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**Subject:** crpc on death penalty  
**Date:** Thursday, July 15, 2021 2:36:34 PM  
**Attachments:** [CRPC21-04 captial punishment.pdf](#)  
[CRPC AR2020 PC revision.pdf](#)

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ANNUAL REPORT AND RECOMMENDATIONS

# Committee on Revision of the Penal Code



# 2020

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**RECOMMENDATIONS**

<b>14</b> Eliminate Incarceration and Reduce Fines and Fees for Certain Traffic Offenses	<b>36</b> Provide Guidance for Judges Considering Sentence Enhancements	<b>56</b> Clarify Parole Suitability Standards to Focus on Risk of Future Violent or Serious Offenses
<b>19</b> Require that Short Prison Sentences Be Served in County Jails	<b>43</b> Limit Gang Enhancements to the Most Dangerous Offenses	<b>64</b> Establish Judicial Process for “Second Look” Resentencing
<b>26</b> End Mandatory Minimum Sentences for Nonviolent Offenses	<b>48</b> Retroactively Apply Repealed Sentence Enhancements	
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## Executive Summary

When the Legislature and Governor Gavin Newsom established the Committee on Revision of the Penal Code, California launched its first concerted effort in decades to thoroughly examine its criminal laws. The Legislature gave the Committee special data-gathering powers, directing it to study all aspects of criminal law and procedure and to make recommendations to “simplify and rationalize” the state’s Penal Code.

This is the Committee’s first report, and it details 10 reforms recommended unanimously by Committee members. Our recommendations span California’s entire criminal legal system, ranging from traffic court to parole consideration for people serving life sentences. If enacted, these reforms would impact almost every person involved in California’s criminal system and, we believe, measurably improve safety and justice throughout the state.

Our recommendations follow a year of studying California’s criminal punishments. We were guided by testimony from 56 expert witnesses, extensive public comment, staff research, and over 50 hours of public hearings and Committee deliberation. We believe the recommendations represent broad consensus among a wide array of stakeholders, including law enforcement, crime victims, civil rights leaders, and people directly impacted by the legal system. The report contains extensive support for each recommendation, including empirical research, experiences from other jurisdictions, and available data on California’s current approach to these issues.

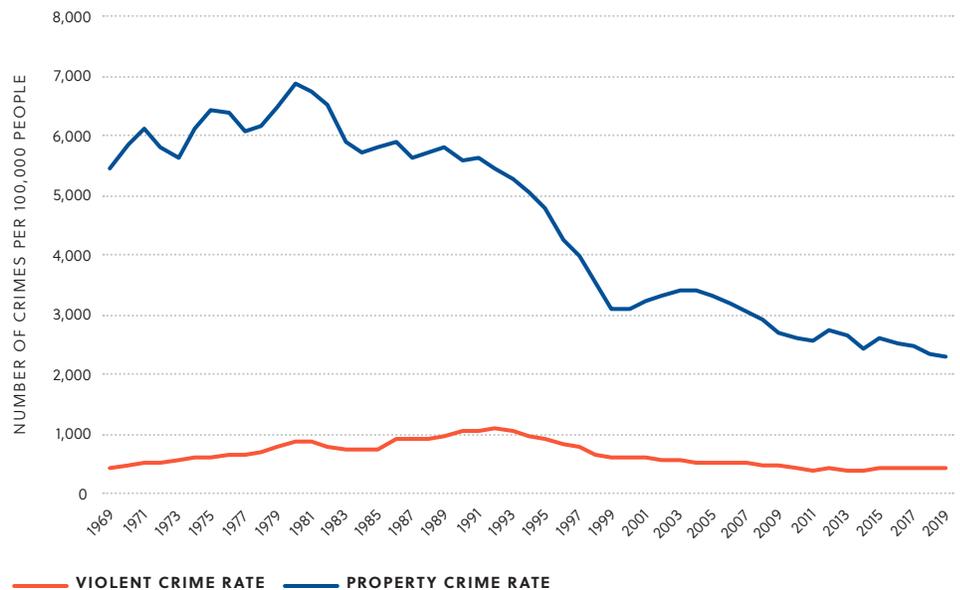
The recommendations are:

1. Eliminate incarceration and reduce fines and fees for certain traffic offenses.
2. Require that short prison sentences be served in county jails.
3. End mandatory minimum sentences for nonviolent offenses.
4. Establish that low-value thefts without serious injury or use of a weapon are misdemeanors.
5. Provide guidance for judges considering sentence enhancements.
6. Limit gang enhancements to the most dangerous offenses.
7. Retroactively apply sentence enhancements previously repealed by the Legislature.
8. Equalize custody credits for people who committed the same offenses, regardless of where or when they are incarcerated.
9. Clarify parole suitability standards to focus on risk of future violent or serious offenses.
10. Establish judicial process for “second look” resentencing.

## Introduction

According to the most recent data from the California Department of Justice, California has the lowest crime rates since comprehensive statewide statistics were first recorded in 1969.<sup>1</sup> This continues a 30-year trend of steadily decreasing crime rates.<sup>2</sup> At the same time, the state has enacted laws that markedly reduced the number of people incarcerated in its state prison system.<sup>3</sup> The Committee on the Revision of the Penal Code was established to rationalize and simplify California's criminal laws,<sup>4</sup> and we are committed to advancing policies that continue the state's course of improving public safety while simultaneously reducing unnecessary incarceration.

### CRIME RATES IN CALIFORNIA



Source: California Department of Justice, *Crime in California*, Table 1 (2019).

Despite the recent public safety accomplishments and reforms, aspects of California's criminal legal system are undeniably broken. California remains under numerous court rulings that our prisons and jails are unconstitutionally overcrowded. A decade ago, the United States Supreme Court affirmed that conditions within California's state prisons constitute cruel and unusual punishment.<sup>5</sup> That case remains unresolved and only exacerbated by the COVID-19 pandemic.<sup>6</sup>

Many law enforcement and judicial leaders appeared before the Committee this year to address these problems and offer solutions that continue to protect public safety.<sup>7</sup> Then-president of the District Attorneys Association, Nancy O'Malley of Alameda County, encouraged expanded programs for alternatives to incarceration, including for repeat offenders.<sup>8</sup> Santa Clara District Attorney Jeff Rosen suggested that all prison sentences could be cut by 20% across the board.<sup>9</sup> Former Governor and Attorney General Jerry Brown offered that all sentence enhancements could be eliminated and

<sup>1</sup> California Department of Justice, *Crime in California*, Table 1 (2019).

<sup>2</sup> Magnus Lofstrom and Brandon Martin, *Crime Trends in California*, Public Policy Institute of California (Oct. 2018).

<sup>3</sup> Magnus Lofstrom, Heather Harris, and Brandon Martin, *California's Future: Criminal Justice*, Public Policy Institute of California, 1-2 (Jan. 2020).

<sup>4</sup> Government Code § 8290.5(a).

<sup>5</sup> *Brown v. Plata*, 563 U.S. 493 (2011).

<sup>6</sup> "More than 4,400 of the state's 95,000 inmates currently have active infections." (Don Thompson, *California urged to move inmates to front of vaccine line*, Associated Press (Jan. 15, 2021).)

<sup>7</sup> Videos of all Committee meetings are available at CLRC website.

<sup>8</sup> Committee on Revision of the Penal Code, Meeting on Apr. 23, 2020, 1:10:38-1:13:10.

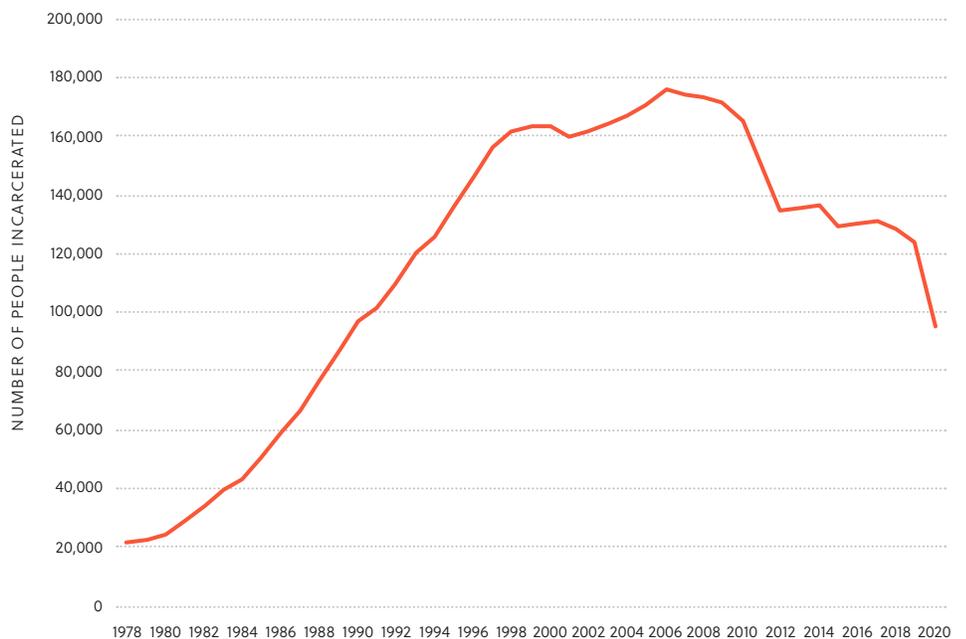
<sup>9</sup> Committee on Revision of the Penal Code, Meeting on Sep. 17, 2020, 1:24:14-1:24:50.

that more people should be granted parole.<sup>10</sup> Los Angeles District Attorney George Gascón questioned the rationale of sentences longer than 20 years.<sup>11</sup> Likewise, Superior Court Judge Richard Couzens told the Committee that it would be “fundamentally fair” to allow any person incarcerated for more than 15 years to seek a “second look” re-evaluation of his or her sentence.<sup>12</sup> And San Mateo County District Attorney Stephen Wagstaffe, another former president of the California District Attorneys Association, agreed that many criminal laws in California have lacked consistency or public safety justification.<sup>13</sup> As he explained to the Committee in October 2020, “[It’s] like the Winchester Mystery House. We just keep adding rooms. There’s no theme.”<sup>14</sup>

This testimony was supported by some of the nation’s leading criminologists who presented studies on the negative impact of extensive incarceration on long-term public safety, communities, families, and individuals.<sup>15</sup> The Committee also heard from University of California Professor Craig Haney, a national expert on criminal justice policy, who testified powerfully at the Committee’s inaugural meeting in January 2020 that mismanaged criminal justice policies have undermined the general wellbeing of all members of society by increasing racial and economic disadvantage.<sup>16</sup>

Governor Newsom acknowledged many of these issues when he addressed the Committee, noting “jaw-dropping” racial disparities in sentencing across the state. He encouraged us to address the “deep racial overlays and the deep socioeconomic overlays that often determine the fate of so many in our system.”<sup>17</sup>

**PRISON POPULATION IN CALIFORNIA**



10 *Id.* at 0:17:08–0:17:55.  
 11 Committee on Revision of the Penal Code, Meeting on Nov. 13, 2020, 0:7:52–0:11:15.  
 12 Committee on Revision of the Penal Code, Meeting on Nov. 12, 2020, 0:42:00–0:43:13.  
 13 Committee on Revision of the Penal Code, Meeting on Oct. 21, 2020, 0:4:23–0:5:33.  
 14 *Id.*  
 15 Committee on Revision of the Penal Code, Meeting on Jun. 24, 2020; Committee on Revision of the Penal Code, Meeting on Jul. 23, 2020.  
 16 Committee on Revision of the Penal Code, Meeting on Jan. 24, 2020, 1:02:04–1:03:07.  
 17 *Id.* at 0:1:12–0:2:00. See also United States Department of Justice, *One Year After Launching Key Sentencing Reforms, Attorney General Holder Announces First Drop in Federal Prison Population in More Than Three Decades* (Sep. 23, 2014) (“High incarceration rates and longer than necessary prison sentences have not played a significant role in materially improving public safety, reducing crime, or strengthening communities. In fact, the opposite is often true.”); Brian Earp, Jonathan Lewis, and Carl Hart, *Racial Justice Requires Ending the War on Drugs*, *The American Journal of Bioethics*, 1 (2020).

Source: US Department of Justice, Bureau of Justice Statistics; CDCR Office of Research.

This past year has made these issues impossible to ignore. The killing of George Floyd last summer once again brought national attention to a truth that many involved in the criminal legal system know: The current system has deep racial inequity at its core. New data published for the first time in this report reveals that racial disparities may be even worse than many imagined. Data obtained by the Committee for this report confirms people of color are disproportionately punished under state laws – from traffic infractions to serious and violent felonies. In addition, the COVID-19 pandemic spotlighted the inadequate medical care and poor conditions within state prisons, including the root cause of overcrowding.

California’s criminal system is also extraordinarily expensive. The 2021-22 state budget for corrections is \$16 billion, the large majority of which funds California Department of Corrections and Rehabilitation operations.<sup>18</sup> This figure does not include expenditures for county jails. California’s Director of Finance Keely Bosler appeared before the Committee in July 2020 and testified that it costs California around \$83,000 per year to house a person in prison.<sup>19</sup> The Committee also heard from the president of Crime Victims United, Nina Salarno Besselman, who emphasized when she appeared before the Committee in October 2020 that the state’s fiscal expenditures do not include sometimes immeasurable costs to crime victims and communities. Nor does the state prison budget address the cost to individuals and families otherwise impacted by the system. We heard several stories of people who were incarcerated far longer than necessary and who are now successful community members and leaders.

Lived experiences in California, newly available data, and peer-reviewed empirical research prove that our mission to maintain or improve public safety while simultaneously reducing unnecessary incarceration is possible and necessary.

In 2020, the Committee studied every level of California’s system over eight public meetings, many of them two-day affairs. We heard from 56 witnesses, including Governor Newsom, former Governor Brown, Attorney General Xavier Becerra, and stakeholders from across California. Every major state law enforcement group contributed to the Committee’s work and research, as did public defenders, victims’ advocates, formerly incarcerated individuals, and other system-impacted people, including one person who joined a Committee meeting by video from behind prison walls.

The Committee also welcomed and heard extensive public comment at each meeting. Committee staff consulted with dozens of scholars, data analysts, and other experts from California and around the country, to whom we are grateful for their expertise and advice.

Throughout our review, the Committee discovered laws that were badly outdated, incoherent, unsupported by data, and frequently implemented harsh punishments without purpose or evidence of advancement of public safety. For example, California’s robbery law—covering one of the most common crimes in California—has been unchanged since 1872 and sweeps broadly, lumping serious and violent conduct with petty thefts.<sup>20</sup> The state standard for determining who to release on parole also involves statutory provisions and regulations that are inconsistent with each other.<sup>21</sup>

<sup>18</sup> Governor’s Proposed Budget, 2021-22, California Department of Finance, available at State of California website.

<sup>19</sup> Committee on Revision of the Penal Code, Meeting on Jul. 23, 2020, 0:9:25–0:9:43.

<sup>20</sup> Penal Code § 211.

<sup>21</sup> Penal Code § 3041(a)(2), (b)(1); 15 CCR § 2281(a).

The 10 recommendations in this report begin to address some of the most obvious problems that the Committee found and indicate where we believe there is widespread, multi-partisan support for reform. We were steered as much as possible by available data and empirical research. This report benefits from dozens of peer-reviewed studies and original research by Committee staff and partners. We also sought out reforms that would have as broad an impact as possible with general consensus across interest groups, keeping in mind the twin goals of improving public safety and creating a more humane system.

Although our recommendations are not a one-dose panacea and will not cure the deep, systemic problems with California's criminal legal system, the recommendations in this report represent a significant start to making our system more fair, more effective in terms of protecting public safety, less racist, and less wasteful.

Of course, these recommendations are not self-executing. It is only with partnerships from the Governor, the Legislature, state agencies, and county decision-makers that any of these recommendations will make a difference. And the Committee is not naive: The issues that are addressed every day in the criminal legal system are some of the most profound and perplexing in human experience. They arouse strong passion on every side.

The Committee also worked under a self-imposed limitation for this first year with a decision to not recommend any reform that would require a voter initiative or two-thirds vote in the Legislature in order to be enacted. This meant that some of the most important issues in California's criminal legal system and laws that impacted the largest number of people – such as the Three Strikes law, life-without-parole sentences, and the death penalty – were not part of our consideration this year.

This is not the first time that California has attempted a comprehensive review of its criminal laws. In 1963, the Legislature established the Joint Legislative Committee for the Revision of the Penal Code. According to that Committee's initial report to then-Governor Ronald Reagan, its mission was to address the "inadequacies of a code which has never undergone basic, comprehensive revision since its adoption almost a century ago."<sup>22</sup> That same year, the Chief Justice of the California Supreme Court remarked that "although we are far along in the twentieth century, our Penal Code in many respects has scarcely entered it."<sup>23</sup> Members of that Committee consulted with experts, examined available data, and collaborated with colleagues from other states. Then, after six years of deliberation and study, the Committee unexpectedly and abruptly abandoned all its work and laid off its staff in 1969. None of its reforms were adopted.<sup>24</sup>

It has now been almost 160 years since the Penal Code has undergone comprehensive revision. Since 1963, the scope of the system, the extremity of the sentences it metes out, and society's conception of the proper response to criminal offending have all changed. But one thing has remained the same: the need for a rational Penal Code that supports a criminal system that maximizes public safety, treats everyone fairly, and helps to improve communities and lives throughout the state.

We believe the reforms recommended in this report make important strides toward achieving those goals.

<sup>22</sup> California Joint Legislative Committee for the Revision of the Penal Code, *Penal Code Revision Project, 1967 Report*, 7 (1967).

<sup>23</sup> Quoting an address given by Chief Justice of the Supreme Court of California Phil S. Gibson on Sep. 25, 1963. (Arthur H. Sherry, *Criminal Law Revision in California*, 4 University of Michigan J. L. Reform 429, 429 (1971).)

<sup>24</sup> "Criminal law revision had no champion in California. When the first gleam of publicity disclosed that the Penal Code Revision Project was well on the road to basic and serious law reform, no one spoke for it; it fell an easy prey to the defenders of the status quo." (*id.* at 432, 442.)

