# **Resentencing Toolkit**

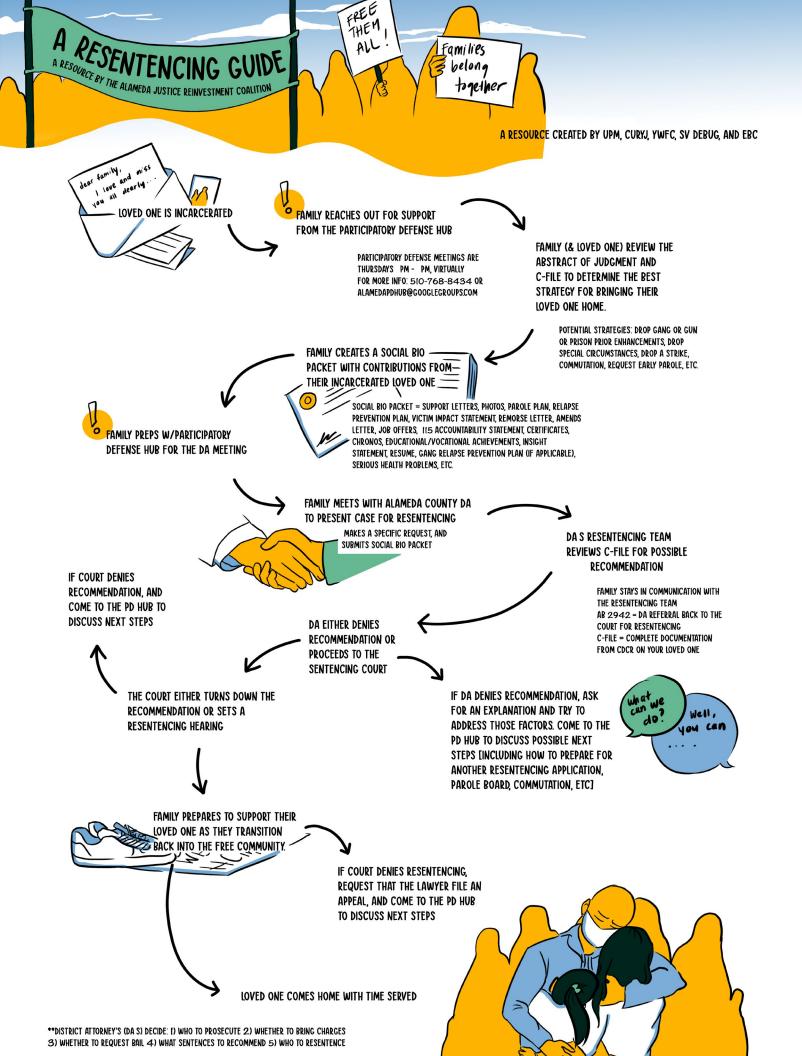
**Bringing Loved Ones Home** 

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### **Resentencing Laws**

The CA Penal Code allows for certain law enforcement agency officials, including CDCR, to request that a person's sentence be recalled and considered for resentencing to a lower term (via PC § 1170(d)(1) prior to 2022, now PC § 1170.03).

In 2018, the California State Legislature passed AB 2942, which authorized district attorneys to make these referrals for recall and resentencing. The law went into effect on January 1, 2019. AB 2942 allows District Attorneys to reevaluate past sentences and determine whether the sentence is no longer in this interest of justice. Recall and resentencing is technically available to all persons, regardless of their conviction or sentence type, but the DA's office must be willing to make the recommendation to the courts. Some DA offices have their own criteria for considering resentencing referrals.

In 2021, California passed four more laws that expand and strengthen resentencing paths: AB 1540 (Ting), AB 124 (Kamlager), SB 483 (Allen), and SB 775 (Becker) all went into effect on January 1, 2022.

