, 2021, and distributed to all persons who have requested to be notified of regulatory actions by the Department. The proposed regulations were also posted on the Department's website and distributed to all CDCR institutions for posting. The Department is accepting public comments through May 7, 2021, and expects to receive a large number of comments.

These regulations establish a major expansion of the process to recommend inmates to their sentencing court for recall of commitment and resentencing, pursuant to Penal Code Section 1170(d)(1). To date, over 1,700 inmates have been referred to the courts for potential resentencing. Nearly 500 inmates have had their sentences reduced by the courts, and the average reduction has shortened sentences by more than four years. This opportunity for significantly reduced terms of incarceration has drawn enormous interest from inmates, families, and advocacy groups. External stakeholders, including advocacy groups, district attorneys, public defenders, and others have been consulted and involved in the formulation of both the emergency regulations and the recently noticed permanent regulations. This consultation and feedback has extended the process of finalizing permanent regulations.

Additionally, as all State agencies have experienced, the COVID-19 emergency has necessitated a major redirection of staff and other resources to mitigate the effects of the pandemic. CDCR has been impacted particularly hard by the pandemic, as the Department has custody of over 100,000 inmates confined in our institutions. The Department has implemented a number of urgent measures to protect the health and safety of staff, inmates, visitors, and others at our institutions, which have necessarily pulled staff from other duties and have delayed processes not directly related to the pandemic.

The readoption of these regulations is necessary to continue to refer inmates for recall of commitment and resentencing and to complete the rulemaking process pursuant to the Administrative Procedure Act.

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Jeffrey Macomber
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4/9/2021

TEXT OF PROPOSED REGULATIONS

California Code of Regulations, Title 15, Crime Prevention and Corrections

Division 3, Adult Institutions, Programs, and Parole.

Chapter 1. Rules and Regulations of Adult Operations and Programs.

Article 6.6. Department Recommendation to Recall Sentence and Resentence Inmate

3076. Secretary's Authority.

(a) Subdivision (d)(1) of Section 1170 of the Penal Code authorizes the Secretary to recommend to a sentencing court that the sentence and commitment previously imposed on an inmate be recalled and that the court resentence the inmate for any reason, subject to the Secretary's sound discretion.

(b) Subdivision (e)(1) of Section 1170 of the Penal Code authorizes the Secretary to recommend to a sentencing court that the sentence previously imposed on an inmate be recalled if the criteria found in subdivision (e)(2) of Section 1170 of the Penal Code are satisfied.

(c) The provisions of this article do not apply to condemned inmates and inmates sentenced to life without the possibility of parole.

Note: Authority cited: Section 5058, Penal Code. Reference: Sections 1170 and 5054, Penal Code.

3076.1. Recommendation Pursuant to Subdivision (d) of Section 1170 of the Penal Code.

(a) Under any of the following circumstances, the Secretary may recommend to a sentencing court that the sentence and commitment previously imposed on an inmate be recalled and that the court resentence the inmate:

- (1) When an inmate demonstrates exceptional conduct as defined in subsection (b)(1);
- (2) When there is the substantial likelihood of a sentencing error as described in subsection (c)(1);
- (3) When there is a change in sentencing law as described in subsection (d)(1); or
- (4) When a referral is received from the head of a law enforcement agency, the head of a prosecutorial agency, or a judicial officer as described in Section 3076.2.

(b) Recommendation Based on Exceptional Conduct.

(1) An inmate may be considered for referral pursuant to subsection (a)(1) if their behavior while incarcerated demonstrates sustained compliance with departmental regulations, rules, and requirements, as well as prolonged participation in rehabilitative programming.

(2) Notwithstanding subsection (b)(1), inmates who meet the following criteria shall be excluded from consideration under this subsection:

(A) Inmates who are required to register pursuant to Section 290 of the Penal Code;

(B) Inmates who have not yet served 10 continuous years or 50% of their current commitment, whichever comes first;

1. For determinately sentenced inmates, "50%" means 50% of their Earliest Possible Release Date, as defined in Section 3371.1(c)(3)(A);

2. For indeterminately sentenced inmates, "50%" means 50% of their Minimum Eligible Parole Date, as defined in Section 3000.