## Prefatory Notes

### PUBLIC SAFETY

Public safety and furtherance of justice are twin goals of any justice system. The Committee is well aware of the great strides California has made in improving crime rates over the past 30 years. Our recommendations are designed to maintain or improve that trend, relying on the most current empirical research and data.

We incorporated key findings from researchers who have studied incarceration trends, both nationally and in California, and the effects on crime rates and recidivism.

We also relied on expertise from law enforcement leaders, including several elected district attorneys, representatives from the California State Sheriffs' Association, the California Police Chiefs Association, the Chief Probation Officers of California, the California Department of Corrections and Rehabilitation, the California Board of Parole Hearings, and the California Correctional Peace Officers Association.

As also noted, crime rates in California began dropping in the 1990s, which is a significant accomplishment. That drop did not stop when the prison population began to decrease after 2006, including in the last decade when California enacted an ambitious agenda of reforms.<sup>25</sup> And while the Committee is not ignorant of the spike in homicides in 2020,<sup>26</sup> crime continues to be at historic lows.<sup>27</sup> The law enforcement representatives who appeared before the Committee this year generally supported the Committee's mission of continuing to both improve public safety and eliminating unnecessary incarceration.

This report also benefits from valuable input from members of the California judiciary, victims' rights organizations, defense attorneys, formerly incarcerated and other system-impacted people, academics, and additional community and interest-group advocates. We believe there are wide areas of common ground – evidenced by empirical research – supporting reforms that improve public safety and reduce wasteful incarceration at the same time.

<sup>25</sup> See Written Submission of Legislative Analyst's Office to Committee on Revision of the Penal Code, Jun. 24, 2020, available at CLRC website.

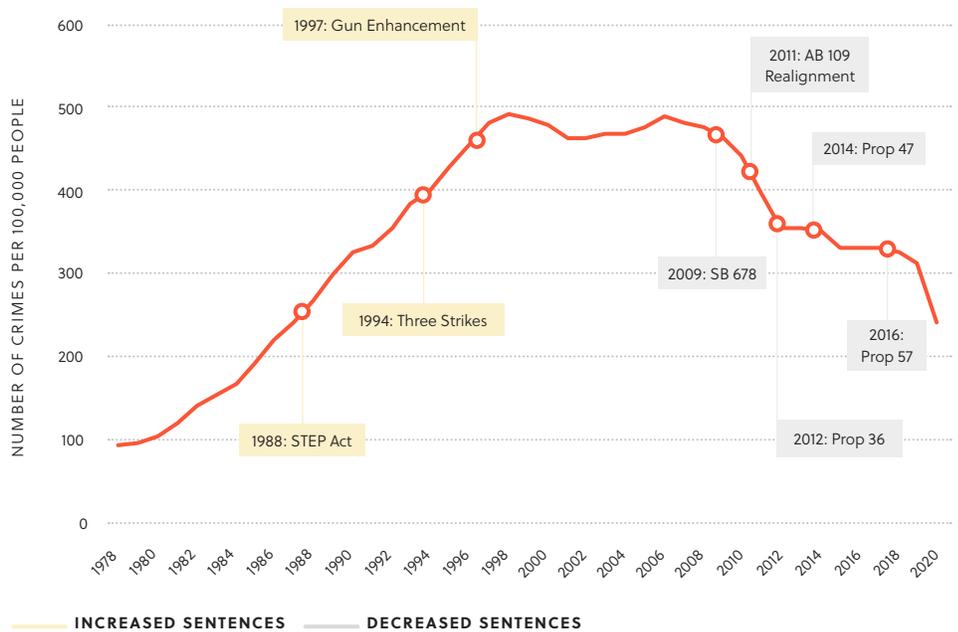
<sup>26</sup> See, e.g., Kevin Rector, *L.A. Hits 300 Homicides for first time in a decade*, Los Angeles Times (Nov. 22, 2020).

<sup>27</sup> Mike Males, *California's 2019 Crime Rate is the Lowest in Recorded State History*, Center on Juvenile and Criminal Justice (Sep. 2020).

### INCARCERATION TRENDS

Starting in the 1970s, the rate of incarceration began to rapidly increase in an unprecedented manner, both nationally and in California.<sup>28</sup> Between 1990 and 2009, the average length of stay for people sent to prison in California increased by 51%.<sup>29</sup>

### PRISON INCARCERATION RATE IN CALIFORNIA



28 National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, Washington, DC: The National Academies Press, 34–37 (2014).

29 *Time Served: The High Cost, Low Return of Longer Prison Terms*, The Pew Center on the States (2012).

30 CDCR Office of Research, *Offender Data Points — Offender Demographics for the 24-Month Period Ending June 2019*, Table 3.3 (Oct. 2020).

31 Board of State and Community Corrections, *Jail Population Dashboard*.

32 CDCR Office of Research, *Offender Data Points — Offender Demographics for The 24-Month Period Ending June 2019*, Figure 1.2 (Oct. 2020).

33 Legislative Analyst’s Office, *How Many Prison Inmates Are There in California?* (last updated January 2019).

34 Committee on Revision of the Penal Code, Meeting on Jan. 24, 2020, 0:35:07–0:36:10; Steven Raphael and Michael A. Stoll, *Why Are So Many Americans in Prison?*, 233 (May 2013); State of *Recidivism: The Revolving Door of America’s Prisons*, The Pew Center on the States, 10–11 (2011).

35 *Id.* “[L]engthier terms of incarceration, beyond a few months, do not readily appear to reduce recidivism and, indeed, may increase it.” (Daniel Mears, Joshua Cochran, William Bales, et al., *Recidivism and Time Served in Prison*, *The Journal of Criminal Law and Criminology*, 122 (2016).)

36 Robert Weisberg, Debbie Mukamal, and Jordan Segall, *Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California*, Stanford Law School Criminal Justice Center, 17 (2011).

37 *Id.* “[A]mong young adults who served more than three years in prison, longer prison stays were associated with increasing probabilities for recidivism.” (Daniel Mears, Joshua Cochran, William Bales, et al., *Recidivism and Time Served in Prison*, *The Journal of Criminal Law and Criminology*, 121 (2016).)

38 Steven Raphael and Michael A. Stoll, *Why Are So Many Americans in Prison?*, 233 (May 2013).

Source: U.S. Department of Justice, Bureau of Justice Statistics.

In 2019, a total of 35,390 people were sentenced to state prison<sup>30</sup> and over 900,000 were booked into county jails.<sup>31</sup>

California’s prison population boom began in 1976 with the enactment of the Determinate Sentencing Law, followed by the Street Terrorism and Enforcement Act of 1988 and the Three Strikes law in 1994.<sup>32</sup> California’s prison population more than tripled from about 50,000 inmates in 1985 to a peak of 173,000 inmates in 2006.<sup>33</sup> At the same time, California’s prison recidivism rate was the second worst in the nation.<sup>34</sup>

Researchers have found that lengthy sentences and high rates of incarceration have diminishing returns in reducing crime rates.<sup>35</sup> This is partly because people largely “age out of crime.”<sup>36</sup> The majority of violent crimes are committed by those less than 30 years old, and criminal involvement diminishes dramatically after age 40 and even more after age 50.<sup>37</sup> As University of California Professor Steven Raphael testified before the Committee in June 2020, the nationwide explosion in incarceration from 1989 to 2010 “had no measurable impact on overall violent crime rates.”<sup>38</sup>

### COUNTY JAIL AVERAGE DAILY POPULATION IN CALIFORNIA



Source: California Board of State and Community Corrections.

In recent years, California voters have embraced reforms to reduce California's prison population. Beginning in 2012, voters returned to the polls every two years, overwhelmingly passing ballot measures that reformed California's Three Strikes law (Proposition 36), punishments for nonviolent offenses (Proposition 47), drug laws (Proposition 64), and prison administration (Proposition 57).<sup>39</sup> These reforms built on the Legislature's intervention to alleviate prison crowding in response to federal lawsuits.<sup>40</sup> Today, according to one survey, even most crime victims in California support further reforms to the state's criminal legal system – including 75% of victims favoring reducing sentence lengths for people in prison who are assessed as a low risk to public safety.<sup>41</sup>

39 See Written Submission of Legislative Analyst's Office to Committee on Revision of the Penal Code, 1–2 (Jun. 24, 2020), available at CLRC website.

40 *Id.* at 1.

41 "[V]ictims support alternatives to incarceration for people with mental illness in the criminal justice system and support replacing lengthy mandatory sentences with increased judicial discretion, including for people convicted of serious or violent crime that are a low risk to public safety. The survey found that victims of violent crime and serious violent crime are just as likely to support these new safety solutions as victims of lesser crimes." (*California Crime Survivors Speak, Crime Survivors for Safety and Justice and Californians for Safety and Justice*, 1–2 (2019).)

42 Generated using the Corrections Statistical Analysis Tool (CSAT), available at Bureau of Justice Statistics website.

43 The average daily population of California jails in September 2020 was 57,768; in February 2020, it was 70,841. (Board of State and Community Corrections, Jail Population Dashboard.)

44 California Department of Corrections and Rehabilitation, *Weekly Report of Population* (as of Dec. 31, 2020, midnight), available at CDCR website.

45 California prisons held 173,000 people in 2006. (Legislative Analyst's Office, *How Many Prison Inmates Are There in California?* (last updated January 2019).)

46 "California's prisons are designed to house a population just under 80,000..." (*Brown v. Plata*, 563 U.S. 493, 502 (2011).)

47 *Governor's Budget Summary, 2021–22*, 173 (Jan. 2021).

48 Committee on Revision of the Penal Code, Meeting on Jan. 24, 2020, 0:52:43–0:55:04, 0:47:10–0:51:16.

From its height in 2006, California's prison population dropped by 27%.<sup>42</sup> In 2020, following emergency measures aimed at curtailing the COVID-19 pandemic, California's state prison and jail populations declined even further.<sup>43</sup> As of December 31, 2020, California's prison population was at a 30-year low of 95,456 people.<sup>44</sup> This is 45% below the prison population in 2006<sup>45</sup> but still significantly above the state prison's intended capacity.<sup>46</sup> And because some of the recent decrease in prison population was caused by pausing intake from county jails, the prison population will likely increase once intake resumes.<sup>47</sup>

Despite these reforms, and California's sustained decrease in crime rates, people of color – Black men in particular – and people with mental health issues continue to be incarcerated disproportionately.<sup>48</sup> The Committee is committed to addressing these deep rooted systemic problems. There is no reason California cannot maintain historically low crime rates while correcting glaring racial inequities in our criminal justice system.

## DATA COLLECTION AND ANALYSIS

One of the Committee’s most important objectives is the development of an aggregated collection of administrative data related to the criminal legal system. If there was one issue that found unanimous agreement across all stakeholders, it was that the state’s criminal legal policy should be based on empirical evidence.

We agree wholeheartedly with Attorney General Becerra, who appeared before the Committee in October 2020 and advised that “data should be the base of where we launch.”<sup>49</sup> Other law enforcement and related agencies, including the California Police Chiefs Association, the Chief Probation Officers of California, and the California State Sheriffs’ Association, agreed that research – particularly into the last decade of reform in California – is essential.<sup>50</sup> Judges from the Judicial Council, prosecutors, defense lawyers, and community activists all echoed that sentiment.<sup>51</sup>

Despite such widespread support for data research and empirical analysis, such information is not readily available.<sup>52</sup> California’s criminal justice data is spread across the records of various state and local agencies, including the California Department of Corrections and Rehabilitation, the California Department of Justice, and the courts, sheriffs, prosecutors, and probation departments of California’s 58 counties. California is not alone in this respect. We are aware of no other jurisdiction in the United States with a comprehensive collection of its criminal justice data.<sup>53</sup>

We are committed to addressing this issue. The Committee was granted special broad authority to gather data and to address the problems of incomplete and fragmented data. The Committee’s enabling statute provides in part that “[a]ll state agencies, and other official state organizations, and all persons connected therewith shall give the ... Committee full information, and reasonable assistance in any matters of research requiring recourse to them, or to data within their knowledge or control.”<sup>54</sup>

With this authority, the Committee has begun the process of gathering the various agency datasets. We have partnered with data analysts and security experts to ensure our research is sound and that confidential state data is protected by the highest security protocols. We also received generous philanthropic support to establish a long-term relationship with the California Policy Lab, a policy-focused research lab at University of California, Berkeley, and University of California, Los Angeles, to assist with collecting, analyzing, and understanding the data that the Committee collects.

## A NOTE ON “VIOLENT,” “NONVIOLENT,” AND “SERIOUS” OFFENSES

Many of the Committee’s recommendations distinguish between how people convicted of violent, serious, and nonviolent offenses should be treated. These distinctions are important because so much of California’s criminal law turns on the definitions of these terms, and recommendations that did not grapple with them would be ignoring the reality of how cases are charged and prosecuted. While these terms can often be subjective, we recognize that the Legislature has created discrete lists of “serious” and “violent” felonies,<sup>55</sup> and this report relies on those statutory definitions. Crimes that do not appear on the list of violent offenses are considered “nonviolent.”

49 Committee on Revision of the Penal Code, Meeting on Oct. 21, 2020, 0:16:17–0:16:20.

50 Written Submission of Lassen County Sheriff Dean Growdon, First Vice President of the California State Sheriffs’ Association to Committee on Revision of the Penal Code, 1 (Oct. 21, 2020); Written Submission of Chief Probation Officers of California to Committee on Revision of the Penal Code, 4 (Oct. 21, 2020); Written Submission of Chief Eric Nuñez (Los Alamitos), President of California Police Chiefs Association to Committee on Revision of the Penal Code, 3–4 (Oct. 21, 2020).

51 Judge Richard Vlavianos, Committee on Revision of the Penal Code, Meeting on Apr. 23, 2020, 0:38:10–0:38:55; District Attorney Nancy O’Malley, Committee on Revision of the Penal Code, Meeting on Apr. 23, 2020, 1:55:15–1:56:45.

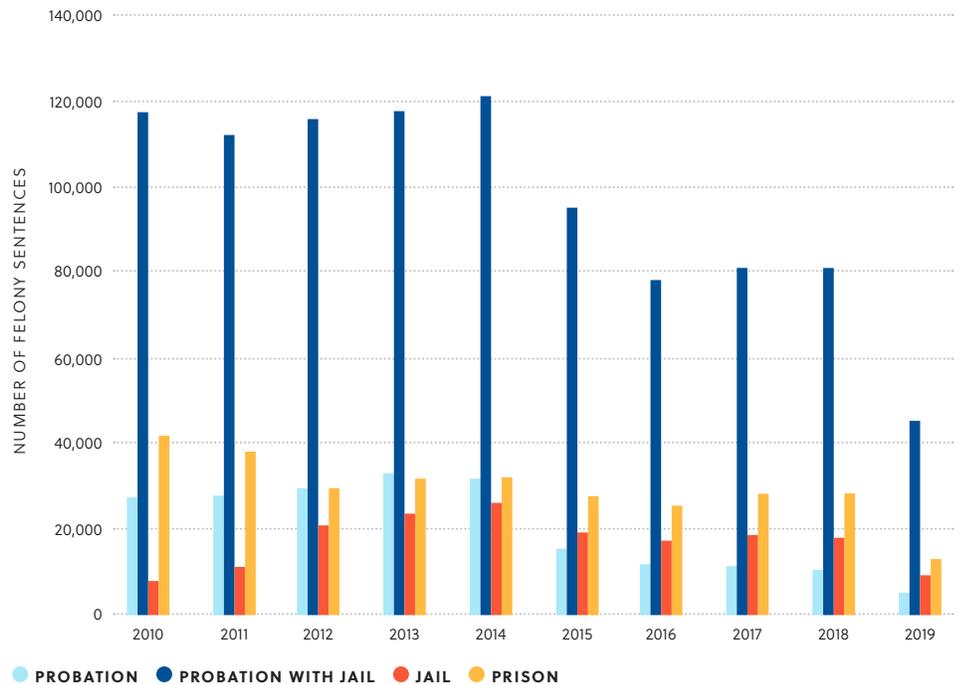
52 See Mikaela Rabinowitz, Robert Weisberg, and Jessica McQueen Pearce, *The California Criminal Justice Data Gap*, Stanford Criminal Justice Center (2019).

53 See, e.g., Matt Ford, *The Missing Statistics of Criminal Justice*, The Atlantic (May 31, 2015); Bill Wichert, *NJ Criminal Justice Data Law Could Spur Reforms Elsewhere*, Law360 (Nov. 15, 2020).

54 Government Code § 8286.

55 Penal Code § 11927(c); Penal Code § 6675(c).

## FELONY SENTENCES BY TYPE OF PUNISHMENT IN CALIFORNIA



Source: California Department of Justice, *Crime in California*, Table 38B (2014); California Department of Justice, *Crime in California*, Table 38A (2019).

For important reasons, violent crimes receive a significant amount of public and political attention. However, it is also true that the vast majority of arrests in California (about 90%) are for misdemeanors and nonviolent felonies.<sup>56</sup> Over 80% of people facing felony charges in California receive a sentence of jail, probation, or a combination of the two.<sup>57</sup> Less than 20% of all felony charges result in prison sentences.<sup>58</sup>

We acknowledge that there is a growing consensus that a rigid distinction between violent and nonviolent offenses may be counterproductive.<sup>59</sup> For example, across the country, people convicted of violent offenses often have lower recidivism rates than people convicted of nonviolent ones.<sup>60</sup> In California, the three-year reconviction rate for people committed to prison for a non-serious/nonviolent offense was 51%.<sup>61</sup> For people committed to prison with a violent offense, it was 29%.<sup>62</sup> Some of this apparent paradox is likely explained by long sentences imposed for violent crimes, which result in older parolees who are less likely to commit new crimes upon release. At the same time, nonviolent crimes are often associated with poverty, addiction, and homelessness — which are rarely cured by incarceration.

While the Committee is not calling for abolishing the distinction between violent and nonviolent offenses, many of its recommendations are informed by this research and call for considering the totality of a person's background and offense, not merely letting an offense's statutory classification be a definitive statement on what rehabilitative responses are appropriate.

<sup>56</sup> California Department of Justice, *Crime in California 2019*, Tables 23–25 (Jul. 2020).