AB 1540 moves the recall and resentencing provisions that used to be in PC 1170(d)(1) into a brand new code section: PC 1170.03. AB 1540 strengthens individuals' procedural rights during recall and resentencing, including: the right to an attorney; clarifies what the court must do when it gets a resentencing referral; and limits the judge's ability to deny resentencing. AB 1540 builds on the reforms of AB 1812 (which went into effect in June 2018) which advises the resentencing court to consider things like age, disciplinary record, record of rehabilitation, and diminished physical condition when deciding a just sentence and whether further incarceration is in the interests of justice. decisions to consider if the person being resentenced: had experienced trauma, including abuse, neglect, exploitation, or sexual violence; if they were a victim of intimate partner violence or human trafficking; and if they were under age 26 at the time of the offense.

Creating a new form of mandatory resentencing in PC 1171 and PC 1171.1, SB 483<sup>1</sup> retroactively repeals 1-year prison prior and 3-year drug prior enhancements, making almost everyone who has one or both of these enhancements is eligible for resentencing (unless the 1-year enhancement was imposed for a prior conviction for a sex offense). People serving a sentence including one of these enhancements will be automatically referred to the sentencing court for a resentencing hearing. People who have already served their base term will be resentenced by October 1, 2022. Regardless of base term, all people with these enhancements are eligible to have them removed and can file a petition for habeas corpus to get back into court. Once a person is in court for SB 483 resentencing, the judge must consider all changes in law and other rehabilitative factors that can be used to reduce a person's sentence.

In a different area of resentencing known as felony-murder resentencing, SB 775 clarifies that certain people who were convicted of aiding and abetting an attempted murder, and certain people who were charged with murder but convicted of manslaughter, can also ask the court to be resentenced on a less serious felony (See PC § 1170.95 for eligibility criteria). SB 775 guarantees the right to counsel for resentencing for those that file a facially valid petition requesting resentencing.

For more information on any of these new laws, please refer to this <u>fact sheet</u> or reach out to the Alameda Participatory Defense hub for help with your loved one's case.

AB 124 required the court in resentencing

### **Resentencing Strategies**

When presenting your loved one's case to the District Attorney, it is often helpful to make a specific request regarding their sentence.

Some resentencing strategies include:

- Dropping "special circumstances" on a murder charge. Special circumstances are to increase a life sentence to a life without parole (LWOP) or death penalty sentence
- Dropping (or "striking") previous strikes for the purpose of sentencing. Prior convictions that count as "strikes" add time to base sentences
- Reducing an Upper or Middle sentencing term to a Lower term. The court identifies aggravating or mitigating factors in a case and uses this to determine whether an upper, middle, or lower term is "appropriate".
- Resentencing to a lesser-included or lesserrelated offense. For example, manslaughter can be a lesser-related offense to murder, and assault can be a lesser-included offense to felony-murder.
- Removing sentencing enhancements. Some common enhancements include:
  - Prior conviction or prison term enhancements:
    - 5-year aka Nickel prior felony (PC 667(a), SB 1393)
    - 1-year prior prison term (PC 667.5(b), SB 136, SB 483)
    - 3-year prior drug felony (HSC 11370.2, SB 180, SB 483)
  - Gun or weapon enhancements (PC 12022.5 and PC 12022.53, SB 620)
  - Gang enhancements (PC 186.22, AB 333)
  - Great bodily injury enhancements (PC 12022.7)
- Resentencing a person who was charged under the age of 18 as an adult:
  - If a person was under 18 when crime was allegedly committed and sentenced before Proposition 57 in November 2016, you can request remand to the superior

court for a new transfer hearing with more juvenile friendly presumptions. (People v. Garcia (2018) 30 Cal.App.5th 316. See People v. Montes (Oct. 7, 2021, E075064) \_\_ Cal.App.5th \_\_\_ [2021 WL 4621862].)

- If a person was 14 or 15 years old when the crime was allegedly committed and transferred to adult court, S.B. 1391 (2018) creates a retroactive opportunity for resentencing due to a new ban on adult transfers for this age group. (Stats. 2018, ch. 1012, § 1)
- Creating a record of mitigation factors for someone who was charged under the age of 26 years old
  - A person can request a Franklin hearing to establish a record of mitigation evidence and youthful factors which can be useful in both resentencing and parole board decisions.
- Resentencing for veterans with determinate sentences
- If a person is a veteran of one of the branches of the U.S. Military and serving a determinate sentence, they can establish a record of PTSD and request Veteran's Resentencing (SB 865 / PC 1170.91).