(C) Inmates who have been found guilty of a serious or violent rules violation which qualifies as a Division A-1, A-2, B, C, or D offense as described in section 3323(b) through (f) within the last five years or whose serious or violent rules violation as described above is pending;

(D) Determinately sentenced inmates who are already scheduled for release within the next 18 months;

(E) Determinately sentenced inmates who, pursuant to subdivision (a)(1) of Section 32 of Article 1 of the California Constitution, are eligible for parole consideration within the next 18 months or have already been afforded parole consideration; or

(F) Indeterminately sentenced inmates who, pursuant to subdivision (a)(1) of Section 32 of Article 1 of the California Constitution or Sections 3041, 3051, or 3055 of the Penal Code, are scheduled for a parole hearing within the next 18 months or have already been afforded a parole hearing, regardless of the decision by the Board of Parole Hearings.

(3) Initial eligibility for consideration under subsection (a)(1) shall be determined by the Classification Services Unit.

(A) The Classification Services Unit shall review all referrals received from a Warden, the Director of the Division of Adult Institutions, or the Secretary.

(B) The Classification Services Unit shall not accept referrals from inmates or other parties on behalf of inmates.

(C) If an inmate is found ineligible for one of the reasons enumerated in subsection (b)(2), the Classification Services Unit shall document the reason or reasons for the inmate's ineligibility and a copy of the document shall be provided to the inmate and another copy placed in the inmate's central file within 10 business days of the decision.

(D) If an inmate is found eligible, the Classification Services Unit shall prepare a Cumulative Case Summary, which shall include all of the following information, and refer the matter to the Secretary:

1. Inmate's name and CDCR number;
2. Current commitment offense, brief description of the crime, and sentence;
3. County of commitment;
4. Summary of sustained juvenile petitions and adult criminal convictions;
5. Active or potential holds, warrants, and detainers;
6. Institutional behavior, including serious rules violation reports, drug test results, gang or disruptive group information, placement score, current housing assignment, a summary of work and educational assignments, and participation in rehabilitative programs and self-help activities;
7. Inmate visitor history (number of approved visitors and number of visits made during incarceration);
8. Victim notification requirements, as described in Section 3076.5;
9. Other legally mandated notification requirements; and
10. A copy of the Abstract of Judgment and minute order for the inmate's current commitment offense, including plea agreements.

(4) Inmates considered under this section but deemed ineligible by the Classification Services Unit or not acted upon by the Secretary may only be reconsidered by the Department after two years have passed from the decision by the Classification Services Unit or the Secretary, whichever is later in time.

(c) Recommendation Based on the Substantial Likelihood of a Sentencing Error.

(1) An inmate shall be eligible for consideration pursuant to subsection (a)(2) if their sentence, as reflected in the Abstract of Judgment, contradicts applicable sentencing laws at the time of their

sentencing hearing or subsequent decisional law suggesting the substantial likelihood of a sentencing error.

(2) Notwithstanding subsection (c)(1), determinately sentenced inmates who are scheduled for release within the next six months shall be excluded from consideration under this subsection (c).

(3) Initial eligibility for consideration under subsection (a)(2) shall be determined by the Correctional Case Records Unit. Eligibility shall be determined by evaluating the Abstract of Judgement of each inmate and determining if there is a discrepancy between the inmate's sentence and the sentencing laws that existed at the time of the sentencing hearing or between the inmate's sentence and applicable judicial decisions. If an inmate is found eligible, the Correctional Case Records Unit shall refer the matter to the Secretary.

(d) Recommendation Based on a Change in Sentencing Law.

(1) An inmate may be considered for referral pursuant to subsection (a)(3) if the applicable sentencing laws at the time of their sentencing hearing are subsequently changed due to new statutory or case law authority with statewide application.

(2) Notwithstanding subsection (d)(1), inmates who meet the following criteria shall be excluded from consideration under this subsection:

(A) Inmates who have not yet served five continuous years or 50% of their current commitment, whichever comes first;

1. For determinately sentenced inmates, "50%" means 50% of their Earliest Possible Release Date, as defined in Section 3371.1(c)(3)(A);

2. For indeterminately sentenced inmates, "50%" means 50% of their Minimum Eligible Parole Date, as defined in Section 3000.

(B) Inmates who have been found guilty of a serious or violent rules violation which qualifies as a Division A-1, A-2, B, C, or D offense as described in section 3323(b) through (f) within the last one year or whose serious or violent rules violation as described above is pending;

(C) Determinately sentenced inmates who are already scheduled for release within the next 18 months;

(D) Determinately sentenced inmates who, pursuant to subdivision (a)(1) of Section 32 of Article 1 of the California Constitution, are eligible for parole consideration within the next 18 months or have already been afforded parole consideration; or

(E) Indeterminately sentenced inmates who, pursuant to subdivision (a)(1) of Section 32 of Article 1 of the California Constitution or Sections 3041, 3051, or 3055 of the Penal Code, are scheduled for a parole hearing within the next 18 months or who have already been afforded a parole hearing, regardless of the decision by the Board of Parole Hearings.