<sup>57</sup> *Id.* at Table 38A. The California Department of Justice notes without further explanation that in 2019 “there was a decrease in the number of final dispositions and sentences for felony adult arrests reported to the California Department of Justice.” (*Id.* at Note b.)

<sup>58</sup> *Id.*

<sup>59</sup> See James Austin, Vincent Schiraldi, Bruce Western, and Anamika Dwivedi, *Reconsidering the “Violent Offender,”* The Square One Project (May 2019).

<sup>60</sup> *Id.* at Table 4.

<sup>61</sup> CDCR Office of Research, *Appendix to the Recidivism Report for Offenders Released from the California Department of Corrections and Rehabilitation in Fiscal Year 2014–15*, Figure 8, Table 12 (Jan. 2020).

<sup>62</sup> *Id.*; Research shows that people who have committed violent offenses are often the victims of other violent offenses. (James Austin, Vincent Schiraldi, Bruce Western, and Anamika Dwivedi, *Reconsidering the “Violent Offender,”* The Square One Project (May 2019).)

### THREE-YEAR RECIDIVISM OUTCOMES FOR PEOPLE RELEASED FROM PRISON IN CALIFORNIA (2014-15)

TYPE OF RECONVICTION	NUMBER OF RELEASED PEOPLE CONVICTED OF NEW OFFENSES	% OF TOTAL PEOPLE RELEASED
Felonies Against Persons	2,788	7%
Other Felony Offenses	5,891	15%
Misdemeanors	9,556	24%
<b>TOTAL RECIDIVISM</b>	<b>18,235</b>	<b>46%</b>

Source: CDCR Office of Research, *Recidivism Report for Offenders Released from the California Department of Corrections and Rehabilitation in Fiscal Year 2014–15*, Table 1 (Jan. 2020).

Recidivism is also an important and often misunderstood term of criminal law. While prisons and jails should do as much as possible to encourage rehabilitation and reduce recidivism, we note that only 7% of people released from prison committed subsequent felony crimes against persons.<sup>63</sup> The remaining 93% committed misdemeanors, nonviolent felonies, or no crime at all.

### LANGUAGE USED THROUGHOUT THIS REPORT

This report avoids using the term “inmate,” “prisoner,” or “offender.”<sup>64</sup> Instead, the report uses “incarcerated person” and similar “person-first” language. Other official bodies have made similar choices about language,<sup>65</sup> and the Committee encourages stakeholders – including the Legislature when drafting legislation – to consider doing the same.

<sup>63</sup> CDCR Office of Research, *Recidivism Report for Offenders Released from the California Department of Corrections and Rehabilitation in Fiscal Year 2014–15*, Table 1 (Jan. 2020).

<sup>64</sup> See Nguyen Toan Tran, et al., *Words Matter: A Call for Humanizing and Respectful Language to Describe People Who Experience Incarceration*, BMC International Health and Human Rights, 18, 41 (2018).

<sup>65</sup> Nancy G. LaVigne, *People First: Changing the Way We Talk About Those Touched by the Criminal Justice System*, Urban Institute (Apr. 4, 2016); John E. Wetzl, *Pennsylvania Dept. of Corrections to Discard Terms ‘Offender,’ ‘Felon’ in Describing Ex-prisoners*, Washington Post (May 26, 2016); Karol Mason, *Guest Post: Justice Dept. Agency to Alter Its Terminology for Released Convicts, to Ease Reentry*, Washington Post (May 4, 2016); Morgan Godwin and Charlotte West, *The Words Journalists Use Often Reduce Humans to the Crimes They Commit. But That’s Changing*, Poynter (Jan. 4, 2021).

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# 1. Eliminate Incarceration and Reduce Fines and Fees for Certain Traffic Offenses

## Eliminate Incarceration and Reduce Fines and Fees for Certain Traffic Offenses

### RECOMMENDATION

Two common traffic offenses – driving without a license and driving with a license suspended for failure to pay a fine or appear in court – can be punished as misdemeanors and carry significant fines, even though they have little relation to unsafe driving.

The Committee therefore recommends the following:

1. Eliminate misdemeanor charging for (a) driving without a license and (b) driving with a license suspended for failure to pay a fine or appear in court. These offenses should be mandatory infractions.
2. Reduce fines and fees for these offenses.
3. Reduce DMV “points” for these offenses to zero.

### RELEVANT STATUTES

Penal Code § 19.8

Vehicle Code §§ 12500, 12810, 14601.1

### BACKGROUND AND ANALYSIS

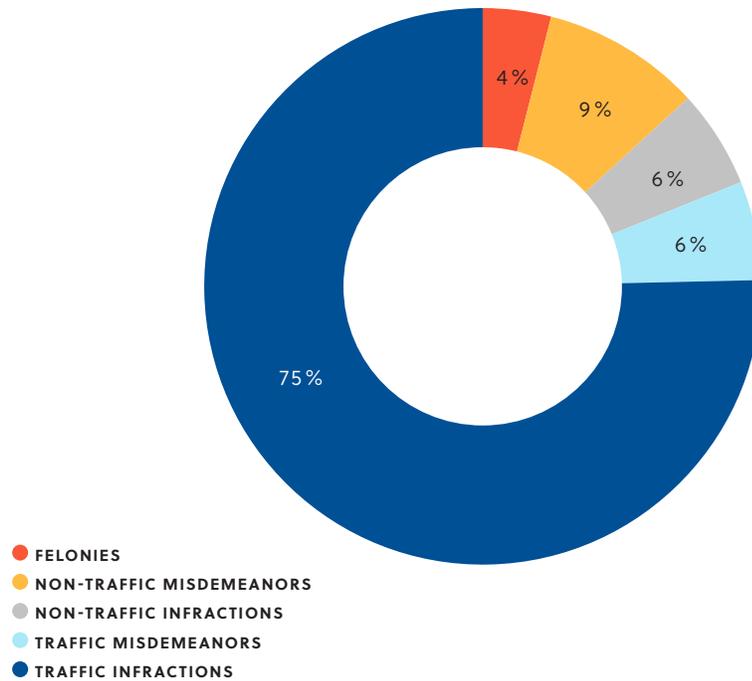
Under current law, people can be convicted of misdemeanors and incarcerated for driving without a license or driving with a license suspended for failure to pay a fine or appear in court.<sup>66</sup> These offenses are primarily financial in nature and are not connected to unsafe driving. Data also indicates that Black and Latinx motorists are disproportionately arrested for these offenses despite there being no documented difference in driving behavior.<sup>67</sup> The Committee recommends that they be considered infractions only and that no one should be incarcerated for them.

These cases make up a large portion of all criminal filings in California and consume considerable resources among police, courts, prosecution and defense offices, and county jails. In fact, the vast majority of all criminal filings in California are traffic cases – more than 81% or 3.6 million filings a year.<sup>68</sup>

<sup>66</sup> “[E]very offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars (\$1,000), or by both.” (Penal Code § 19; Vehicle Code §§ 14601.1(b)(1)–(2), 40000.11(b).)

<sup>67</sup> *Stopped, Fined, Arrested, Back on the Road California*, 1, 21 (Apr. 2016); John Macdonald & Steven Raphael, *An Analysis of Racial/Ethnic Disparities in Stops by Los Angeles County Sheriff’s Deputies in the Antelope Valley: Report Period: January–June 2019*, xi (Sep. 2020).

<sup>68</sup> Judicial Council of California, *Court Statistics Report, Statewide Caseload Trends, 2009–10 through 2018–19*, 124–25, Table 7a.

**BREAKDOWN OF CRIMINAL FILINGS IN CALIFORNIA (2018-19)**

Source: Judicial Council of California, Court Statistics Report, Statewide Caseload Trends, 2009–10 through 2018–19, 134–35 (Table 7a).

Annually, almost 260,000 traffic offenses are charged as misdemeanors,<sup>69</sup> and the people arrested and jailed for these offenses are disproportionately people of color.<sup>70</sup> Additional data confirms that license suspensions for failure to appear are correlated with high poverty rates and race, with the highest rates of suspensions in poorer neighborhoods with a high percentage of Black and Latinx residents.<sup>71</sup>

According to data provided to the Committee from the California Department of Motor Vehicles, approximately 600,000 people currently have their licenses suspended solely for failure to appear in court.<sup>72</sup>

The number of prosecutions for driving without a license and driving on a suspended license is also large. In Los Angeles County, between 2010 and 2019, there were more than 180,000 charges for driving without a license and more than 92,000 charges filed for driving on a license suspended for failure to appear or pay a fine.<sup>73</sup>

<sup>69</sup> This data is from the Judicial Council's Statewide Caseload Trend reports. See, e.g., Judicial Council of California, Court Statistics Report, Statewide Caseload Trends, 2009–10 through 2018–19, 134–35, Table 7a.

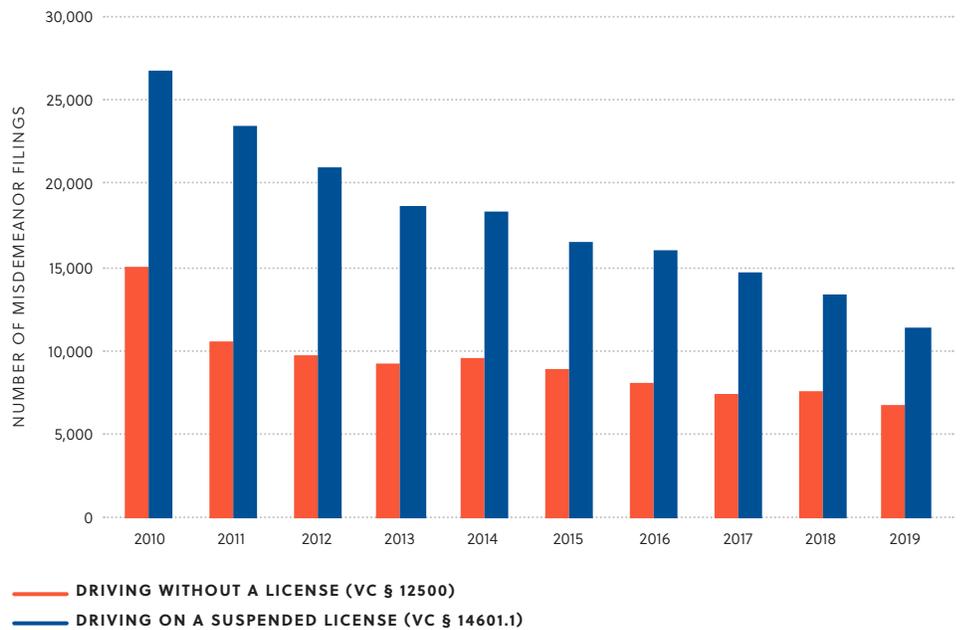
<sup>70</sup> Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California, Back on the Road California, 4–20 (Apr. 2016); California Department of Justice, Racial and Identity Profiling Advisory Board 2021 Annual Report.

<sup>71</sup> Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California, Back on the Road California, 1, 9 (Apr. 2016).

<sup>72</sup> Data provided by California Department of Motor Vehicles (Jan. 2021).

<sup>73</sup> This information was provided by the Los Angeles County Public Defender's Office.

## MISDEMEANOR TRAFFIC FILINGS IN LOS ANGELES COUNTY



Source: Source: Los Angeles County Public Defender.

74 Commission on the Future of California's Court System, Report to the Chief Justice, 58 (2017).

75 American Association of Motor Vehicle Administrators, *Reducing Suspended Drivers and Alternative Reinstatement: Best Practices*, 3 (Nov. 2018).

76 Committee on Revision of the Penal Code, Meeting on Oct. 21, 2020, 0:6:28–0:7:18.

77 Los Angeles County District Attorney Special Directive 20-07, 2-3 (effective Dec. 8, 2020); Santa Clara County District Attorney, Bend the Arc Reforms, 9 (Jul. 22, 2020) (noting disproportionate impact that this offense has on people of color); Memorandum from M.C. Molidor, Jose Egurbide, and Robert Cha, Re: Update to the Los Angeles City Attorney Filing Guidelines for Direct Citations — Changes Re: Vehicle Code Section 14601.1(a) (Feb. 22, 2020).

78 "In 2018, the San Francisco Court also formalized a policy stopping the suspension of driver's licenses for missing a traffic court date, or Failure to Appear (FTA)." (*Driving Toward Justice*, San Francisco Financial Justice Project, 1 (Apr. 2020)).

79 Vehicle Code § 14601.1.

80 Vehicle Code § 12500.

81 Penal Code § 19.8(a) (listing Vehicle Code § 12500 (driving without a license) and Vehicle Code § 14601.1 (driving on suspended license) as "subject to subdivision (d) of Section 17"); Penal Code § 17(d) (allowing the offenses in § 19.8(a) to be filed as infractions). A court may also reduce these misdemeanors to infractions with the defendant's consent. (Penal Code § 17(d)(2).)

82 See, e.g., Vehicle Code § 14601.8 (allowing judge to permit "weekend jail" for people convicted under § 14601.1).

83 Via thirteen different code provisions, an infraction with a base fine of \$100 ends up costing \$815 once an initial deadline to pay is missed. (*Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California*, Back on the Road California, 23 (Apr. 2016).)

84 Vehicle Code § 12810 (specifying "point violation count"); *Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California*, Back on the Road California, 22 (Apr. 2016); Vehicle Code § 12810(b) & (e). See also DMV, California Department of Motor Vehicles, *DMV Point System in California*, available at DMV website.

In 2017, California's Commission on the Future of California's Court System, convened by Chief Justice Tani Cantil-Sakauye, recommended that minor traffic court cases be handled entirely in civil court and not as criminal proceedings.<sup>74</sup> Likewise, the American Association of Motor Vehicle Administrators has long opposed suspending licenses for reasons unrelated to safety.<sup>75</sup> More generally, Attorney General Becerra told the Committee at its October 2020 meeting that "the fewer times we have to go to the justice system to deal with people on a criminal ground, the better off we'll always be."<sup>76</sup>

In recognition of some of these issues, three large prosecutor's offices in California — the Santa Clara County District Attorney, the Los Angeles City Attorney, and the Los Angeles County District Attorney — have exercised their discretion to either decline filing charges in these cases or to always file them as infractions.<sup>77</sup> San Francisco does not suspend licenses for people who fail to appear for traffic court dates.<sup>78</sup>

Although there is little relationship between unsafe driving and the two traffic misdemeanors at issue here — driving on a license suspended for failure to pay a fine or appear in court<sup>79</sup> and driving without a license<sup>80</sup> — prosecutors currently have the discretion to charge these offenses as misdemeanors.<sup>81</sup> Therefore, not only can people can be arrested and jailed,<sup>82</sup> but fines and fees can also be exorbitant.<sup>83</sup> In addition, a conviction for driving on a suspended license adds two "points" on the person's license — the same consequence as driving under the influence of drugs or alcohol.<sup>84</sup>

California has taken recent steps to address the inequities inherent in some license suspensions, but it is unknown how many people still have misdemeanor charges pending despite these reforms.<sup>85</sup>

In addition, California has some of the county's highest court costs and penalty fees for vehicle infractions.<sup>86</sup> The total cost in fines and fees for driving on a suspended license and driving without a license can amount to more than \$4,000. According to the Alliance for a Just Society, failures to appear and license suspensions are among "the most common ways courts are able to legally [] jail poor people."<sup>87</sup>

These violations are often directly related to poverty and do not invariably reflect a disregard for the law.<sup>88</sup> Advocates note that many low-income people face "significant barriers to attending [court], including an inability to take time off work, lack of available transportation, lack of child care, or lack of a reliable or permanent address where they can receive notice of the hearing."<sup>89</sup> Other people may avoid coming to court, knowing they cannot pay a court fine or fee and fearing arrest.<sup>90</sup> The violations can also result in other significant consequences, including serving as the basis for arrest<sup>91</sup> or vehicle impounding.<sup>92</sup>

While every driver should take the steps to be properly licensed and appear in court, driving without a license does not necessarily indicate unsafe driving and frequently relates to income level. If someone without a license is driving in an unsafe manner, they can be separately cited and charged for those offenses.<sup>93</sup>

## EMPIRICAL RESEARCH

Recent research shows that license suspension for failure to appear in court is not the most effective way to coerce people to appear in court and pay their fines.<sup>94</sup> In fact, after California prohibited license suspensions for failure to pay court fees in 2017, on-time collections increased the following year. As the San Francisco Financial Justice Project concluded, "[t]he increase in collections without the use of driver's license suspensions indicates that the ability to suspend driver's licenses was not needed to ensure payment."<sup>95</sup>

Other research shows that license suspensions have dramatic economic consequences. Data from New Jersey concludes that 42% of people surveyed lost a job while their license was suspended, 45% reported not finding another job, and 88% reported reduced income.<sup>96</sup> Another study showed that women with young children receiving public assistance were twice as likely to find employment if they had a driver's license – a bigger impact than having graduated from high school.<sup>97</sup>

## INSIGHTS FROM OTHER JURISDICTIONS

Seven states, including Virginia, Mississippi, and South Carolina, do not restrict driving privileges for failure to appear in court.<sup>98</sup> Six additional states, including Pennsylvania, Oregon, and New Jersey, do not criminalize a first offense for driving on a suspended license when the suspensions are not related to driving under the influence.<sup>99</sup>

Connecticut, Oregon, Pennsylvania, Washington, and Wisconsin treat driving without a license as a traffic infraction.<sup>100</sup> Texas considers driving without a license a misdemeanor offense, but the penalty is limited to a \$200 fine.<sup>101</sup>

<sup>85</sup> In 2017, Governor Brown's budget stopped the practice of suspending licenses for people who did not pay court fees. (AB 103 (2017) (Committee on Budget) (Section 53 & 54).) After this change, the Department of Motor Vehicles voluntarily revoked all license suspensions that had been caused by failures to pay court fines. (California Department of Motor Vehicles, *DMV Removes Driving Suspensions for Failure to Pay Fines* (Mar. 15, 2018), available at DMV website.)

<sup>86</sup> *Paying More for Being Poor*, Lawyers' Committee for Civil Rights of the San Francisco Bay Area, 1 (May 2017).

