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June 8, 2020

Judicial Council of California
455 Golden Gate Avenue
San Francisco, CA 94102-3688
Submitted via email to judicialcouncil@jud.ca.gov

RE: San Francisco Public Defender's Comments on Proposed Rule 4.520

Dear Judicial Council Members:

We submit the following comments for the proposed rules on Resentencing Recommendations under Penal Code Section 1170(d) by Hon. J. Richard Couzens, Chair of the Criminal Law Advisory Committee.

1. We support significant aspects of the Proposal

Penal Code Section 1170(d) is an important mechanism for providing reentry on the county level. We applaud the following sections of the proposed Rule 4.520 which promotes effectiveness and fairness in resentencing recommendations.

- Rule 4.520(i)(1) provides that supplemental probation reports are not required for resentencing unless ordered by the court (pp. 3, 10).

- Under Rule 4.520(h)(4)(B), the court must not deny resentencing recommendations solely because the original sentence resulted from a negotiated plea (pp. 3, 9).

- Rule 4.520(g)(3) permits the impacted person to appear for resentencing through a video conference system without a written waiver (p. 8). We support the video conference option but due to its lack of widespread availability, an appearance by telephone should also be permitted where video conferencing is not possible. Prisons should be encouraged to make video conference systems readily available for court appearances. In addition, the language should more clearly state that no written waiver is required where the person appears by telephone or video conference.

- Under Rule 4.520(h)(6), if the court determines that no change in the sentence is to be made, it must issue an order stating the reasons for the determination and enter the order in minutes (p. 9).

2. We have significant Concerns and recommendations about the proposal as well.

We have serious concerns about the sections of the proposal which may harm impacted persons and their communities, limit 1170(d)(1)'s intended purpose and effectiveness, and lead to protracted litigation. We urge the Judicial Council to reconsider the following sections of the proposal:

A. Allowing courts to summarily deny a recommendation and to provide a tentative response would work against the purpose of the policy and harm persons who fail to respond through no fault of their own.

The Proposal provides that courts can "summarily deny a recommendation, including notification of the parties and an opportunity to request a status conference or hearing if either disagrees with the court's proposed summary disposition" (The Proposal, p. 2). This provision works entirely against the purpose of the policy to ensure that impacted persons are resentenced fairly and will undoubtedly result in unintended forfeitures. It is safe to assume that all impacted persons will want a recommended shorter sentence and will thus always object to summary denial.

The Proposal provides for a "court's tentative response, including notification of the parties and an opportunity to object and set the matter for a status conference or hearing" (The Proposal, p. 2). We believe a court's tentative response will harm impacted persons in the same manner as above and that it should be removed from the proposal.

B. Following a court's proposed summary disposition, counsel cannot reasonably consult with their client in prison and submit a request for a status conference or hearing within ten court days.

Under Rule 4.520(e)(4), "if no party requests a status conference or hearing within 10 court days, the summary disposition of the recommendation to recall a sentence resentence the defendant must be noted in a minute order" (p. 7). Ten court days is simply not enough time logistically for defense counsel to consult with their client in prison and to request a status conference or hearing. Some institutions will arrange phone calls while others will not, rendering U.S. mail the only method of attorney-client communication in many situations.

Moreover, a tentative response before both parties have had an opportunity to be heard is of limited use in any event.

C. Summary denial is highly problematic, and it is improbable to assume that notification to the defense counsel of record is adequate.

Under Rule 4.520(e)(2), a court intending to summarily deny a recommendation to recall a sentence and resentence an impacted person must notify the prosecuting agency and defense counsel of record

(p. 7). But defense counsel of record may no longer be practicing, no longer alive, or otherwise unavailable. Many of these cases were decided decades ago. Moreover, it cannot be remedied by specifying notice to a public defender when there are counties that lack this service. This reason alone should be sufficient to remove summary denial from the proposal.

D. Guidelines on status conferences and hearings should permit the impacted person to appear by phone or video conference and to so waive the right to personally appear.

Guidelines on status conferences will not require the impacted person to be present and the court will resentence the person in their absence with a knowing and intelligent waiver of the right to be present (The Proposal, p. 2). The impacted person should be permitted to appear by phone or video conference. In addition, persons should be authorized to orally waive the right to be personally present through phone or video call particularly since it is ideal for counsel to be discussing the waiver with the person prior to their consent. The requirement of a written, informed waiver would slow the process considerably.

Guidelines on hearings include a provision that the impacted person's presence may be waived (The Proposal, p. 2). The provision should only waive personal presence, as persons should be permitted to appear by phone or video conference.

E. The appointment of counsel may not be limited to persons whose recommendations meet specific conditions.

The committee only recommends the appointment of counsel for persons whose recommendations are based on equitable considerations and where the court does not summarily deny the recommendations and instead set a status conference or hearing (Alternatives Considered, p. 3). Since this is resentencing in a criminal case and *Gideon v. Wainwright*, 83 S.Ct. 792, 797 (1963) provides that indigent defendants must have the right to assistance of counsel, all those subject to 1170(d) resentencing have a constitutional right to counsel.

F. Rule 4.520 should not include the provision that courts may consider any factors that were present in the original sentencing.

Under Rule 4.520(h)(4)(A)-(B), the court may consider any factors that were present at the original sentencing, including whether consecutive sentences could have been imposed and the terms of a negotiated plea (pp. 3, 9). We request that the committee reconsider including this provision as it unduly highlights factors that mitigate against reduced sentences, thus working to thwart the legislative intent of recent amendments to section 1170(d).

G. The Council should encourage CDCR to permit impacted persons to bring their property with them to resentencing and coordinate with the local jail for the provision of gate money upon release.

The committee decided not to include a specialized removal order in order to minimize interference with a person's housing and programming in state prison (Alternatives Reconsidered, p. 3). We recommend that the Judicial Council urge CDCR to allow persons to take their property with them to resentencing and to arrange with the local jail for provision of gate money if the person is released from the jail.

H. Rules should be drafted with the assumption that impacted persons will object to summary denial and should not inevitably result in claims for waiver and forfeiture.

Under Rule 4.520(f)(1)(B), if there is an objection, then the matter must be set for a status conference or hearing (p. 8). We can assume that there is no reason for any person to concede a summary denial. The proposed summary denial rule will only result in claims for waiver and forfeiture, again working counter to the statute's purpose to shorten sentences.

I. The court should never be required to order a supplemental probation report.

Under Rule 4.520(i)(1), a supplemental probation report is not required for resentencing, but a report must be prepared if ordered by the court based on the request of either party or on the court's own motion (p. 10). But supplemental probation reports post-conviction progra lack any information on post-conviction conduct or community and reentry plans and instead focus on the crime and preexisting criminal records, essentially duplicating the the original probation report. Moreover, the preparation of supplemental probation reports will only cause further delays to the process. At most, a supplemental probation report should be permitted for the sole purpose of obtaining an up-to-date credit calculation, once the court has accepted a case for resentencing.

We appreciate your consideration. Please do not hesitate to contact us should you have any questions or concerns.

Sincerely,

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