(3) Initial eligibility for consideration under subsection (a)(3) shall be determined by the Classification Services Unit or the Correctional Case Records Unit.

(A) If an inmate is found ineligible for one of the reasons enumerated in subsection (d)(2), the Classification Services Unit or the Correctional Case Records Unit shall document the reason or reasons for the inmate's ineligibility and a copy of the document shall be provided to the inmate and another copy placed in the inmate's central file within 10 business days of the decision.

(B) If an inmate is found eligible, the Classification Services Unit or the Correctional Case Records Unit shall prepare a Cumulative Case Summary as described in subsection (b)(3)(D) and refer the matter to the Secretary.

(4) Inmates considered under this section but deemed ineligible by the Classification Services Unit or the Correctional Case Records Unit, or not acted upon by the Secretary, may only be

reconsidered by the Department after one year has passed from the decision by the Classification Services Unit, the Correctional Case Records Unit, or the Secretary, whichever is later in time.

(e) Decision by the Secretary.

(1) The Secretary shall reach a decision on any matter referred under this section within 10 business days of its receipt.

(2) If the Secretary elects to recommend an inmate for recall and resentencing, a recommendation letter and Cumulative Case Summary shall be forwarded to the sentencing court and a copy shall be provided to the inmate and another copy placed in the inmate's central file within 10 business days of the decision.

(3) If the Secretary elects not to recommend an inmate for recall and resentencing, a "General Chrono" (CDC Form 128-B; Rev. 4/74), which is incorporated by reference, shall be generated informing the inmate that the Secretary took no action and a copy shall be provided to the inmate and another copy placed in the inmate's central file within 10 business days of the decision.

(4) Pursuant to the broad discretion vested in the Secretary by statute, namely subdivision (d) of Section 1170 of the Penal Code, the Secretary's decision is final and not subject to administrative review.

Note: Authority cited: Section 5058, Penal Code. Reference: Sections 290, 1170(d), 3041, 3051, 3055 and 5054, Penal Code; and Cal. Const., art. 1, sec. 32.

3076.2. Recommendation Based on a Law Enforcement, Prosecutorial, or Judicial Referral.

(a) No more than 10 business days after receiving a request from the head of a law enforcement agency, head of a prosecutorial agency, or judicial officer asking that the Secretary consider recommending an inmate to a sentencing court pursuant to subdivision (d) of Section 1170 of the Penal Code, the Classification Services Unit shall prepare a Cumulative Case Summary as described in subsection (b)(3)(D) of Section 3076.1 and forward the request and the summary to the Secretary for consideration.

(b) If the Secretary elects to recommend the inmate for recall and resentencing pursuant to subsections (a)(1), (a)(2), or (a)(3) of Section 3076.1, the Secretary shall, no more than 10 business days after receiving the Cumulative Case Summary, notify the District Attorney of the county that prosecuted the inmate resulting in his or her current incarceration in state prison and forward a copy of the recommendation and Cumulative Case Summary to the District Attorney.

(c) If the District Attorney indicates his or her intent to recommend the inmate to the sentencing court pursuant to subdivision (d) of Section 1170 of the Penal Code, then the matter shall be considered closed. If the District Attorney does not respond to the Secretary within 10 business days of the Secretary's referral or indicates that he or she will not recommend the inmate to the sentencing court, then the Secretary shall independently recommend the inmate for recall of sentence and resentencing unless any information presented by the District Attorney in response causes the Secretary to reconsider.

Note: Authority cited: Section 5058, Penal Code Reference: Sections 1170(d), 3043 and 5054, Penal Code.

3076.3. Recommendation Pursuant to Subdivision (e) of Section 1170 of the Penal Code - Consideration Factors.

For inmates meeting one or more of the recall eligibility requirements of section 3076(b), the Classification and Parole Representative (C&PR), shall consider the following factors as may be applicable when recommending recall of commitment consideration for an inmate:

- (a) The inmate's commitment offense.
- (b) Whether the inmate has a history of affiliation with organized criminal activity, including, but not limited to, any known disruptive group, street gang, prison gang, terrorist group, or racketeering enterprise.
- (c) The inmate is or is not designated as a Public Interest Case by the Classification Staff Representative, or their placement has or has not been ordered by the Departmental Review Board because of an unusual threat to the safety of persons or public interest in the inmate's case.
- (d) Whether the court was aware of the inmate's medical condition at the time of sentencing.
- (e) Whether the inmate's prior criminal history includes violent acts against persons pursuant to Penal Code (PC) section 667.5(c) or PC section 1192.7(c), or registerable offense pursuant to PC section 290.
- (f) Whether there exists a documented victim or next of kin of the inmate's commitment offense in the community who would suffer fear from the release of the inmate back into the community.
- (g) Whether the inmate's documented institutional behavior reflects a history of offenses involving force, violence, assault, arson, or predatory sexual behavior.
- (h) Whether there are verifiable community resources appropriate, sufficient, and immediately available to provide support and sustenance and to meet the inmate's medical and/or psychological needs upon release.
- (i) Whether the inmate has committed any other criminal acts, either prior to or during the current period of incarceration, that indicates he or she would be a danger to the public if released.
- (j) Whether the inmate retains the capacity to commit or to influence others to commit criminal acts that endanger public safety.

Note: Authority cited: Section 5058, Penal Code Reference: Sections 1170(e), 3043 and 5054, Penal Code; and *Martinez v. Board of Parole Hearings* (2010) 183 Cal.App.4th 578.

3076.4. Recommendation Pursuant to Subdivision (e) of Section 1170 of the Penal Code - Processes.

A physician employed by the California Department of Corrections and Rehabilitation (CDCR) who determines an inmate meets the eligibility requirements described in section 3076(b), shall initiate the recall process on behalf of the inmate. The inmate or his or her family member or designee may also independently request Penal Code (PC) section 1170(e) recall consideration by contacting the institution's Chief Medical Officer (CMO) or Chief Medical Executive (CME), or the Secretary.

- (a) The physician shall document on a CDC Form 128-C (Rev. 01/96), Chrono - Medical-Psychiatric-Dental, the inmate's illness, functional status, including the inmate's abilities or limitations in performing activities of daily living, ambulatory status, the reason why the inmate has six months or less to live or is permanently medically incapacitated, and his or her desire to participate in the recall process.
- (b) The CMO or CME, Deputy Medical Executive, and Statewide Chief Medical Executive, California Prison Health Care Services, shall have five working days to review and sign the CDC Form 128-C, approving the physician's prognosis. The signed CDC Form 128-C shall be

submitted to the C&PR within three working days following the Statewide Chief Medical Executive's approval.

(1) If the CMO or CME, or the Deputy Medical Executive, or the Statewide Chief Medical Executive do not concur with the physician's prognosis, the recall of commitment process shall be terminated.

(c) The C&PR shall review the CDC Form 128-C and the inmate's central file.

(1) If the inmate is sentenced to death or to life without the possibility of parole, the Classification and Parole Representative (C&PR) shall document the reason for the ineligibility on a CDC Form 128-B (Rev. 04/74), General Chrono, and file the original in the inmate's central file. A copy of the CDC Form 128-B excluding any confidential information, as defined in section 3321, shall be sent to the inmate and the inmate's physician.

(2) If the inmate is not sentenced to death or to life without the possibility of parole, medical staff shall explain the recall of commitment process to the inmate within 48 hours of notification and arrange for the inmate to designate a family member or other outside agent on CDCR Form 7385 (Rev. 09/09), Authorization for Release of Information, which is incorporated by reference. The inmate's designee shall be informed about the recall of commitment process and the inmate's medical condition. If the inmate is mentally unfit to designate a family member or other outside agent, medical staff shall contact the inmate's emergency contact listed on the Notification in Case of Inmate Death, Serious Injury, or Serious Illness (see section 3357) and advise them of the recall process.

(d) The C&PR shall submit the CDC Form 128-C to the inmate's caseworker. The inmate's caseworker shall have five working days to prepare an evaluation report noting the inmate's case factors as listed in section 3076.3, which consists of the following information and attachments:

(1) CDC Form 128-C.

(2) The inmate's cumulative case summary, including, but not limited to the following information:

(A) Inmate's name and CDC number.

(B) Current commitment offense, brief description of the crime, and sentence.

(C) County of commitment.

(D) Prior juvenile and adult criminal history.

(E) Active or potential holds, warrants, detainers.

(F) Institutional adjustment, including rules violation reports, counseling chronos, pending disciplinary actions, gang/disruptive group information, placement score, current housing assignment, work and education assignments, and participation in self-help activities.

(G) Mental health and developmental disability status.

(3) A list of any victim notification or other special notification or registration requirements.

(4) The inmate's post-release plan.