<sup>87</sup> Allyson Fredericksen and Linnea Lassiter, *Debtors' Prisons Redux: How Legal Loopholes Let Courts Across the Country Criminalize Poverty*, Alliance for a Just Society, 4 (Dec. 2015).

<sup>88</sup> *Id.* at 2.

<sup>89</sup> *Id.* See also Brief of Legal Services of Northern California as Amici Curiae Supporting Appellant, *Hernandez v. Department of Motor Vehicles*, 49 Cal.App.5th 928 (2020).

<sup>90</sup> Allyson Fredericksen and Linnea Lassiter, *Debtors' Prisons Redux: How Legal Loopholes Let Courts Across the Country Criminalize Poverty*, Alliance for a Just Society, 2 (Dec. 2015).

<sup>91</sup> Penal Code § 836 (allowing a police officer to arrest a person for a public offense committed in their presence); Penal Code § 15 (defining "public offense" as a violation of law punishable by death, imprisonment, fine, removal, or disqualification from office); Vehicle Code § 40303(a)-(b).

<sup>92</sup> Vehicle Code § 22651(p).

<sup>93</sup> See, e.g., Vehicle Code §§ 23103 (reckless driving), 22350 (basic speed law), 22107 (unsafe lane change).

<sup>94</sup> Redesigned summons form and text messages reduced failures to appear on average by 13% and 21%, respectively. (Alissa Fishbane, Aurelie Ouss, and Anuj K. Shah, *Behavioral Nudges Reduce Failure to Appear for Court*, Science (Nov. 6, 2020).)

<sup>95</sup> "And across California, on-time collections went up in the year following the end of driver's license suspensions for Failure to Pay." (*Driving Toward Justice*, San Francisco Financial Justice Project, 3 (Apr. 2020).) "[C]ollections have declined slightly in the year since, [but] the Judicial Council attributes the decline primarily to the continuing decline in the number of filings." (*Id.* at 5.)

<sup>96</sup> New Jersey Motor Vehicles Affordability and Fairness Task Force Final Report, xii (Feb. 2006).

<sup>97</sup> John Pawasarat and Lois M. Quinn, *Research Brief on ETI Driver's License Studies*, ETI Publications 186, 1 (2017).

<sup>98</sup> The states are Idaho, Iowa, Mississippi, South Carolina, South Dakota, Virginia, and Wisconsin. The Free to Drive Coalition conducted research into the laws governing license suspensions in these states and found that, while various codes list the circumstances that can lead to license suspension, failure to appear is not one of them.

<sup>99</sup> Indiana Code § 9-24-19-1; New Jersey Stat. Ann. § 39:3-40; Oregon Rev. Stat. § 811.175; 75 Pennsylvania Code Stat. Ann. § 1543; Rhode Island Stat. § 31-11-18(b); and 23 Vermont Stat. Ann. § 676.

<sup>100</sup> Connecticut Gov't Stat. Ann. § 14-36(i); Oregon Rev. Stat. § 807.010; 75 Pennsylvania Code Stat. Ann. § 1501; Rev. Code Washington Ann. § 46.20.015; Wisconsin Stat. Ann. § 343.05.

<sup>101</sup> Texas Code Ann., Transp. §§ 521.021, 521.461.

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## 2. Require that Short Prison Sentences Be Served in County Jails

## Require that Short Prison Sentences Be Served in County Jails

### RECOMMENDATION

Thousands of people are sentenced to state prison every year for less than a year instead of serving their sentences in county jail, despite evidence indicating better public safety outcomes from local incarceration.

The Committee therefore recommends the following:

1. Require counties to maintain custody of people who would serve less than one year in state prison.
2. Follow state practice of reimbursing counties if jail populations increase as a result.
3. Ensure that no person serves more than five years in county jail.
4. Add tools to help manage jail populations, including increasing use of the county parole release process, and specify “warm handoff” upon release from jails to state parole and county probation authorities.

### RELEVANT STATUTES

Penal Code § 1170

### BACKGROUND AND ANALYSIS

A large number of people sent to state prison are incarcerated there for less than one year. Although their imposed sentence is almost always longer than one year, their actual time in state prison is short because of time they have already served awaiting trial in county jails and through available custody credits.<sup>102</sup>

According to data provided to the Committee by the California Department of Corrections and Rehabilitation (CDCR), approximately 37% of people sentenced to state prison for determinate terms serve less than one year in CDCR custody. (The statistic addresses someone’s actual length of incarceration – that is, how much time is left to serve on a sentence.) This amounts to roughly 14,000 people annually. Approximately 5,000 people per year serve less than six months in CDCR custody.<sup>103</sup>

<sup>102</sup> Committee on Revision of the Penal Code, Meeting on Jul. 23, 2020, 0:59:54–1:00:00.

<sup>103</sup> Information provided by CDCR Office of Research.

**NUMBER OF PEOPLE WHO SERVED LESS THAN ONE YEAR IN PRISON**

	2017	2018	2019
<b>LESS THAN 6 MONTHS</b>	5,103	4,822	5,461
<b>6 MONTHS TO 1 YEAR</b>	8,627	9,312	9,046
<b>TOTAL</b>	<b>13,730</b>	<b>14,134</b>	<b>14,507</b>

Source: Source: CDCR Office of Research.

At the same time, new data presented to the Committee in July 2020 by professors Mia Bird and Ryken Grattet concludes that people with short sentences have significantly lower recidivism rates (22% fewer felony convictions) if they serve their sentences in county jails or on probation, rather than state prison.<sup>104</sup> The study accounts for a wide array of criminogenic variables, including crimes committed and criminal histories.<sup>105</sup>

In addition, at the Committee’s hearings in July and October 2020, representatives from the California State Sheriffs’ Association agreed that county jails can generally provide better services and public safety benefits in the form of reduced recidivism compared to CDCR.

California State Sheriffs’ Association First Vice President, Lassen County Sheriff Dean Growdon, told the Committee he was unsurprised that people incarcerated locally are less likely to commit new crimes compared to those sent to state prison for the same offenses. Sheriff Growdon explained that people incarcerated in county jails stay local and maintain their ties to their families and communities while serving their sentences. He also emphasized that sheriffs put extra effort into rehabilitative and reentry services, especially following the enactment of Public Safety Realignment in 2010.<sup>106</sup>

Butte County Sheriff Kory Honea, Second Vice President of the California State Sheriffs’ Association, also agreed that county jails have better recidivism rates compared to CDCR. He told the Committee that “we at the local level can provide better outcomes,”<sup>107</sup> describing a program in his county that had lower recidivism rates than CDCR at the time.<sup>108</sup> Sheriff Honea noted that local officials have natural and direct incentives to develop programs with better public safety results: “[If] we don’t do anything to address the underlying causes of criminal behavior, and then we turn them back loose into our community, they’re going to victimize members of our community, including my friends and my family, or perhaps me.”<sup>109</sup> Sheriff Growdon noted that people in county jails may be able to “maintain those local ties and support that they might develop while they’re in custody.”<sup>110</sup> Other research has shown that counties that prioritized spending funds on reentry services over enforcement had better recidivism rates.<sup>111</sup>

<sup>104</sup> Written submission of Mia Bird and Ryken Grattet to Committee on Revision of the Penal Code (Jul. 2020).

<sup>105</sup> *Id.*

<sup>106</sup> Committee on Revision of the Penal Code, Meeting on Oct. 21, 2020, 0:48:33–0:52:56.

<sup>107</sup> Committee on Revision of the Penal Code, Meeting on Jul. 23, 2020, 0:50:33–0:51:00.

<sup>108</sup> See Jonathan W. Caudill, Ryan Patten, Sally Parker and Matt Thomas, *Breaking Ground: Preliminary Report of Butte County Sheriff’s Alternative Custody Supervision Program*, ii (Sep. 19, 2012), discussing Butte County’s alternative custody program.

<sup>109</sup> Committee on Revision of the Penal Code, Meeting on Jul. 23, 2020, 1:06:52–1:07:39.

<sup>110</sup> Committee on Revision of the Penal Code, Meeting on Oct. 21, 2020, 0:51:01–0:51:19.

<sup>111</sup> Mia Bird and Ryken Grattet, *Do Local Realignment Policies Affect Recidivism in California?*, Public Policy Institute of California, 20 (Aug. 2014).

Although CDCR may have larger rehabilitative and reentry systems, those state prison benefits generally do not apply to people who are incarcerated there for less than one year. This is because people entering state prison spend their first months (up to 120 days) in “Reception Centers” which have minimal programming. In addition, waitlists for rehabilitative programming are often over one year in length.<sup>112</sup> The combination of short stays, long waitlists, and initial confinement in Reception Centers means that people receive few meaningful rehabilitative opportunities while in CDCR custody if confined in prison for less than one year.

As former Governor Brown remarked to the Committee in September 2020: “[These people] go to prison for a year [or] 18 months. What does that accomplish?”<sup>113</sup> Governor Brown said that he favored having people serve shorter sentences locally rather than in prison and recommended that jails be given the resources to provide successful treatment and programming.<sup>114</sup>

The financial impact of short prison sentences is also significant. According to Director of Finance Keely Bosler, the intake costs for bringing people into CDCR (including transportation costs, security intake assessments, and health screens) are significant – up to \$47 million annually.<sup>115</sup> A portion of these savings could be passed on to counties to offset additional costs of incarcerating more people locally.

Since the enactment of Public Safety Realignment in 2011, many counties have shown sufficient capacity and expertise in managing people serving sentences of incarceration in county jail, even if that burden was initially unwanted. As Sheriff Growdon told the Committee, the difference between jails before and after Realignment and other reforms is “night and day” because sheriffs have embraced rehabilitative programming and alternative custody arrangements, often with better public safety outcomes and reduced costs.<sup>116</sup>

Recent experience with the COVID-19 public health emergency provides another example of the ability of county jails to maintain custody over people sentenced to state prison sentences. In March 2020, CDCR stopped the transfer of people from jail to prison in an effort to curtail spread of the virus.<sup>117</sup> Though not without some significant difficulties, this experience demonstrates the ability of local authorities to incarcerate additional people sentenced to state prison, especially for periods less than a year.

<sup>112</sup> CDCR Ombudsman, *What to Expect — Reception and Classification Process*, available at CDCR website. Once intake at CDCR resumes, the waiting times at reception centers is expected to be shorter. (California Department of Finance, *California State Budget Summary 2021–22*, 177 (Jan. 2021).)

<sup>113</sup> Committee on Revision of the Penal Code, Meeting on Sep. 16, 2020, 0:9:20–0:9:30.

<sup>114</sup> Committee on Revision of the Penal Code, Meeting on Sep. 17, 2020, 0:32:22–0:34:30; 0:41:38–0:42:40.

<sup>115</sup> California Department of Corrections and Rehabilitation, *2020–21 State Budget*, CR 19; Director Bosler explained that such wasted expenditures were key drivers for the passage of AB 109. (Committee on Revision of the Penal Code, Meeting on Jul. 23, 2020, 0:19:00–0:21:30.)

<sup>116</sup> Committee on Revision of the Penal Code, Meeting on Oc. 21, 2020, 0:39:23–0:40:55.

<sup>117</sup> CDCR, *COVID-19 Updates*; CDCR, *People Sentenced to CDCR Held in County Jail — FAQs*, available at CDCR website.

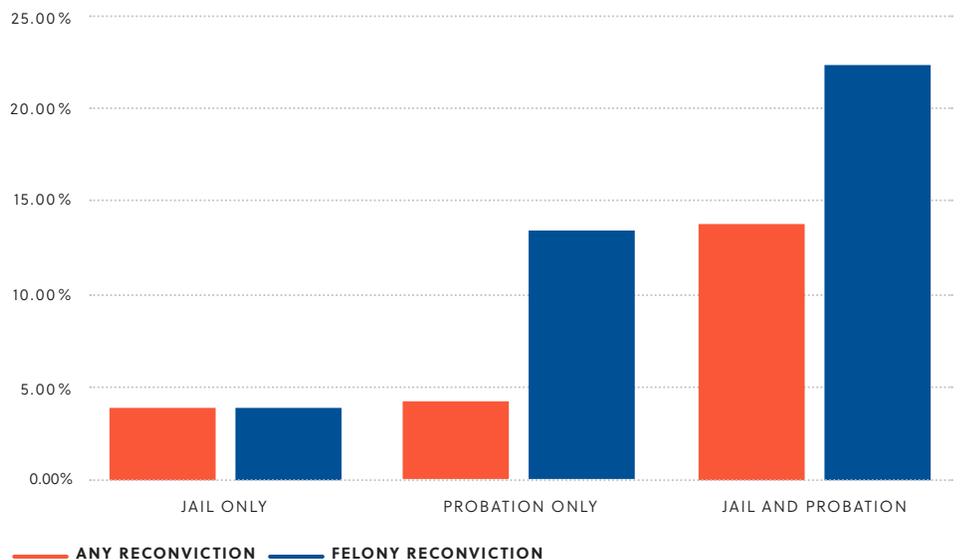
## EMPIRICAL RESEARCH

As noted, according to a multi-county study of incarceration trends in California by professors Bird and Grattet, people who served a sentence in jail and on probation had significantly lower felony reconviction rates (23% fewer felony convictions) compared to people sentenced to prison for the same crimes.<sup>118</sup> The research controlled for a number of variables, including criminal history, length of sentence, and conviction offense.

More information about the different outcomes is here:

### IMPACT OF SENTENCE TYPE ON TWO-YEAR RECIDIVISM RATE

Bars Represent Percentage Decrease in Two-Year Reconviction Rate Relative to Prison Sentence.



Source: Source: Mia Bird and Ryken Grattet, Public Policy Institute of California (Jun. 2019).

The study also examined five common offenses – burglary, motor vehicle theft, controlled substance possession, controlled substance possession with intent to sell, and weapons – and found that people sentenced locally to jail, probation, or jail and probation have lower reconviction rates than their prison-sentenced counterparts, except for jail sentences for burglary.<sup>119</sup> In addition, people serving prison terms for these five offenses spent more than twice the amount of time in custody compared to people who were sentenced to county jail.<sup>120</sup>

### INSIGHTS FROM OTHER JURISDICTIONS

According to the United States Department of Justice, the general rule and practice in criminal law is that sentences less than a year are served in county jail, whereas longer

<sup>118</sup> Mia Bird and Ryken Grattet, *Felony Sentencing and Recidivism Outcomes in California*, Public Policy Institute of California (Jun. 2019); Committee on Revision of the Penal Code, Meeting on Jul. 23, 2020, 0:00:00–1:00:21.

<sup>119</sup> Mia Bird and Ryken Grattet, *Felony Sentencing and Recidivism Outcomes in California*, Public Policy Institute of California (Jun. 2019).  
<sup>120</sup> Committee on Revision of the Penal Code, Meeting on Jul. 23, 2020, 0:11:25–0:12:00, 0:12:39–0:13:47, 0:23:24–0:24:07.

sentences are served in state prisons.<sup>121</sup> This is not the rule in California. Instead, following 2011's Public Safety Realignment,<sup>122</sup> each felony offense in the Penal Code specifies whether a sentence of incarceration should be served in jail or in prison.<sup>123</sup> Under Realignment, some people can be sentenced to serve several years in jail, rather than in state prison.

Some states have addressed the recurring problem of short sentences by finding alternatives to state prison. For example, in Massachusetts there are "Houses of Correction" run by local sheriffs that are designated for some sentences up to two and a half years long.<sup>124</sup> In 2019, Pennsylvania enacted a short-sentence parole law that grants presumptive parole release to people whose minimum term of imprisonment is two years or less.<sup>125</sup>

### ADDITIONAL CONSIDERATIONS

- Current state policy provides for reimbursing counties for the cost of maintaining custody of people sentenced to state prison under Realignment.<sup>126</sup> If the Committee's recommendation for counties to maintain custody over people with short prison sentences results in an increased jail population, the state should follow its usual practice of reimbursing counties for that additional expense.
- If the Committee's recommendation is implemented, some counties may have extra capacity in their jails that neighboring counties may be able to use. Current law does not permit these transfers for people sentenced to state prison terms,<sup>127</sup> and the Legislature should consider allowing them to do so.
- As noted above, following Realignment, some people received lengthy jail sentences – more than five years. In 2016, the California State Sheriffs' Association reported that approximately 1,500 people statewide were serving sentences of more than five years in county jails as a result of Realignment.<sup>128</sup> People sentenced to five years or more should not be incarcerated in county jail facilities because jails are not built to incarcerate people for this long. Instead, these people should serve their time in state prison.
- Under current law, every county is expected to manage its local jail population through a "board of parole commissioners" that is empowered to release people from jail to county parole supervision.<sup>129</sup> However, county parole is rarely used,<sup>130</sup> and the law has not been updated to reflect current practices in community supervision. Counties should be encouraged to utilize this provision, which can become an important tool to incentivize rehabilitation, manage jail populations, and help reduce unnecessary local correctional costs.
- If enacted, this proposal would likely result in more people being released from jail custody to community supervision. There should be better coordination between local jail officials and authorities responsible for supervision upon a person's release from custody. This "warm handoff" between jails and probation and parole agencies should be as robust as possible. To ensure this,

<sup>121</sup> "Prisoners sentenced to jail facilities usually have a sentence of one year or less." (United States Department of Justice, *Prisoners in 2018*, Bureau of Justice Statistics, 2.)

<sup>122</sup> AB 109 (Committee on Budget), 2011 Cal. Stat. ch. 15.

<sup>123</sup> J. Richard Couzens and Tricia A. Bigelow, *Felony Sentencing After Realignment*, 6–8 (May 2017).

<sup>124</sup> Massachusetts General Laws, ch. 279, § 23.

<sup>125</sup> 61 Pennsylvania Code Stat. Ann. § 61371.

<sup>126</sup> The daily rate in 2010 was \$77.17. (Brian Albert, *State Prisoners in County Jails*, National Association of Counties, 6 (Feb. 2010).)

<sup>127</sup> Penal Code § 4016.5(a).

<sup>128</sup> See Letter of Cory Salzillo & Cathy Coyne, *Re: Updated Survey of Long-Term Offenders in Jail*, (Oct. 17, 2016). More current data is not available.