Some combinations of enhancements are now illegal due to recent case law. If you find that any of the following situations apply to your loved one's case, this provides legal justification for removing those enhancements:

- Great Bodily Injury Enhancements via People v. Cook (2015) 60 Cal. 4th 922. According to PC section 12022.7 (g), enhancements for "infliction of great bodily injury" (§ 12022.7(a-e)) cannot be applied to charges of murder, manslaughter, arson, or reckless burning. And enhancements from PC section 12022.7(a-d) cannot be applied to charges where "infliction of great bodily injury" is an element of the crime.
- Great Bodily Injury Enhancements via People v. Gonzalez (2009) 178 Cal. App. 4th 1325,

1332. The Court cannot impose multiple enhancements for "infliction of great bodily injury" if they come from the same offense, only impose the longer of the two enhancements.

- Gun Enhancements via People v. Le (2015) 61 Cal. 4th 416, 429. The Court cannot apply both a firearm enhancement (§ 12022.5(a)(1)) and a serious felony gang enhancement (§ 186.22(b)(1)(B)) when the offense is a serious felony if the sole reason the judge is applying the enhancement is because the offense involves firearm use.
- Gun Enhancements via People v. Rodriguez (2009) 47 Cal. App. 4th 501, 504-505, 509. The Court cannot impose both a firearm enhancement (§ 12022.5(a)) and a gang violent felony enhancement (§ 186.22(b)(1) (C)) if they both are based on the use of a firearm during a single offense. Only the greater of the two enhancements can be imposed (§ 1170.1(g)).
- Alternative Sentences for Gang-Motivated Witness Dissuasion via People v. Lopez (2012) 208 Cal. App. 4th 1049. Seven years-tolife alternative sentences that result from attempts to dissuade witnesses (§ 136.1) that are motivated by gang activity (§ 186.22(b) (4)(G)) can only be applied if the defendant is convicted under felony dissuasion of a witness by use of explicit force or implicit threat of force (§ 136.1(c)(1)).
- Child Pornography Possession Charges via People v. Manfredi (2008) 169 Cal. App. 4th 622. For child pornography convictions (§ 311.11(a)), multiple child pornography materials at the same location can only be used to charge for a single possession for child pornography even if the materials are stored in separate physical media.
- Consecutive In-Prison Felony Terms via People v. McCart (1982) 32 Cal. 3rd 338. Penal Code section 1170.1(c) (formerly § 1170.1(b)) requires the calculation of a single term of imprisonment for all convictions of felonies committed in prison and sentenced consecutively. Subordinate terms for consecutive felony offenses consist of onethird of the middle base term

You can find the details of your loved one's sentence on their Abstract of Judgment (form CR-290.1) filed by the court they were convicted in.

Section 1: Lists convictions

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- There may be multiple counts included in their conviction, details will be provided for each individual count.
- Under "Term (L, M, U)", you will see the letter indicating whether they were sentenced to the lower, middle, or upper term for that count
- Section 2: Lists enhancements related to this conviction, including weapon or gang enhancements.
- Section 3: Lists enhancements resulting from prior convictions.
- Section 4: Different sentencing considerations
  - If the box marked "per PC 667(b)-(i) or PC 1170.12 (strike prior)" is checked, this means there is a prior strike that changed the sentence listed in Section 1.

We encourage you to bring your loved one's Abstract of Judgment to the Alameda Participatory Defense Hub. We can help you understand their sentence and enhancements and identify different resentencing strategies.

### Connecting with Alameda Participatory Defense Network

Participatory Defense is a community organizing model for people facing charges, their families, and communities to impact the outcomes of cases and transform the landscape of power in the court system.

The approach is to bring a community organizing ethos to the otherwise isolating court experience. Participatory defense meetings are not legal clinics. From a movement-building sensibility, the case outcome is not the only measuring stick, but also important is whether the process transformed someone's sense of power and agency.