(5) CDCR Form 7385 (Rev. 09/09), Authorization for Release of Information.

(6) CDCR Form 3038 (12/10) Notification to Inmate/Inmate Designee - Recall and Re-sentencing Procedure, which is incorporated by reference.

(7) CDCR Form 3039 (12/10), Waiver of Defendant's Personal Presence at the Recall and Re-sentencing Hearing, which is incorporated by reference.

(8) Abstract of Judgment for the inmate's current commitment offense.

(9) Probation Officer's Report for the inmate's current commitment offense.

(10) Institutional Staff Recommendation Summary.

(11) Legal Status Summary.

- (12) CDC Form 112 (Rev. 09/83) Chronological History.
- (13) The inmate's most recent Board of Parole Hearings Parole Consideration Report with the Lifer Parole Hearing Decision Face Sheet containing the Board of Parole Hearings' disposition (applies only to inmates who are sentenced to an indeterminate term).
- (e) The C&PR shall review and forward the evaluation report to the warden or chief deputy warden within three working days.
- (f) The warden or chief deputy warden shall review and sign the evaluation report and ensure it is forwarded to CDCR headquarters within three working days.
- (g) The evaluation report for a PC section 1170(e) recall shall be referred to the Secretary, or designee, for review and consideration.
- (1) If a positive recommendation for recall is made, and the inmate is sentenced to a determinate term, the recommendation shall be referred directly to the sentencing court and shall include one or more medical evaluations, the findings of which must determine the inmate meets the criteria set forth in PC section 1170(e)(2), and a post-release plan.
- (2) If the inmate is sentenced to an indeterminate term, the Secretary or designee's recommendation, whether positive or negative, shall be referred to the Board of Parole Hearings for review and consideration.
- (h) Pursuant to PC section 1170(e)(9), if the sentencing court grants the recall and resentencing application, the inmate shall be released by the department within 48 hours of receipt of the court's order, unless a longer time period is agreed to by the inmate or ordered by the court. If the inmate has agreed to waive the 48-hour release requirement, the department shall request the sentencing court include in its order that the inmate shall be released within 30 calendar days to allow for the coordination of his or her housing and medical needs in the community to a location where access to care is available.
- (i) If the Division of Adult Parole Operations (DAPO) is coordinating the inmate's placement within the community, the C&PR shall provide a copy of the release order to DAPO upon receipt from the sentencing court.
- (j) At the time of release, medical staff shall ensure the inmate has each of the following in his or her possession; a discharge medical summary, full medical records, State identification, parole medication, and all property belonging to the inmate. After discharge, any additional records shall be sent to the inmate's forwarding address.

Note: Authority cited: Section 5058, Penal Code Reference: Sections 1170(e), 3043 and 5054, Penal Code; and *Martinez v. Board of Parole Hearings* (2010) 183 Cal.App.4th 578.

3076.5. Victim Notification.

- (a) Recommendation pursuant to subdivision (d) of Section 1170 of the Penal Code.
- (1) No more than 10 business days after the Office of Victim and Survivor Rights and Services has been notified of a referral by the Department to the sentencing court pursuant to subdivision (d) of Section 1170 of the Penal Code, based on exceptional conduct as described in section 3076.1(a)(1) or a law enforcement, prosecutorial, or judicial referral as described in section 3076.2, that office shall notify all victims registered with the Department pursuant to subdivision (b) of Section 679.03 of the Penal Code of the Department's action.

(2) No more than 10 business days after the Office of Victim and Survivor Rights and Services has been notified that the sentencing court has scheduled a hearing on a referral pursuant to subdivision (d) of Section 1170 of the Penal Code, based on the substantial likelihood of a sentencing error as described in subsection 3076.1(a)(2) or a change in sentencing law as described in section 3076.1(a)(3), that office shall notify all victims registered with the Department pursuant to subdivision (b) of Section 679.03 of the Penal Code of the Department's action.

(b) Recommendation pursuant to subdivision (e) of Section 1170 of the Penal Code. No more than 10 business days after the Office of Victim and Survivor Rights and Services has been notified of a referral by the Department to the sentencing court pursuant to subdivision (e) of Section 1170 of the Penal Code, that office shall notify all victims registered with the Department pursuant to subdivision (b) of Section 679.03 of the Penal Code of the Department's action.

(c) All notifications made pursuant to this section shall include the name and the address of the court that will consider the recall of the inmate's commitment.

Note: Authority cited: Section 5058, Penal Code Reference: Sections 679.03, 1170(d), 1170(e) and 5054, Penal Code.