<sup>129</sup> Penal Code §§ 3075 (specifying that the board should have a sheriff's representative, a probation representative, and a member of the public selected by the presiding judge of the Superior Court); 3081(b) (authority to release).

<sup>130</sup> Asm. Com. on Public Safety, Analysis of Asm. Bill No. 884 (2013–2014 Reg. Sess.), 2 (Mar. 3, 2013).

current law that specifies what information CDCR must give to probation departments for people going on post-release community supervision should be made applicable to all people released from jail.<sup>131</sup>

- Conditions in many county jails are constitutionally inadequate.<sup>132</sup> And even where conditions are not so dire, most jails simply do not operate with long-term stays in mind and may not provide access to the outdoors, contact visits, rehabilitative programming, or work opportunities. Counties should continue to take steps to improve the conditions of their jails in order to maximize the benefits of this proposal.

<sup>131</sup> Penal Code § 3003(e)(1).

<sup>132</sup> At the time of report publication, 19 county jail systems had court-ordered population caps and housed 65% of people in California jails. (Sarah Lawrence, *Court-Ordered Population Caps in California County Jails*, Stanford Criminal Justice Center, 6 (Dec. 2014); Prison Law Office, *Settlement Reached in Contra Costa County Jail Class Action Lawsuit* (Oct. 1, 2020); Prison Law Office, *Settlement Reached in Lawsuit Challenging Conditions in Santa Barbara County Jail* (Jul. 2020); Prison Law Office, *Settlement Reached in Class Action Challenging Conditions in Sacramento County Jail* (Jun. 2019); Prison Law Office, *Settlement Reached in Santa Clara County Jail Litigation* (Oct. 2018).) "Most county jails have a grossly inadequate system to serve people with mental health disabilities." (Written Submission of Aaron Fischer to Committee on Revision of the Penal Code, 4–5 (Jul. 23, 2020), available at CLRC website; Abbie Vansickle and Manuel Villa, *Who Begs to Go to Prison? California Jail Inmates*, The Marshall Project (Apr. 23, 2019).)

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# 3. End Mandatory Minimum Sentences for Nonviolent Offenses

# End Mandatory Minimum Sentences for Nonviolent Offenses

## RECOMMENDATION

Many nonviolent offenses in California, including many drug crimes, require incarceration because the state does not have a coherent approach to probation eligibility.

The Committee therefore recommends the following:

Allow probation or other alternatives to incarceration for all nonviolent offenses.

## RELEVANT STATUTES

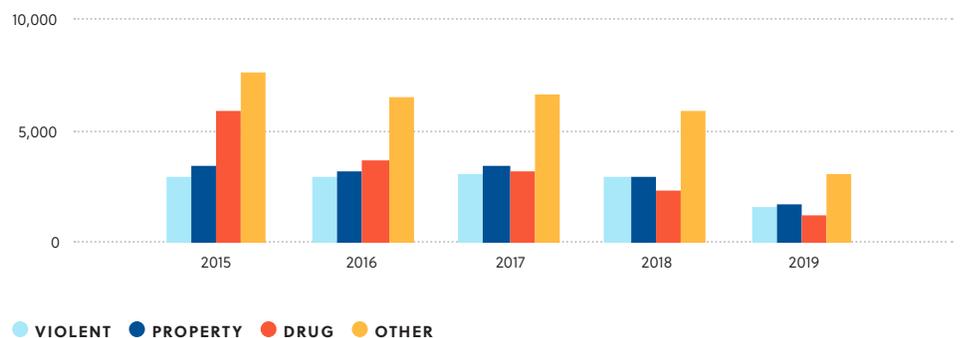
Penal Code § 1203, et seq.

## BACKGROUND AND ANALYSIS

California law provides mandatory minimum sentences for many nonviolent crimes, including many drug crimes.<sup>133</sup> These laws remove all discretion from judges to fashion the most appropriate sanctions, even if a judge believes supervision and treatment on probation may be the most appropriate result in a case. By contrast, there is no mandatory minimum sentence for some violent crimes, including murder.<sup>134</sup> In total, 20% of straight probation sentences (i.e., without incarceration) are for violent offenses.<sup>135</sup>

Probation is the most common criminal sanction in the United States, yet California's laws governing who is eligible for probation (and who is not) lack coherence and consistency, create unintended mandatory minimum sentences, and fail to account for individual impact on public safety.

## PROBATION SENTENCES BY TYPE OF OFFENSE IN CALIFORNIA



Source: California Department of Justice, *Crime in California*, Table 40 (2019).

<sup>133</sup> See, e.g., Penal Code §§ 462(a), 1203(e)(4), 1203.07(a)(1).

<sup>134</sup> See, e.g., *People v. Denner*, 2019 WL 5927604, \*6 (3d District 2019).

<sup>135</sup> California Department of Justice, *Crime in California* 2019, Table 40 (Jul. 2020).

<sup>136</sup> Penal Code § 1203.07.

Los Angeles District Attorney George Gascón testified before the Committee in November 2020 that mandatory minimum sentences make especially little sense for nonviolent crimes.<sup>136</sup> He has also described mandatory minimum sentences as “cruel, ineffective, and actually exacerbate our recidivism and racial disparities across the

criminal justice system.”<sup>137</sup> A representative of the California District Attorneys Association, Larry Morse, recently said that “I don’t think most DAs have any heartburn about eliminating mandatory minimums.”<sup>138</sup>

The Committee agrees that all relevant information should be considered in fashioning a sentence, and probation should be a permissible sentence for nonviolent crimes. A judge hearing the individual circumstances of a person’s case should determine the appropriate punishment. As San Mateo Chief of Probation John Keene, Secretary and Treasurer of the Chief Probation Officers of California, argued to the Committee in April 2020, probation eligibility should be determined by evaluating someone’s individual circumstances and not be guided solely by the offense charged against them.<sup>139</sup>

The Committee also considered diversion programs and collaborative courts available in many counties.<sup>140</sup> Many of these programs depend on the availability of sentences to probation. For example, Alameda County District Attorney O’Malley told the Committee that successful diversionary programs can tailor sanctions to individuals and that in “a cost-benefit analysis, there’s no question that diversion wins out over incarceration.”<sup>141</sup> San Joaquin County Superior Court Judge Richard Vlavianos agreed, testifying that recidivism was lower for certain offenses resolved with diversion programs.<sup>142</sup> And former United States District Court Judge Thelton Henderson urged the Committee in December 2020 that “diversion programs ought to play a much larger role than they now do.”<sup>143</sup> The Committee was impressed by the steps that stakeholders have taken to expand alternatives to incarceration, and eliminating mandatory jail conditions would further support their efforts by removing statutory barriers. At the same time, most diversion programs and collaborative courts rely heavily on local stakeholders and resources, and aside from the elimination of mandatory incarceration for nonviolent offenses, the Committee does not currently make any specific recommendation to improve access alternatives to incarceration at the state level.

## EMPIRICAL RESEARCH

Research shows that states can improve public safety outcomes by sentencing more people who commit lower-level and nonviolent crimes to probation and other intermediate community measures such as community service or treatment.<sup>144</sup> In 2016, the Brennan Center estimated that alternatives to prison, including probation, are likely more effective sentences for about 25% of the entire American prison population.<sup>145</sup> The Brennan Center study also concluded that incarceration does little to rehabilitate this group of lower-level offenders and can enhance the likelihood of recidivism.<sup>146</sup>

Similar findings were reported from cost-benefit studies of incarcerated populations in eight states.<sup>147</sup> A study of New York, New Mexico, and Arizona found that the benefits of incapacitating 50% of males incarcerated in those states were not worth the high costs.<sup>148</sup> A subsequent study found that the risk of recidivism for a substantial number of incarcerated people in five additional states was too low to justify their incarceration on a cost-benefit basis.<sup>149</sup>

In 2018, the Virginia Criminal Sentencing Commission found that, of the people who committed drug and property crimes for which the Virginia sentencing guidelines

<sup>137</sup> Alexei Koseff, *Jail Time for Nonviolent Drug Crimes in California Would Be Cut Under Scott Wiener*, San Francisco Chronicle (Dec. 15, 2020).

<sup>138</sup> *Id.*

<sup>139</sup> Committee on Revision of the Penal Code, Meeting on Apr. 23, 2020, 0:42:27–0:44:39.

<sup>140</sup> Judicial Council of California, *Collaborative Justice Courts Fact Sheet* (Nov. 2020). Includes 400+ collaborative courts statewide.

<sup>141</sup> Committee on Revision of the Penal Code, Meeting on Apr. 23, 2020, 1:14:20–1:15:15, 1:12:27–1:12:37.

<sup>142</sup> *Id.* at 0:10:10–0:12:00.

<sup>143</sup> Committee on Revision of the Penal Code, Meeting on Dec. 10, 2020, 0:19:50–0:20:10.

<sup>144</sup> *Id.*; Kevin Reitz, *The Compelling Case for Low-Violence-Risk Preclusion in American Prison Policy*, Behavioral Sciences & The Law, 210–211 (2020).

<sup>145</sup> James Austin, Lauren-Brooke Eisen, James Cullen, and Jonathan Frank, *How Many Americans Are Unnecessarily Incarcerated?*, Brennan Center for Justice, Introduction, 7–9 (2016).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*; Anne Morrison Piehl, Bert Useem, and John J. Dilulio Jr., *Right-Sizing Justice: A Cost-Benefit Analysis of Imprisonment in Three States*, Manhattan Institute, 8–9, Endnote 17 (1999).

<sup>148</sup> Study findings translated the social costs and benefits of incarcerating people into dollars, and then compared them. (*Id.* at 3–9.)

<sup>149</sup> *Id.* at 9; Bert Useem and Anne Morrison Piehl, *Prison State: The Challenge of Mass Incarceration*, 67 (2008); Kevin Reitz, *The Compelling Case for Low-Violence-Risk Preclusion in American Prison Policy*, Behavioral Sciences & The Law, 210–211 (2020).

recommended prison time, 50% could be instead directed to community-based programs with little threat to public safety.<sup>150</sup>

Finally, researchers have found “little evidence” that people on probation perceive a jail sentence to be substantially more punitive than community-based sanctions such as electronic monitoring, curfews, or community service.<sup>151</sup>

## INSIGHT FROM OTHER JURISDICTIONS

In the last two decades, at least 28 states have undertaken reforms aimed at reducing or excising mandatory minimums from their state statutes and instead providing for probation or other community supervision.<sup>152</sup>

These reforms have positively impacted crime rates and reduced prison populations. For example, in 2002, the Michigan Legislature repealed most mandatory minimum drug sentences.<sup>153</sup> Since then, Michigan’s prison population dropped by over 21%,<sup>154</sup> while the state’s property crime rate declined roughly 52%, the violent crime rate dropped by 15%, and homicides dropped by 11%.<sup>155</sup>

In 2009, New York enacted similar reforms to its drug laws,<sup>156</sup> followed by great drops in violent and property crime rates and prison population.<sup>157</sup> Since 2011, New York has closed 17 prison facilities and realized \$193 million in annual savings due to the decrease in its prison population.<sup>158</sup> Maryland and Montana also recently eliminated their mandatory minimum sentences for nonviolent drug offenses.<sup>159</sup>

In 2021, the Virginia Crime Commission recommended the wholesale elimination of mandatory minimum sentences for all offenses.<sup>160</sup> The New Jersey Criminal Sentencing and Disposition Commission also recommended that the Legislature eliminate mandatory minimum sentences for nonviolent drug and property crimes.<sup>161</sup>

In some states, the majority of people convicted of felonies are sentenced to straight probation (compared to only 7% in California). In Minnesota, between 2004 and 2018, 75% of those convicted of a felony were placed on probation.<sup>162</sup> Similarly, in Kansas, over 70% of those convicted of a felony were placed on probation.<sup>163</sup>

In other states, probation is presumed for nonviolent offenses.<sup>164</sup> In Maryland, sentencing preferences for probation and drug treatment programs were recently enacted for certain drug offenses.<sup>165</sup> Arkansas law requires judges to weigh 13 factors in favor of sentence suspension or straight probation<sup>166</sup> and includes an explicit directive that courts have the discretion to sentence those convicted of felonies to drug courts or other rehabilitation programs.<sup>167</sup>

The Model Penal Code — as well as the American Bar Association and the Federal Judicial Conference — all recommend that no mandatory minimum prison sentences be attached to any offenses.<sup>168</sup> Instead, all favor judicial discretion to impose a sentence proportionate to the severity of the offense,<sup>169</sup> which could include probation and other forms of supervised release.

<sup>150</sup> *Id.* (citing Matthew Kleiman, Brian J. Ostrom, and Fred L. Cheesman, II, *Using Risk Assessment to Inform Sentencing Decisions for Nonviolent Offenders in Virginia*, 53 *Crime & Delinq.* 106 (2007); Virginia Criminal Sentencing Commission, *Annual Report*, 31-34 (2018)).  
<sup>151</sup> Eric J. Wodahl, Brett E. Garland, and Kimberly Schweitzer, *Are Jail Sanctions More Punitive Than Community-Based Punishments? An Examination into the Perceived Severity of Alternative Sanctions in Community Supervision*, *Criminal Justice Policy Review* 31(5), 696-720, 713 (2020).

<sup>152</sup> *Recent State-Level Reforms to Mandatory Minimum Laws*, Families Against Mandatory Minimums (May 10, 2017), available at FAMM.org website.

<sup>153</sup> Patrick Affholter and Bethany Wicksall, *Eliminating Michigan’s Mandatory Minimum Sentences for Drug Offenses*, Senate Fiscal Agency, 1 (Nov./Dec. 2002).

<sup>154</sup> Michigan Department of Corrections, *2018 Statistical Report*, C-12 (Nov. 14, 2019) (end of year population in 2018 was 38,761); Michigan Department of Corrections, *2016 Statistical Report*, C-12 (Sep. 5, 2017) (end of year population in 2003 was 49,357); *Michigan Prison Population Continues to Decline*, *News 10* (Dec. 19, 2019) (Michigan prison population in Dec. 2019 was down to 38,005).

<sup>155</sup> From 2003–2019, burglaries fell by 58%, robberies fell by 52.5%, motor vehicle theft fell by 69%, and larceny fell by 47%. (Crime Data Explorer: Michigan, Federal Bureau of Investigation, available at the FBI Crime Data Explorer website.)

<sup>156</sup> Jeremy Peters, *Albany Reaches Deal to Repeal ’70s Drug Laws*, *New York Times* (Mar. 25, 2009).

<sup>157</sup> New York State Corrections and Community Supervision, *DOCCS Fact Sheet*, 3 (Sep. 1, 2020); Federal Bureau of Investigation Crime Data Explorer: New York, available at FBI Crime Data Explorer website.

<sup>158</sup> New York State Corrections and Community Supervision, *DOCCS Fact Sheet*, 3 (Sep. 1, 2020).

<sup>159</sup> “Elimination of mandatory minimum sentences for controlled dangerous substance felonies,” *Governor Larry Hogan Announces Implementation of Justice Reinvestment Act*, Governor’s Office of Crime Prevention, Youth, and Victim’s Services, (Oct. 3, 2017); *Recent State-Level Reforms to Mandatory Minimum Laws*, Families Against Mandatory Minimums (2017), available at FAMM.org website.

<sup>160</sup> Ned Oliver, *Virginia Crime Commission Recommends Eliminating All Mandatory Minimum Sentences*, *Virginia Mercury* (Jan. 5, 2021).

<sup>161</sup> *New Jersey Criminal Sentencing & Disposition Commission, Annual Report*, 21–23 (Nov. 2019).

<sup>162</sup> *Minnesota Sentencing Guidelines Commission, 2019 Probation Revocations*, 2 (Sep. 2, 2020).

<sup>163</sup> *Justice Reinvestment in Kansas: Update to the Kansas Sentencing Commission*, The Council of State Governments Justice Center, 8 (Oct. 22, 2020).

<sup>164</sup> *35 States Reform Criminal Justice Policies Through Justice Reinvestment*, The Pew Charitable Trusts (Jul. 2018) (since 2011, nine states have created some form of presumptive probation); Alison Lawrence, *Making Sense of Sentencing: State Systems and Policies*, *National Conference of State Legislatures*, 7 (Jun. 2015) (describing presumptive probation systems in four states).

<sup>165</sup> *Maryland Code Ann. § 5-601(e)(3)(i); Maryland Justice Reinvestment Act*, Maryland Alliance for Justice Reform, available at Maryland Alliance for Justice Reform website.

<sup>166</sup> *Arkansas Code Ann. § 5-4-301*.

<sup>167</sup> *Arkansas Code Ann. § 5-4-313*.

<sup>168</sup> *Model Penal Code: Sentencing Pre Publication Draft* (2020), Section 6.11(8); *Id.* at 267-68; ABA Opposes Mandatory Minimum Sentences, ABA (Aug. 15, 2017); *Sentencing, Corrections, and Re-Entry Reforms*, ABA (Dec. 11, 2020); *Judicial Conference Addresses Judgeship Needs Issues*, United States Courts (Mar. 16, 2016) (“The Judicial Conference has long-standing positions opposing mandatory minimums and supporting their repeal.”); *Letter from Judge Bell to Chairman Leahy*, Committee on Criminal Law of the Judicial Conference of the United States (Sep. 17, 2013), available at United States Courts website.

<sup>169</sup> *See, e.g., Model Penal Code: Sentencing Pre Publication Draft*, Commentary, 267-68.

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## 4. Establish that Low-Value Thefts without Serious Injury or Use of a Weapon Are Misdemeanors

## Establish that Low-Value Thefts without Serious Injury or Use of a Weapon Are Misdemeanors

### RECOMMENDATION

Minor thefts that do not result in serious bodily injury and do not involve use of a deadly weapon are currently punished as violent felonies but should be considered misdemeanors.

The Committee therefore recommends the following:

1. Thefts of property under \$950 without serious bodily injury or use of a deadly weapon must be charged as petty theft, punishable by up to one year in jail.
2. Exclude any theft with the use of a deadly weapon. This crime would constitute robbery (a violent felony with a prison sentence of two to five years).
3. Exclude any theft that results in serious bodily injury. This crime would also constitute robbery.
4. Permit retroactive reductions.