#### **Oakland Participatory Defense Hub**

Collaboration between All of Us or None, CURYJ, Urban Peace Movement, Young Women's Freedom Center Contact Email: alamedapdhub@googlegroups. com Contact Phone: (510) 768-8434 Participatory Defense Meetings: Thursdays 5pm-7pm

For participatory defense hubs in other locations you can find the list <u>participatorydefense.org/hubs</u>

# Obtaining a Central File (C-File)

#### What is a central file?

Central file is the complete record of your loved one in prison: writeups, programming, reports, etc.

#### How does a family receive a C-file?

The first step to making arguments for a loved one's release is to have access to their Central File (C-File).

### How does the family of an incarcerated loved one request a C-file?

You can request a C-file from the Prison Litigation Office using this form, but we have discovered that the DA also receives a copy of the C-File if we are not careful with the "Purpose" section, which all but notifies them that there might be intent to resentence. When the family presents their application for resentencing to the DA, we want the DA to read the C-file for the first time through the family's framing, not through their own framing of public safety.

#### Process for receiving a C-file:

- 1. Download "Authorization for Release of Offender Central File"
- 2. Fill out personal information on C-file
- Under the "Purpose for Release or Use of the Information" put "PC 1170(d) resentencing request/review" or to be more general "Personal Review" (FTP suggested this option)
- 4. Get incarcerated person to sign the C-file authorization form
- 5. Send to the Prison litigation office via fax
- Prison litigation coordinator charges family \$6 for CD-Rom which is sent through mail

#### Things to note:

 Please track every C-file that families request to let us know what works and what doesn't. We are still trying to optimize this process and every prison's process will be slightly different. Please let us know of any successes or failures

Don't be quick to accept whatever the Prison Litigation office says. Another family requested a C-file and was denied on the grounds on the untrue statement by Prison Litigation office that "only the incarcerated person's attorney can request the C-file"

CDCR Directory<sup>1</sup>

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# How to Put Together a Social Bio Packet

Social biography packets that include photos, character letters, videos, grades, certificates, pay stubs — anything that reveals the defendant's good qualities, the support of loved ones, and ties to the community. The packets enable judges, prosecutors, probation officers, and the public to see a human being rather than merely a case number or a list of charges.

Each case is different and the components in these guidelines might not be applicable to every case. Some cases might require different information and the packet should be tailored to the needs of the case.

Be clear on what you need to show. Every social bio packet is different, depending on the concerns of the DA/ Judge/ Probation/ Defense Attorney – and on the stage of the case (bail, court transfer (as in from adult to juvenile), plea negotiations, sentencing, etc).

### Sample Themes to Demonstrate (as Appropriate)

#### Past Hardships

Past Traumas
Mental Illness
Special Education/Learning Disability
Past incidents
Lack of adult guidance/ role models
Lack of community
resources available to the person

#### Past Accomplishments

- $\cdot$  Graduations
- Program completions · Sports
- $\cdot$  Certifications
- $\cdot$  Church/ Religious affiliations  $\cdot$  Volunteer Work
- · Overcoming of any barrier
- $\cdot$  Anything the person is proud of that he/she has accomplished

#### Current/ Future prospects

- School Enrollment
- $\cdot$  Rehabilitation Programs that have agreed to accept the person
- Employment possibilities Family Support
- Friends Support
- New Environmental Changes

#### Other Items to Include

#### **Character Letters**

should say ....

 $\cdot$  who the person is and their association with the individual facing charges to help portray the true character of the person.

 $\cdot$  how long they have known the individual and their relationship to that person.

• If you can describe the person in three words, what would they be? Can you give examples of each of those words? Any specific incident or moment that is memorable to the person that captures the individual's personality.

Examples of who can write character letters: • From any/all family members: mom, dad,

sisters, brothers, nieces, sons, daughters, uncles, aunts, and significant other....

• From previous work: employers, coworkers, work friends...

• Community involvement: church (pastors, priest, spiritual leader), programs, sports, neighbors

 $\cdot$  Anyone you believe could speak to the person's character

#### Pictures

Pictures don't have to be limited to the present time. They can span the person's life: from childhood to present. You want to be able to show the person in their character, with their family/ community, and environment.

Examples:

- Pictures with Family
- $\cdot$  Pictures in Work environment, working, with coworkers
- Performing Community Service
- $\cdot$  With neighbors
- $\cdot$  Going to Church
- Family Events/ Special occasions
- $\cdot$  At Sporting Events
- $\cdot$  At school
- $\cdot$  Doing family responsibilities

### 1–15s (consider 1–28's within last year) Confidentiality Challenges and Best Practices

### How to address 115s (writing a 115 accountability statement)

Own it and take responsibility! The DA will not attempt to retry the disciplinary hearing. If you were found guilty, the DA will take that as fact. Minimizing and rationalizing will lead the DA to think you are not taking accountability. On the other hand, maximizing often takes the wind out of their sails. Certain 115s have more of a detrimental impact than others, and "clean time" works in your favor. DAs often consider violent 115s (fighting, assaults, riots, weapon possession, etc.) as the most serious, especially if you have multiple ones and they are recent. Here are some suggestions when writing your 115 accountability statement:

- List your 115s in chronological order starting with the most recent
- Do not go into details of what happened.
   Briefly explain what the 115 was for and make sure it matches the report
- Explain why it happened. What were you going through at the time (personal relationship issues, breakup, death of a loved one, loss of hope, etc.)
- Identify causative factors/character defects that were in play (unresolved resentment, lack of coping & communication skills, irrational beliefs "can't back down from a fight," getting high to cope with incarceration and other trauma, unhealthy desire for acceptance, low self-esteem, criminal thinking)
- Explain what you did to address the causative factors/character defects that were in play (anger mgt courses, conflict resolution courses, book reports, AA, NA, CGA, etc.)
- Explain what you learned from the experience
- Provide an example of how you dealt with a similar situation since then and how it didn't

lead to a write-up

*Example:* I was doing good with my programming when a guy asked me to pass something for him. Not thinking, I did it. As I was doing this favor, a C/O pulled me over, searched me, and found drugs in what I was passing. Even though I didn't know that drugs were in there, I take full responsibility because I should have asked what it was that the guy wanted me to pass.

Take Responsibility: I am guilty because regardless of me not knowing there was drugs in there I shouldn't be passing things for people without knowing what I am passing. I am responsible for my own actions.

Explain why it happened & identify causative factors/character defects that were in play:

This happened because even though I was addressing my addictions to drugs and alcohol at the time, I was neglecting my addiction to criminal thinking and my need for peer acceptance that I sought for most of my life. I was seeking a need for acceptance and acting impulsively.

Explain what you learned from the experience:

Through taking NA, I learned that I need to always pay attention to my criminal thinking and continue to work on myself for the rest of my life. I was addicted to the whole criminal lifestyle, not just drugs and alcohol. I learned to always think things through and not make impulsive decisions. This is why today I make it a priority to practice Step 10 every day by taking a personal inventory of my thoughts, feelings, and motivations. Through Step 4 I also learned that I was seeking a need for acceptance because I never received the love and acceptance from my father which I so desperately wanted as a child.

Provide an example of how you dealt with a similar situation:

- A few weeks ago a guy asked me to pass something. I asked him if it was hot. He said yes. I told him no and walked away.
- By articulating "why it happened" and "what you learned" it shows you have "insight," which demonstrates growth, maturity, and accountability.

#### How to address Confidentials (1030s)

The DA will not have access to your confidential file, but will know if you have confidentials. Request your 810 "Confidential Information Listing" from your counselor. Try to determine what they could be about. If they are older than 5 years, and true, you may want to take responsibility and own it. If they are recent, explain why you believe someone dropped a kite on you and emphasize that you have no 115s during that time period (hopefully). An excellent way to counter recent confidentials is to get laudatory chronos from correctional officers.

Example: At the time I got that confidential, a lot of people were rolling it up off the yard because they owed drug debts. It's not uncommon that people lie about others and drop kites just to get off the yard. Whatever was said had to be investigated. If the allegations were true, I would have received a 115. Unfortunately, confidentials remain in a C-File even when they are not proven to be true.