### RELEVANT STATUTES

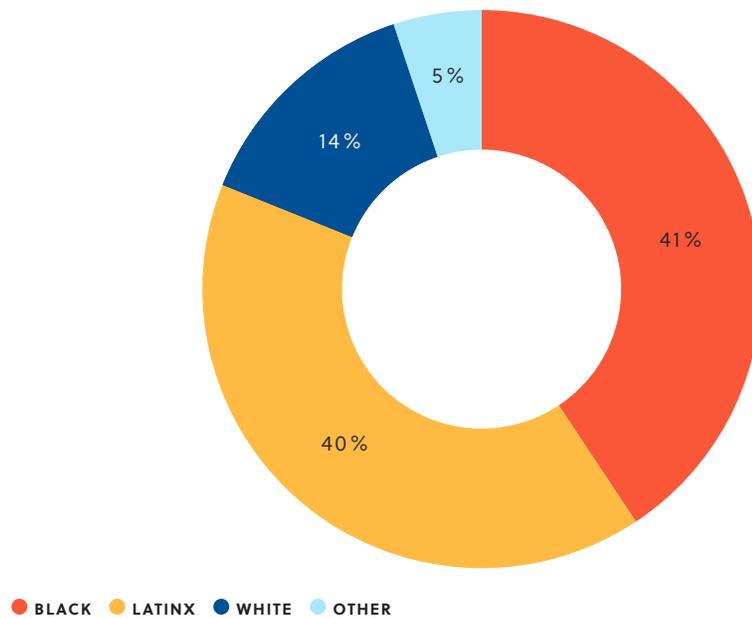
Penal Code §§ 211, 486

### BACKGROUND AND ANALYSIS

California's robbery statute has not been updated since 1872.<sup>170</sup> Over the years, the punishment has been extended to a violent felony with a mandatory prison sentence of up to five years, without enhancements. At the same time, courts have also expanded the conduct that constitutes robbery to cover thefts of any value, even when there is no weapon involved nor physical injury to the victim. Additionally, the number of people currently in prison for robbery in California are disproportionately people of color.

<sup>170</sup> Penal Code § 211.

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**PERCENTAGE OF PEOPLE IN PRISON FOR ROBBERY IN CALIFORNIA BY RACE**

Source: CDCR Office of Research.

The Penal Code defines robbery as any taking of any property, regardless of value, if “accomplished by means of force or fear.”<sup>171</sup> Following the landmark *People v. Estes*<sup>172</sup> case in 1983, courts have allowed prosecutors to charge robbery in cases that were previously considered simple shoplifting. In effect, shoplifting can be elevated from a mandatory misdemeanor to a violent crime with a mandatory sentence to state prison. Purse snatches and stealing a cell phone can also be considered robbery, even if a victim is not physically touched. In addition, robbery’s automatic classification as a “violent felony,” regardless of the circumstances, can subject a person to enhanced penalties, including a life sentence under the Three Strikes law.<sup>173</sup>

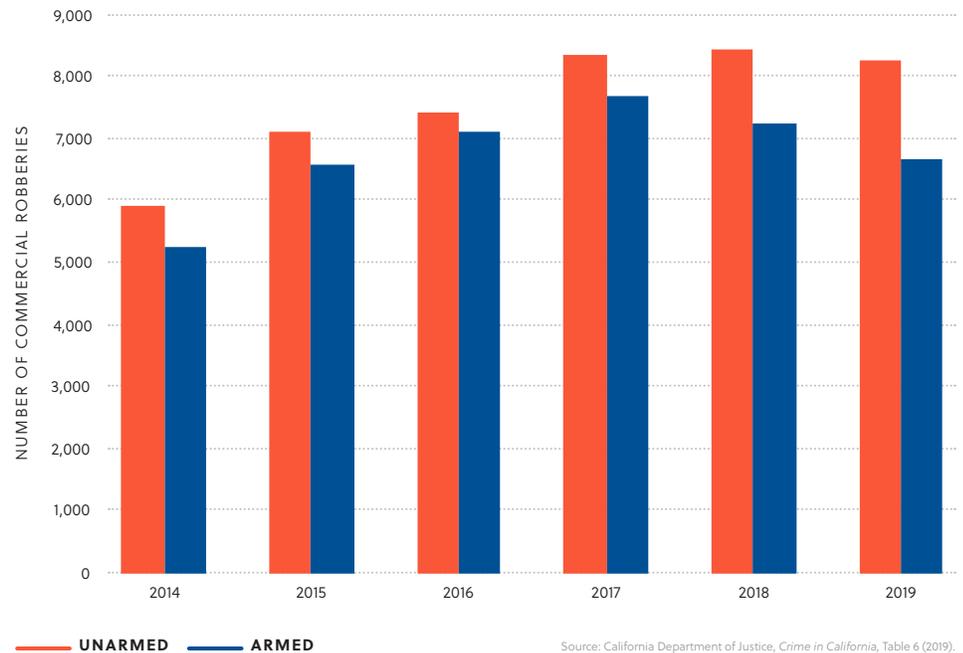
“*Estes* robberies” are extremely common. In 2019, over 8,000 unarmed commercial robberies were reported throughout the state.

<sup>171</sup> *Id.*

<sup>172</sup> *People v. Estes*, 147 Cal.App.3d 23 (1983).

<sup>173</sup> Penal Code § 667.

## COMMERCIAL ROBBERIES IN CALIFORNIA



When Alameda District Attorney O’Malley, then-president of the District Attorneys’ Association, appeared before the Committee in April 2020, she said that *Estes* robberies are often low-level crimes that her office recommended for less severe sanctions, including diversion and treatment, rather than incarceration.<sup>174</sup>

Santa Clara County District Attorney Jeff Rosen and San Mateo County District Attorney Stephen Wagstaffe also suggested limiting prosecutors’ ability to charge these types of cases as violent robberies.<sup>175</sup> District Attorney Wagstaff added that if *Estes* robberies were eliminated, “I wouldn’t sit there and say, ‘Oh my heavens, you’ve taken one of our great tools in protecting public safety.’”<sup>176</sup> While people charged in *Estes* cases often end up pleading guilty to a lesser offense, including grand theft from a person, charging an offense that carries steep penalties greatly impacts a defendant’s ability to negotiate a reasonable plea agreement.<sup>177</sup>

California is currently out of step with other states, which distinguish between different types of thefts and forbid thefts involving minor use of force or fear from being charged as robberies or other felonies.<sup>178</sup>

California’s Penal Code currently divides theft into two degrees: grand and petty theft. Generally, grand theft occurs when the value of the stolen property exceeds \$950,<sup>179</sup> and theft that does not meet one of the definitions of grand theft is petty theft.<sup>180</sup> The Penal Code also has a separate misdemeanor “shoplifting” offense for thefts from commercial establishments.<sup>181</sup> Theft involving *any* force or fear is considered a robbery.<sup>182</sup>

<sup>174</sup> Committee on Revision of the Penal Code, Meeting on Apr. 23, 2020, 2:11:30–2:12:12.

<sup>175</sup> Committee on Revision of the Penal Code, Meeting on Oct. 21, 2020, 0:16:48–0:17:18, 0:59:10–1:01:46.

<sup>176</sup> *Id.* at 59:10–101:46.

<sup>177</sup> H. Mitchel Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal*, 63, CATH. U. L. Rev. 51, 62 (2013).

<sup>178</sup> The Penal Code currently divides theft into two degrees: grand and petty theft. (Penal Code § 486.) Generally, grand theft occurs when the value of the stolen property exceeds \$950. (Penal Code §§ 487, 490.2(a).)

<sup>179</sup> Penal Code § 487; Penal Code § 490.2(a).

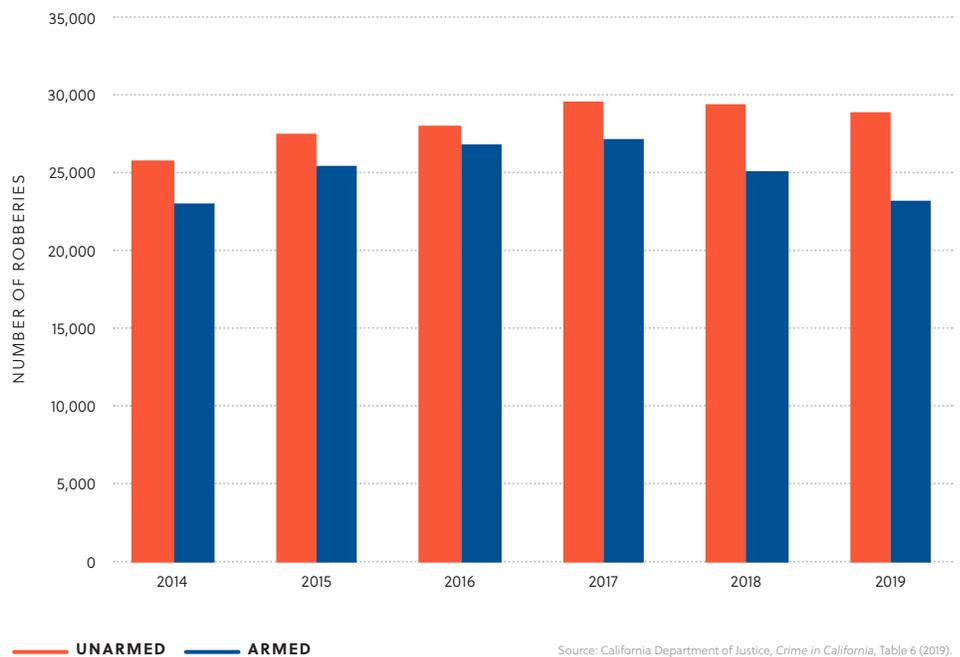
<sup>180</sup> Penal Code § 488.

<sup>181</sup> Penal Code § 459.5(a).

<sup>182</sup> Penal Code § 211.

The Committee recommends adding a new offense to this hierarchy: petty theft in the first degree, punished as a misdemeanor. The offense would cover any thefts from a person or commercial establishment that involved the use of force or fear but where no serious injury was caused and no deadly weapon was used.

### TOTAL ROBBERIES IN CALIFORNIA



The Committee recognizes that some purely verbal altercations can be extremely traumatizing for the victim. These offenses should be treated seriously. However, the Penal Code has other offenses that may be appropriate to apply in these scenarios, such as criminal threats,<sup>183</sup> which can be charged as a felony strike offense.<sup>184</sup>

### EMPIRICAL RESEARCH

In 2016, The Pew Charitable Trusts researched the effects of changing state theft penalties and found that states that raised the dollar threshold of what constitutes a felony theft offense saw crime and larceny rates fall.<sup>185</sup> California's Proposition 47, which was enacted in 2016 by voter initiative and established shoplifting under \$950 as a mandatory misdemeanor, had no effect on violent crime and, at worst, a small effect on property crime.<sup>186</sup>

<sup>183</sup> Penal Code § 422(a).

<sup>184</sup> Penal Code § 422(a), Penal Code § 1192.7(c)(38).

<sup>185</sup> Adam Gelb et al., *The Effects of Changing State Theft Penalties*, The Pew Charitable Trusts (2016).

<sup>186</sup> Bartos and Kubrin, *Can We Downsize Our Prisons and Jails Without Compromising Public Safety? Findings from California's Prop 47*, American Society of Criminology, Volume 17, Issue 3 (2018); Mia Bird, Magnus Lofstrom, Brandon Martin, Steven Raphael, and Viet Nguyen, *The Impact of Proposition 47 on Crime and Recidivism*, Public Policy Institute of California, 21 (Jun. 2018).

## INSIGHTS FROM OTHER JURISDICTIONS

Most states acknowledge the wide range of behavior a person may use to steal and distinguish between offenses with different levels of seriousness. Of 15 examined states, 14 had a system of statutes that created increasingly serious degrees of robbery, based on how the offense was committed.<sup>187</sup>

For example, in Texas<sup>188</sup> and Illinois<sup>189</sup>, the crime of pushing a store employee while shoplifting is a misdemeanor. In New York and Oregon, the same crime is a low-level felony carrying a sentence as low as probation.<sup>190</sup>

In Texas, a robbery conviction requires proof that the accused “intentionally, knowingly, or recklessly causes bodily injury to another” or “places another in fear of imminent bodily injury or death.”<sup>191</sup> Similarly, Vermont’s robbery statute requires some bodily injury to be inflicted for the offense to apply.<sup>192</sup>

<sup>187</sup> The states are Alabama, Alaska, Arizona, Colorado, Florida, Illinois, Massachusetts, New York, Oregon, Texas, Utah, Vermont, Washington, and West Virginia. (See Alabama Code §§ 13A-8-41–13A-8-43; Alaska Stat. §§ 11.41.500–11.41.510; Arizona Rev. Stat. §§ 13-1902–13-1904; Colorado Rev. Stat. §§ 18-4-301–18-4-303; Florida Stat. Ann. §§ 812.13, 812.131; 720 Illinois Comp. Stat. Ann. §§ 5/18-1–5/18-6; Massachusetts Stat. Ann. Ch. 265 §§ 17-21; N.Y. Penal Law §§ 160.00–160.15; Oregon Rev. Stat. §§ 164.395, 164.405, 164.415; Texas Penal Code Ann. §§ 29.02, 29.03, 31.03; Utah Code Ann. §§ 76-6-301–76-6-302; Vermont Stat. Ann. § 608; Washington Stat. Ann. § 9A.56.190; West Virginia Code § 61-2-12.) Only Nevada had a single degree of robbery. (Nevada Rev. Ann. § 200.380.)

<sup>188</sup> Texas Penal Code Ann. §§ 31.03(e), 12.23.

<sup>189</sup> 720 Illinois Comp. Stat. Ann. §§ 5/16-25, 5/12-3; 730 Illinois Comp. Stat. Ann. § 5/5-4.5-55.

<sup>190</sup> Oregon Rev. Stat. §§ 164.395, 161.605.

<sup>191</sup> Texas Penal Code Ann. § 29.02.

<sup>192</sup> 13 Vermont Stat. Ann. § 608; *State v. Francis*, 151 Vt. 296, 305 (1989).

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# 5. Provide Guidance for Judges Considering Sentence Enhancements

## Provide Guidance for Judges Considering Sentence Enhancements

### RECOMMENDATION

Judges currently have authority to dismiss sentence enhancements “in furtherance of justice,” but that standard has never been defined or clarified by the Legislature or courts and can be applied inconsistently.

The Committee therefore recommends the following:

1. Establish guidelines and presumptions (but not requirements) that judges should consider dismissing sentencing enhancements in furtherance of justice when:
  - The current offense is nonviolent.
  - The current offense is connected to mental health issues.
  - The enhancement is based on a prior conviction that is over five years old.
  - The current offense is connected to prior victimization or childhood trauma.
  - The defendant was a juvenile when he/she committed the current offense or prior offenses.
  - Multiple enhancements are alleged in a single case or the total sentence is over 20 years.
  - A gun was used but it was inoperable or unloaded.
  - Application of the enhancement would result in disparate racial impact.
2. Provide that the presumptions can be overcome if there is “clear and convincing evidence that dismissal of the enhancement would endanger public safety.”
3. Clarify that the list is not exclusive. Judges maintain power to strike enhancements in other compelling circumstances.

### RELEVANT STATUTES

Penal Code § 1385

### BACKGROUND AND ANALYSIS

California’s Penal Code includes over 150 different sentence enhancements.<sup>193</sup> The vast majority of people in the state’s prisons (over 80%) are serving a term lengthened by a sentence enhancement.<sup>194</sup> More than 25% of current prisoners are serving sentences extended by three or more enhancements.<sup>195</sup> On average, enhancements more than double a defendant’s original sentence length.<sup>196</sup>

<sup>193</sup> Data provided by CDCR Office of Research.

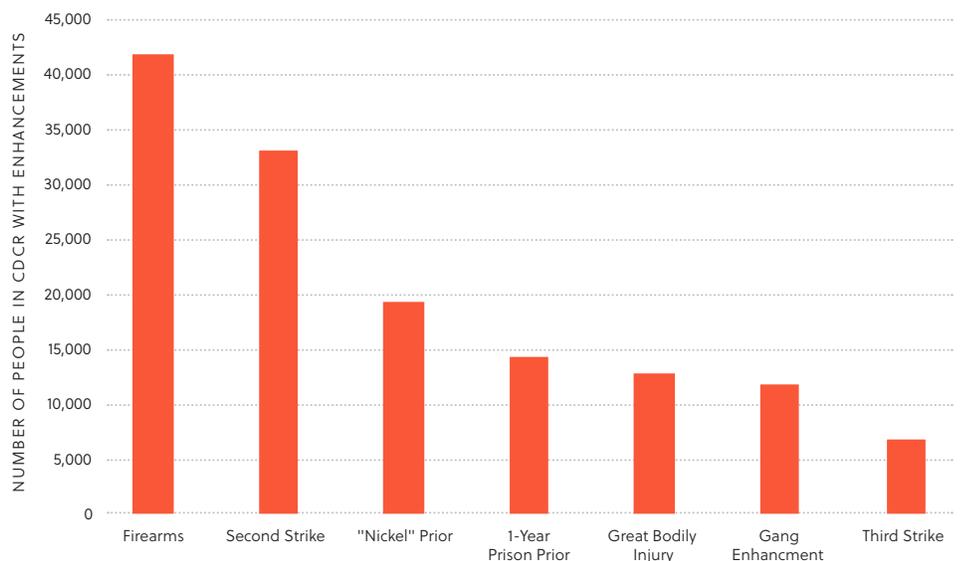
<sup>194</sup> Ryken Grattet, *Sentence Enhancements: Next Target of Corrections Reform?*, PPIC Blog (Sep. 27, 2017). Between 1984 and 1991, California passed over 1,000 crime bills, many of them enhancing criminal sentences. (Michael Vitiello and Clark Kelso, *A Proposal for Wholesale Reform of California’s Sentencing Practice and Policy*, 38 Loy. L.A. L. Rev. 903, 921 (2005).)

<sup>195</sup> Ryken Grattet, *Sentence Enhancements: Next Target of Corrections Reform?*, PPIC Blog (Sep. 27, 2017).