\*Owning your 115s and "legit" confidentials builds credibility, which makes it easier for you to deny the bogus confidentials which many people have in their C-File. That's why it is a good strategy to admit to old things (which likely won't hurt you). Credibility is HUGE, and necessary when showing the DA that you are not the same person as you once were.

### Advocacy with District Attorney

A checklist of steps you can take to increase advocacy for your loved one by meeting with Alameda District Attorney.

Reach out to hub - strongly encouraged

Attend hub meeting - Thursday's 5-7

Obtain abstract of judgment from county's courthouse -

- C file -
- Identify love one and family's ask of the DA for resentencing
  - Making sure that person's support network is aligned w/ incarcerated loved one
  - Identify family member that will speak with DA
    - More than one family member can join but it's strongly recommended that one person speaks for the support network

Create Social Bio- include certificates, letters of support, re-entry plan, cronos, accountability statement from loved one, Collect photos

Create presentation

- Draft 2-5 minute presentation with specific asks for DA
  - Highlighting key points in bio packet
  - With emphasizes on reentry plan
- The Hub can coordinate space for you to practice and give any pointers if needed
   Stay connected to the hub - we here to

support if you have any questions or just want to remain connected in community

Keep the DA updated on loved ones progress - don't afraid share a 2-3 month progress report, it ensures that the DA understands the urgency for the release of your loved one

Don't hesitate to reach out directly to the DA for updates

Strongly recommend to do this in collaboration with the hub

Who to contact to get a meeting with the DA Video of family member about meetings with

DA from PD hub

Remember that this is a process, and although be rough, remember that there is a community here to support you and your love one's return home!

# Other Avenues to your Loved One Coming Home & Parole Resources

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Seeking a commutation<sup>1</sup> and pardon<sup>2</sup>

#### What is commutation<sup>3</sup>?

People serving a sentence for a criminal conviction can petition the California Governor to have their sentence reduced or eliminated by applying for a commutation of sentence. Executive Clemency is another term for commutation. Pardons are a separate process. Generally, pardon applications are only considered after someone is released from prison and discharged from parole or probation for at least 10 years.

#### What is a pardon?

A gubernatorial pardon is a public document that legally acknowledges that a person has been rehabilitated. In California, a pardon restores certain rights people lose (like the ability to serve on a jury or to obtain certain professional licenses) due to a conviction. A pardon acknowledges that the crime happened, as well as the positive growth the individual who committed a crime has made. Pardons are an extraordinary remedy, particularly because of the legal impact they have to restore legal rights. Because California gubernatorial pardons are full and unconditional, they can help noncitizens by eliminating certain criminal grounds of deportation or bar to citizenship

#### Going back to court on other laws and opportunities for obtaining DA 2942 referral while in court

- There was a Rise Act (SB 483) & PC 1170 training EBC put together for PDs, with this checklist of related bills and enhancements.<sup>4</sup>
- SB 775 / SB 1437 Felony Murder Resentencing
  - Helpful resource here from OSPD: <u>https://</u> www.ospd.ca.gov/idid/

- · ADI San Diego has good forms:
  - <u>http://www.adi-sandiego.com/pdf\_</u> <u>forms/Franklin\_Cover\_Letter.pdf</u>
  - <u>http://www.adi-sandiego.com/pdf\_</u> <u>forms/Franklin\_answer\_to\_Q6.pdf</u>
- SB 483 Rise Act (1 year or 3 year enhancements coming off)
- EBC letter (updated!) <u>https://docs.</u> google.com/document/d/17Z1XvXib\_ JvOJc27OxDE5TwdW1J1Ri-Afy30cMXTCTU/ edit\_

- 2 <u>https://www.ilrc.org/sites/default/files/resources/gubernatorial\_pardons\_in\_california\_ilrc\_cdc\_2019.pdf</u>
- 3 <u>https://www.gov.ca.gov/wp-content/uploads/2019/03/Commutation-Application.pdf</u>
- 4 <u>https://www.ospd.ca.gov/idid/</u>

Franklin Hearings (for parole hearings)

<sup>1 &</sup>lt;u>https://survivedandpunished.org/wp-content/uploads/2019/07/ccwp-commutation-application-guide-re-vised-july-2019.pdf</u>