<sup>196</sup> Elan Dagenais, Raphael Ginsburg, Sharad Goel, Joseph Nudell, and Robert Weisberg, *Sentencing Enhancements and Incarceration: San Francisco, 2005–17*, Stanford Computational Policy Lab, 2 (Oct. 17, 2019).

The most common enhancements include extended sentences for use of a firearm, the Three Strikes law, the Street Terrorism Enforcement and Protection Act (gang enhancements), and the five-year serious felony enhancement (“nickel prior”).<sup>197</sup>

### MOST COMMON SENTENCING ENHANCEMENTS IN CALIFORNIA (2020)



Source: Source: CDCR Office of Research.\*

These common enhancements are applied disproportionately against people of color and people suffering from mental illness.<sup>198</sup> Over 92% of people sentenced to prison for a gang enhancement statewide are Black or Latinx.<sup>199</sup> In Los Angeles, 95% of people sentenced to prison for a gang enhancement statewide are Black or Latinx.<sup>200</sup> Yet, according to the Anti-Defamation League, California has a “uniquely large population of white supremacist gangs.”<sup>201</sup> People sentenced under the Three Strikes law are also more likely to be Black and suffer from a mental illness compared to those who do not face Three Strikes sentences.<sup>202</sup>

When former Governor Brown addressed the Committee in September 2020, he argued that California should “get rid of all of the enhancements” or change the law so that judges are steered towards not imposing enhancements.<sup>203</sup>

\* See Penal Code §§ 12022(a), 12022.5(a), 12022.53(b)–(d) (firearm use); 667(e)(1) (second strike); 667(a)(1) (nickel prior); 6675(b) (1-year prison prior) (West 2018); 12022.7(a) and (e) (great bodily injury); 186.22(b)(1) (gang enhancement).

197 Data provided by CDCR Office of Research.

198 *Id.* See also *The Prevalence and Severity of Mental Illness Among California Prisoners on the Rise*, Stanford Justice Advocacy Project, 1 (2017).

199 Data provided by CDCR Office of Research.

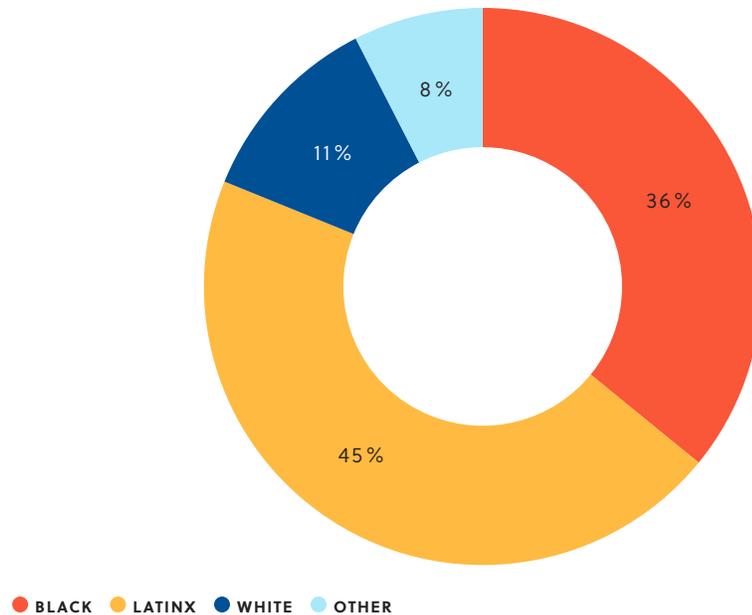
200 *Id.*

201 Anti-Defamation League, *White Supremacist Prison Gangs in the United States, A Preliminary Inventory* (2016).

202 *The Prevalence and Severity of Mental Illness Among California Prisoners on the Rise*, Stanford Justice Advocacy Project, 1 (2017).

203 Committee on Revision of the Penal Code, Meeting on Sep. 17, 2020, 0:17:08–0:17:55.

### PERCENTAGE OF CALIFORNIA PRISON POPULATION WITH GUN ENHANCEMENT BY RACE (2020)



Source: CDCR Office of Research.

Santa Clara District Attorney Rosen testified before the Committee in September 2020 that enhancements have evolved to distort and dominate the criminal charging and sentencing process: “[W]hen I began as a prosecutor, enhancements could moderately shift the underlying sentence. Now they have become the tail that wags the dog. It’s quite common now that the entire trial and all pretrial negotiations are solely about the enhancement, not the crime itself.”<sup>204</sup>

Los Angeles District Attorney Gascón also told the Committee that enhancements were largely inappropriate, resulting in excessive sentences with “absolutely no connection to public safety.”<sup>205</sup> One of District Attorney Gascón’s first acts in office was to instruct deputy prosecutors to avoid charging enhancements in almost all cases.<sup>206</sup> Enhancement statutes are also arcane and opaque. Former Governor Brown said California’s enhancement laws had a “tax code–like complexity.”<sup>207</sup>

Despite prominent leaders calling for overhauls of California’s sentence enhancement laws, many of the most important and commonly used enhancements – such as Three Strikes, the five-year “nickel prior,” and certain gang enhancements – were enacted by voter initiative and cannot be modified by a majority vote in the Legislature.<sup>208</sup> As previously noted, the Committee limited itself in this report only to those recommendations that could be passed by a majority vote, so the Committee does not currently advocate for complete revision of California’s enhancement laws, as misguided as they may be.

<sup>204</sup> *Id.* at 1:05:57 to 1:06:24.

<sup>205</sup> Committee on Revision of the Penal Code, Meeting on Nov. 13, 2020, 0:10:05–0:10:41.

<sup>206</sup> James Queally, *On First Day as L.A. County D.A., George Gascón Eliminates Bail, Remakes Sentencing Rules*, Los Angeles Times (Dec. 7, 2020).

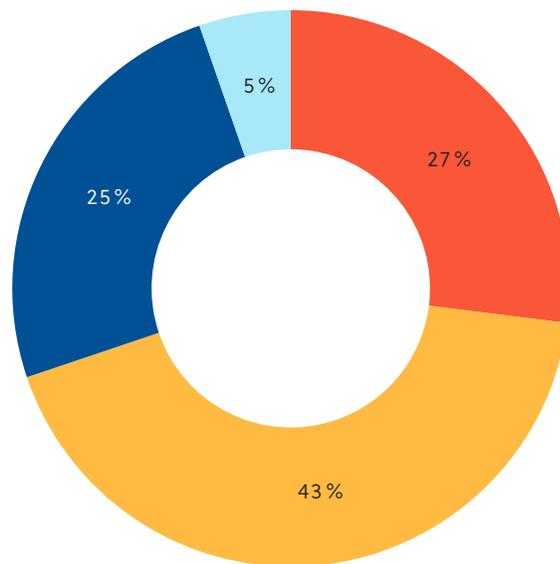
<sup>207</sup> Committee on Revision of the Penal Code, Meeting on Sep. 17, 2020, 0:4:17–0:7:00.

<sup>208</sup> Penal Code § 667(j).

Sentence enhancements can be dismissed by sentencing judges. The current legal standard instructs judges to dismiss a sentence enhancement when “in furtherance of justice.”<sup>209</sup> Courts have not clarified or defined this standard, and the California Supreme Court noted that the law governing when judges should impose or dismiss enhancements remains an “amorphous concept.”<sup>210</sup> As a result, this discretion may be inconsistently exercised and underused because judges do not have guidance on how courts should exercise the power.

The lack of clarity and guidance is especially concerning given demographic disparities in sentences.<sup>211</sup> As noted, Three Strikes sentences and gang enhancements in California are disproportionately applied against people of color.<sup>212</sup> People suffering from mental illness are also overrepresented among people currently serving life sentences under the Three Strikes law for nonviolent crimes.<sup>213</sup>

#### PERCENTAGE OF NONVIOLENT SECOND STRIKERS CURRENTLY IN PRISON BY RACE (2020)



● BLACK ● LATINX ● WHITE ● OTHER

Source: Data provided by CDCR Office of Research.

<sup>209</sup> Penal Code § 1385(a).

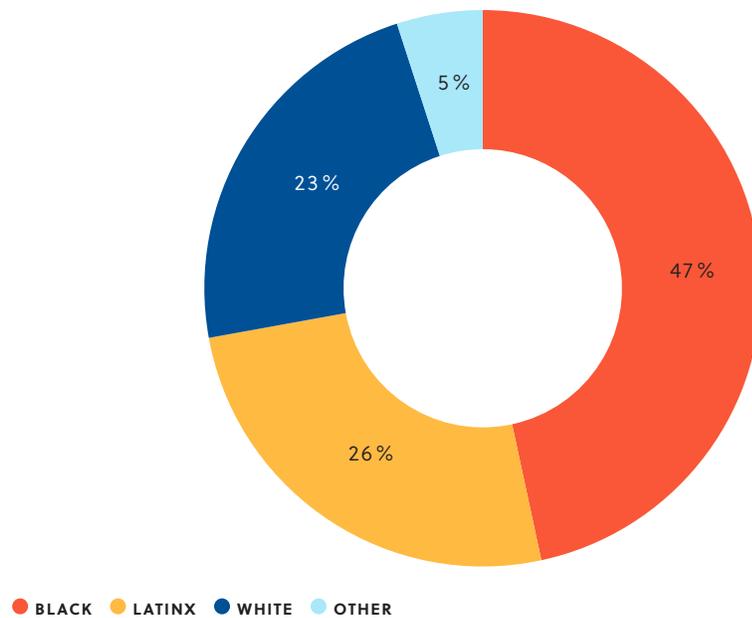
<sup>210</sup> *People v. Superior Court (Romero)*, 13 Cal.4th 497, 530 (1996).

<sup>211</sup> See, e.g., Josh Salman, Emily Le Coz, and Elizabeth Johnson, *Florida's Broken Sentencing System*, Sarasota Herald Tribune (Dec. 12, 2016) (exploring racial disparities in Florida's criminal sentences); The Sentencing Project, *Report of The Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance: Regarding Racial Disparities in the United States Criminal Justice System*, 6–8 (Mar. 2018).

<sup>212</sup> Data provided by CDCR Office of Research. See also *Letter of California Legislative Black Caucus, Re: Proposition 57 Regulations*, Notice File No. Z2017-0703-04 (Jul. 18, 2017).

<sup>213</sup> *The Prevalence and Severity of Mental Illness Among California Prisoners on the Rise*, Stanford Justice Advocacy Project, 1 (2017).

### PERCENTAGE OF THIRD STRIKERS CURRENTLY IN PRISON BY RACE (2020)



Source: CDCR Office of Research.

We appreciate that racial disparities in sentencing are hardly confined to California,<sup>214</sup> but they are especially concerning given the extreme prison terms required by many sentence enhancements. At minimum, lack of clarity in sentencing authority encourages subjectivity and inconsistency.

The Committee recommendation follows legal guidance provided to judges when exercising sentencing discretion in other contexts. For example, California law directs judges on how to exercise their sentencing discretion in the context of probation.<sup>215</sup> Furthermore, our recommendation builds on existing California Rules of Court that guide judges on what circumstances they should consider in aggravation and mitigation in imposing a felony sentence,<sup>216</sup> such as prior abuse, recency and frequency of prior crimes, and mental or physical condition of the defendant.<sup>217</sup> The Committee recommendations are also informed by the California Surgeon General's recent annual report, which recommends that the criminal legal system implement policies and practices that address trauma in justice-involved youth and adults.<sup>218</sup>

Finally, the Committee believes that judges should retain authority to impose sentence enhancements in appropriate cases. The Committee's recommendation leaves to judges the authority to impose sentence enhancements to protect public safety. But providing guidance on how and when judges should evaluate the appropriateness of sentence enhancements would provide more consistency, predictability, and reductions in unnecessary incarceration while ensuring that punishments are focused on protecting public safety.

<sup>214</sup> See Bergeron, et al., *How a Spreadsheet Could Change the Criminal Justice System*, The Atlantic (Dec. 14, 2020). See also Elizabeth Tsai Bishop, Brook Hopkins, Chijindu Obiofuma, and Felix Owusu, *Racial Disparities in the Massachusetts Criminal System*, The Criminal Justice Policy Program, Harvard Law School, 64 (Sep. 2020).

<sup>215</sup> See, e.g., Penal Code §§ 1170(h)(5)(A); 1203(e); California Rule of Court 4.415 provides further guidance to judges when applying this presumption.

<sup>216</sup> California Rules of Court, Rules 4.421 and 4.423.

<sup>217</sup> California Rules of Court, Rules 4.423(a)(9), 4.423(b)(1), and 4.423(b)(2).

<sup>218</sup> Harris, et al., *Roadmap for Resilience: The California Surgeon General's Report on Adverse Childhood Experiences, Toxic Stress, and Health*, Office of the California Surgeon General (2020).

## EMPIRICAL RESEARCH

There is a broad consensus among academic studies of decades of nationwide crime and incarceration data concluding that long sentences have little or no public safety value. As Professor Steven Raphael wrote, “[t]here is very little evidence of an impact of extremely harsh punishments (that is, longer sentences, capital punishment) on the levels of the crimes they are intended to deter.”<sup>219</sup> Professor Raphael also noted people sentenced by harsher judges had higher recidivism rates than people sentenced by more lenient judges.<sup>220</sup>

Other studies show that a person’s criminal involvement tends to be limited to a period of less than 10 years.<sup>221</sup>

## INSIGHTS FROM OTHER JURISDICTIONS

The most common type of sentencing enhancement across other jurisdictions are enhancements based on prior convictions, including Three Strikes and habitual offender statutes.

Many of these states have restrictions on the use of these enhancements. For example, out of 20 jurisdictions examined by the Committee,<sup>222</sup> 12 have cut-off dates or “wash-out” provisions, after which criminal history no longer counts for purposes of increasing the length of some sentences. Florida, Illinois,<sup>223</sup> Michigan, Delaware, and the District of Columbia have 10-year cut-offs for counting most prior felony offenses.<sup>224</sup> Arkansas, Minnesota, and the federal government<sup>225</sup> have a cut-off for counting most felony priors at 15 years, and for misdemeanor priors at 10 years.<sup>226</sup> In Arizona, defendants are subject to a longer sentence for a new felony conviction if they committed certain felonies within the past five years or more serious felonies within the past 10 years.<sup>227</sup> Similarly, Washington has a five-year wash-out period for enhanced sentences based on most prior offenses and a 10-year wash-out period for more serious felony priors.<sup>228</sup>

<sup>219</sup> Steven Raphael and Michael A. Stoll, *Why Are So Many Americans in Prison?*, 222 (2013). See also National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, The National Academies Press, 134-140 (2014).

<sup>220</sup> Written Submission of Professor Steven Raphael to Committee on Revision of the Penal Code, 5 (Jun. 26, 2020) (explaining research in Anna Aizer and Joseph J. Doyle, *Juvenile Incarceration, Human Capital, and Future Crimes: Evidence from Randomly Assigned Judges*, *Quarterly Journal of Economics*, 130(2): 759-803 (2015) and Michael Mueller-Smith, *The Criminal and Labor Market Impacts of Incarceration*, University of Michigan Working Paper (2015)).

<sup>221</sup> Alex R. Piquero, J. David Hawkins, Lila Kazemian, and David Petechuk, *Bulletin 2: Criminal Career Patterns (Study Group on the Transitions between Juvenile Delinquency and Adult Crime)*, (2013).

<sup>222</sup> The states examined in addition to the federal system were Alabama, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Florida, Illinois, Kansas, Maryland, Massachusetts, Michigan, Minnesota, North Carolina, Oregon, Pennsylvania, Tennessee, Utah, and Washington.

<sup>223</sup> In Illinois, judges have discretion to subject people to “extended term sentencing” — a longer sentence based on certain factors — one of which is if they had a prior conviction within the last 10 years. (730 Illinois Comp. Stat. § 5/5-5-3.2(b)(1).)

<sup>224</sup> 4 Delaware Sentencing Accountability Comm’n Benchbook 25 (2020); D.C. Voluntary Sentencing Guidelines Manual § 2.2.3 (2020); Florida Crim. Punishment Code: Scoresheet Preparation Manual 10 (2019); Michigan Sentencing Guidelines Manual Step.1D (2020).

<sup>225</sup> To calculate criminal history for federal offenses, every prior sentence of one year and a month within the last 15 years counts, as does every sentence of imprisonment of 60 or more days within the last 10 years. (United States Sentencing Guidelines Manual § 4A1.2 (2020).)

<sup>226</sup> Arkansas Sentencing Standards Grid Offense Serious Rankings & Related Material 102-03 (2017); Minnesota Sentencing Guidelines §§ 2.B.1.c and 2.B.3.e (2020).

<sup>227</sup> Arizona Rev. Stat. § 13-105(22)(b),(c); § 13-703(B)(C).

<sup>228</sup> Washington State Adult Sentencing Guidelines Manual 53-54 (2020). Prior Class A and felony sex convictions are always counted for criminal history purposes. (*Id.*)

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## 6. Limit Gang Enhancements to the Most Dangerous Offenses

## Limit Gang Enhancement to the Most Dangerous Offenses

### RECOMMENDATION

Gang enhancements are applied inconsistently and disproportionately against people of color, and fail to focus on the most dangerous, violent, and coordinated criminal activities.

The Committee therefore recommends the following:

1. Focus the definition of “criminal street gang” to target organized, violent enterprises.
2. Remove nonviolent property crimes from the list of predicate gang-related felonies.
3. Require the defendant to know the person responsible for any predicate gang-related offense.
4. Prohibit use of the current offense as proof of a “pattern” of criminal gang activity.
5. Require direct evidence of current and active gang involvement and violence, and limit expert witness testimony.
6. Bifurcate direct evidence of gang involvement from the guilt determination at trial.

### RELEVANT STATUTES

Penal Code § 186.22

### BACKGROUND AND ANALYSIS

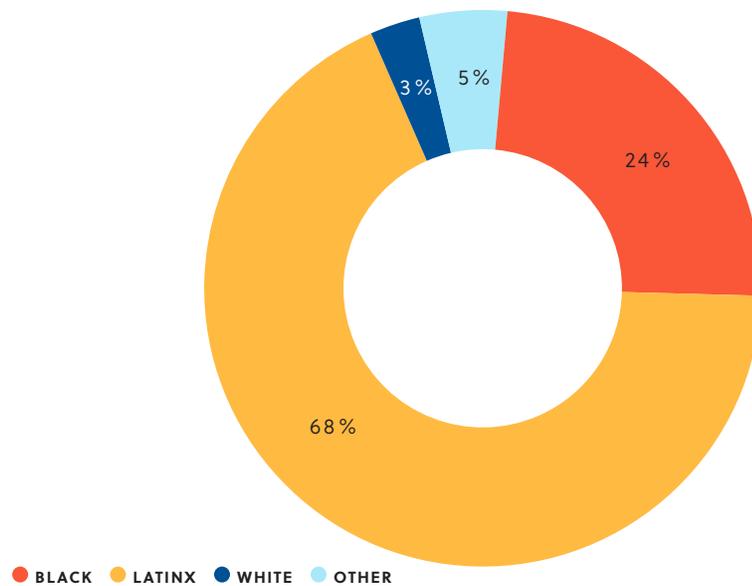
As previously noted, Black and Latinx people comprise 92% of the people sentenced under California’s gang enhancement statute.<sup>229</sup> The racial disparity is even starker in the state’s largest jurisdiction: Over 98% of people sentenced to prison for a gang enhancement in Los Angeles are people of color.<sup>230</sup> Yet research shows that white people make up the largest group of youth gang members.<sup>231</sup> It is difficult to imagine a statute, especially one that imposes criminal punishments, with a more disparate racial impact.

<sup>229</sup> Data provided by CDCR Office of Research.

<sup>230</sup> *Id.*

<sup>231</sup> Judith Greene and Kevin Pranis, *Gang Wars: The Failure of Enforcement Tactics and the Need for Effective Public Safety Strategies*, Justice Policy Institute (2007).

### PERCENTAGE OF PEOPLE CURRENTLY IN PRISON WITH GANG ENHANCEMENTS BY RACE (2020)



Source: CDCR Office of Research.

California’s gang enhancement can result in life sentences and may apply to crimes as minor as misdemeanors.<sup>232</sup> The law was originally enacted in 1988 as the Street Terrorism Enforcement and Prevention (STEP) Act to “seek the eradication of criminal activity by street gangs.”<sup>233</sup> The law was controversial from the start. Then-member of the Legislature and future Attorney General Bill Lockyer went so far as predicting the law would be “laughed out of court.”<sup>234</sup> But proponents of the law promised the enhancement would only apply when “the provable purpose of the gang is to commit serious and violent crime, and it can be shown that a gang member knew that was the gang’s purpose when he joined.”<sup>235</sup>

At the time, the Legislature asserted that California was “in a state of crisis ... caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods.”<sup>236</sup> As originally enacted, the Act aimed to eliminate gangs by creating a three-year enhancement for gang-related offenses.<sup>237</sup> Since then, the scope of the enhancement and severity of related punishments have greatly expanded.

Lawmakers, courts, and voters who enacted Proposition 21 in 2000 have increased the penalties that accompany the enhancement and broadened its application. Not only were punishments made longer, but it became easier to charge gang enhancements. This is because the list of predicate offenses, which must be established to prove the existence of a gang, has also ballooned and includes many nonviolent offenses.<sup>238</sup> Under current law, a person charged with a gang enhancement does not even have to know the person responsible for predicate offenses.<sup>239</sup>

<sup>232</sup> Penal Code §§ 186.22(b)(4)(C) & (d). Gang enhancements now add five years for a serious felony and 10 years for a violent felony. (Penal Code § 186.22(b).)

<sup>233</sup> Penal Code § 186.21.

<sup>234</sup> Martin Baker, *Stuck in the Thicket: Struggling with Interpretation and Application of California’s AntiGang STEP Act*, 11 Berkeley J. Crim. L. 101, 102 (2006) (quoting *Criminal Street Gang Bill Passes Committee*, Eagle Rock Sentinel (Jun. 27, 1987).)

<sup>235</sup> *Id.* at 101.

<sup>236</sup> *Id.*

<sup>237</sup> Penal Code § 186.22(b) (1988).

<sup>238</sup> Penal Code § 186.22(e)(1)-(33).

<sup>239</sup> *People v. Prunty*, 62 Cal.4th 59, 67–68 (2015).

The racially disproportionate application of gang enhancements is particularly concerning. Director of Systemic Issues Litigation at the Office of the State Public Defender Lisa Romo explained to the Committee in September 2020: “Although social science tells us [gang] members come in all races and all ethnicities, law enforcement officers are taught that gang members are people of color. This means that communities of color are overpoliced, and white gang members can pass.”<sup>240</sup> Civil Rights attorney Sean Garcia-Leys testified to the Committee that police often have difficulties knowing the difference between active gang members, former gang members, and people who are non-members but are “meshed in a gang social network by virtue of family and neighborhood.”<sup>241</sup>

Another problem with gang enhancements is that the evidence considered in court can be unreliable and prejudicial to a jury. San Joaquin County Deputy District Attorney Kevin Rooney, who specializes in gang prosecutions, agreed that bifurcating evidence of gang involvement from evidence related to the underlying charges would reduce the risk of unfairly prejudicing juries and convicting innocent people.<sup>242</sup> Empirical research corroborates this assessment.<sup>243</sup> Studies show that even merely associating an accused person with a gang makes it more likely that a jury will convict them.<sup>244</sup>

The Committee acknowledges that revising the gang enhancement presents special challenges. Because the law was amended by Proposition 21 in 2000, some aspects of the law can only be changed by another voter initiative or a two-thirds vote in the Legislature. As discussed in the introduction, the Committee decided to not make any recommendations that would require a supermajority vote of the Legislature. The recommendations in this section therefore require only a majority vote because they do not involve aspects of the gang enhancement statute enacted by Proposition 21.

## EMPIRICAL RESEARCH

Recent studies reveal the unreliability of gang evidence. For example, the California Attorney General’s 2019 Annual Report on CalGang, the statewide intelligence database used by law enforcement to track purported gang members, found that the demographics of those entered into the database were 65% Latinx, 24% Black, and 6% white.<sup>245</sup> Yet evidence indicates that white people make up the largest group of youth gang members.<sup>246</sup> Indeed, recent reports, including an audit by the Los Angeles Police Department, found that the CalGang database includes unreliable and false information.<sup>247</sup>

Survey data from California indicates that youth of different ethnicities self-identify as gang members at similar rates to each other.<sup>248</sup> In 2015, the Anti-Defamation League found that California has a “uniquely large population of white supremacist gangs (from skinhead gangs to street gangs),”<sup>249</sup> and a recent sting by federal authorities of members of the Aryan Brotherhood confirms that white gangs remain extremely active in the state.<sup>250</sup>

As noted, this problem is not limited to California. In Chicago, the police department’s gang database found that 95% of the 65,000 individuals listed in it are Black or Latinx.<sup>251</sup> In Mississippi, a recent report found that every person arrested under the state’s gang law between 2010 and 2017 was Black, even though the state’s Association of Gang Investigators reports that 53% of the state’s gang members are white.<sup>252</sup>

240 Committee on Revision of the Penal Code, Meeting on Sep. 17, 2020, 0:52:22–0:52:44.

241 *Id.* at 1:04:02–1:04:45. Scholars have also questioned law enforcement’s ability to accurately identify gang members. (Malcolm W. Klein, *What Are Street Gangs When They Get to Court?*, 31 Val. U.L. Rev. 515, 516 (1997).)

242 Deputy District Attorney Rooney was generally supportive of the gang enhancement, though he noted that it could be improved in certain areas including bifurcating trials. (Committee on Revision of the Penal Code, Meeting on Sep. 17, 2020, 1:16:32–1:17:09.)

243 Mitchell L. Eisen, Dayna M. Gomes, Lindsey Wandry, and David Drachman, *Examining the Prejudicial Effects of Gang Evidence*, 13 J. Forensic Psychol. Pract. 1 (2013); Mitchell L. Eisen, Brenna Dotson, and Gregory Dohi, *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?*, 62 UCLA Law Review Discourse 2 (2014).

244 Mitchell L. Eisen, Mitchell L. Eisen, Dayna M. Gomes, Lindsey Wandry, and David Drachman, *Examining the Prejudicial Effects of Gang Evidence*, 13 J. Forensic Psychol. Pract. 1 (2013); Mitchell L. Eisen, Brenna Dotson, and Gregory Dohi, *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?*, 62 UCLA Law Review Discourse 2 (2014).

245 Attorney General’s Annual Report on CalGang for 2019.

246 Judith Greene and Kevin Pranis, *Gang Wars: The Failure of Enforcement Tactics and the Need for Effective Public Safety Strategies*, Justice Policy Institute, 37–38 (2007).

247 Los Angeles Police Department Intradepartmental Correspondence 114, Re: Review of CalGang Database Entries by the Metropolitan Division and the Gang Enforcement Details (Jul. 10, 2020) (audit limited to LAPD gang entries); Richard Winton, *California Gang Database Plagued with Errors, Unsubstantiated Entries*, *State Auditor Finds*, Los Angeles Times (Aug. 11, 2016).

248 Data collected and published by the California Healthy Kids Survey (CHKS) and Biennial State CHKS and compiled by the Lucile Packard Foundation for Children’s Health, available at the CHKS website. See also Todd C. Hiestand, *Gang Membership, Duration, and Desistance: Empirical Literature Review*, DOJ Research Center (2018).

249 Anti-Defamation League, *White Supremacist Prison Gangs in the United States, A Preliminary Inventory* (2016).

250 Nate Gartrell, *‘Build an army’: Aryan Brotherhood Leaders Attempted to Rule Over All White California Prison Gangs*, *Feds Say*, The Orange County Register (Sep. 1, 2019).

251 Odette Yousef, *Activists: Gang Database Disproportionately Targets Young Men of Color*, NPR (Jan. 27, 2018).

252 Donna Ladd, *Only Black People Prosecuted Under Mississippi Gang Law Since 2010*, Jackson Free Press (Mar. 29, 2018).

## INSIGHTS FROM OTHER JURISDICTIONS

All 50 states and the District of Columbia have enacted some form of anti-gang measures.<sup>253</sup>

But in comparison to California, other states require more evidence of connection or organization between gang members for gang enhancements to apply. For example, in Illinois, to qualify as a criminal street gang, it must be shown that a group has “an established hierarchy.”<sup>254</sup> In Arkansas, a person commits the offense of engaging in a criminal gang when they commit two or more predicate offenses “in concert” with two or more other persons.<sup>255</sup> In Maryland, a “criminal organization” is required to have an “organizational or command structure,”<sup>256</sup> and to convict a person of participating in a criminal organization, the prosecution must prove the defendant had knowledge of the pattern of criminality of members of the gang.<sup>257</sup>

Other state courts have treated expert witness testimony about an accused’s gang membership with caution and required such testimony to be closely connected to direct evidence. For example, the Minnesota Supreme Court has warned “that criminal gang involvement is an element of the crime does not open the door to unlimited expert testimony,” and gang activity must therefore be proven by “firsthand knowledge.”<sup>258</sup> New Mexico’s Supreme Court reached a similar result.<sup>259</sup>

At least three states (Indiana, Tennessee, and Rhode Island) require gang enhancements to be proven in a separate phase of trial.<sup>260</sup>

<sup>253</sup> *Highlights of Gang-Related Legislation*, National Gang Center.

<sup>254</sup> 740 Illinois Code Stat. § 147/10.

<sup>255</sup> Arkansas Code Ann. § 5-74-104(a)-(b).

<sup>256</sup> Maryland Crim. Law § 9-801.

<sup>257</sup> Maryland Crim. Law § 9-804(a)(1); *Madrid v. State*, 247 Maryland App. 693 (2020).

<sup>258</sup> *State v. DeShay*, 669 N.W.2d 878, 885 (2003).

<sup>259</sup> *State v. Torrez*, 146 N.M. 331, 339 (2009).

<sup>260</sup> Rhode Island Stat. § 12-19-39(a)-(d); Indiana Stat. § 25-50-2-15(c);

Tennessee Stat. § 40-35-121(h)(1).

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# 7. Retroactively Apply Repealed Sentence Enhancements

## Retroactively Apply Repealed Sentence Enhancements

### RECOMMENDATION

In recent years, the Legislature eliminated certain sentence enhancements in Senate Bills 136 (2017) and 180 (2019), but these reforms apply only to new cases.

The Committee therefore recommends the following:

1. Retroactively apply the elimination of sentence enhancements enacted in SB 136 and SB 180.
2. Automatically remove these enhancements without requiring court action for the new sentence, and do not limit how many enhancements can be removed per person.
3. Prevent renegotiation of plea bargains.

### RELEVANT STATUTES

Penal Code § 667.5(b)

Health & Safety Code § 11370.2

### BACKGROUND AND ANALYSIS

In 2017 and 2019, the Legislature repealed sentencing enhancements that added one year of incarceration to a defendant for each prior prison or jail term he or she previously served and added three years to a sentence for some prior drug convictions.<sup>261</sup> These reforms apply prospectively only to new cases filed after SB 136 and SB 180 became law. Most people already serving time for these enhancements did not benefit from the change in the law.<sup>262</sup>

As with other sentence enhancements discussed above, the enhancements eliminated by SB 136 and SB 180 were disproportionately applied against people of color. As the author of SB 136, Sen. Scott Weiner, stated, “This injustice undermines the public trust in our laws, law enforcement, and our political institutions.”<sup>263</sup> The Los Angeles Times editorial page also supported the repeal of this one-year enhancement as “good lawmaking in that it would roll back foolish lawmaking.”<sup>264</sup>

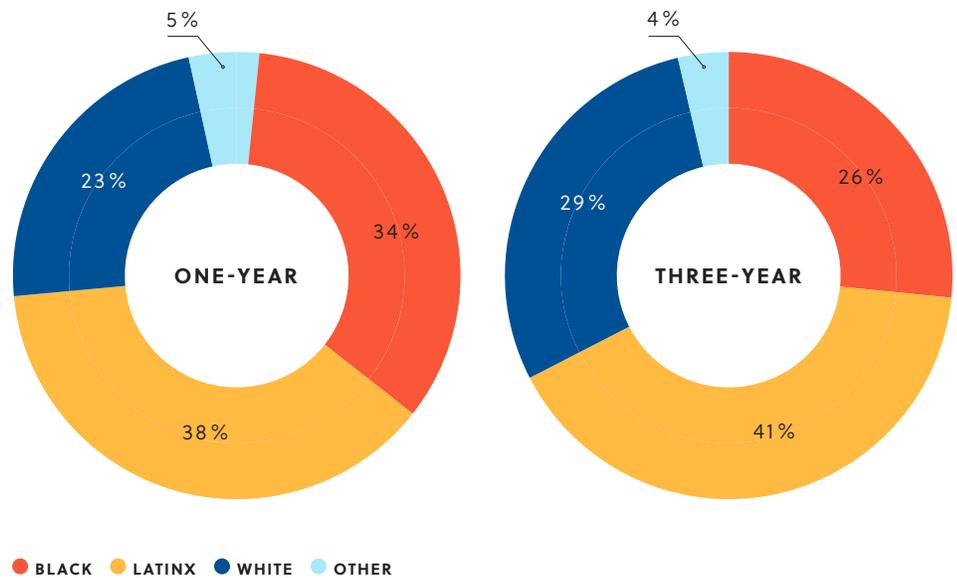
<sup>261</sup> Health & Safety Code § 11370.2; Penal Code § 667.5(b).

<sup>262</sup> Penal Code § 3; *People v. McKenzie*, 9 Cal.5th 40 (2020); *In re Estrada*, 63 Cal.2d 740, 744 (1965); *People v. Chamizo*, 32 Cal.App.5th 696, 700–01 (2019) (SB 180).

<sup>263</sup> Sen. Com. On Public Safety, Analysis of Sen. Bill No. 136 (2019–2020 Reg. Sess.) 2 (Mar. 26, 2019).

<sup>264</sup> Los Angeles Times Editorial Board, *Editorial: It's Time to Take Politics out of Sentence Enhancements*, Los Angeles Times (July 20, 2019). See also Michelle Alexander, *Op-Ed: Michelle Alexander: Sentence 'Enhancement' for Drug Offenders Is a Tool of Community Destruction*, Los Angeles Times (May 9, 2016).

### PERCENTAGE OF PEOPLE CURRENTLY IN PRISON WITH ONE- AND THREE-YEAR SENTENCE ENHANCEMENTS BY RACE (2020)



Source: CDCR Office of Research.

It is difficult to justify a sentence that is longer than someone's else's merely because it was imposed at a slightly different date. California has offered retroactive application for some of its most significant sentencing reforms: People serving life sentences under the Three Strikes law could seek resentencing under Proposition 36, people with certain felony convictions could be resentenced under Proposition 47, and marijuana convictions could be modified or vacated under Proposition 64.<sup>265</sup> Recent reforms to the felony murder rule were also given retroactive application.<sup>266</sup> The same principle should apply here.

### EMPIRICAL RESEARCH

Research has shown that modest reductions in sentences, as recommended here, have no public safety impact. In 2018, the United States Sentencing Commission studied retroactive application of reductions to federal drug sentences, which resulted in an average reduction of 30 months for more than 7,500 people with no measurable impact on recidivism rates.<sup>267</sup> Another United States Sentencing Commission study on other retroactive sentence reductions had similar findings.<sup>268</sup>

Additional research on the federal system shows that "average length of stay can be reduced by 7.5 months with a small impact on recidivism."<sup>269</sup> A similar analysis of the prison populations in Maryland, Michigan, and Florida concluded that a sentence reduction of three to 24 months would have produced minimal public safety impacts for a significant portion of the prison population.<sup>270</sup>

<sup>265</sup> Penal Code § 1170.126; Penal Code § 1170.18; Health & Safety Code § 11361.8.

<sup>266</sup> Penal Code § 1170.95.

<sup>267</sup> United States Sentencing Commission, *Recidivism Among Federal Offenders Receiving Retroactive Sentence Reductions*, 1, 3 (Mar. 2018); United States Sentencing Commission, *Retroactivity & Recidivism: The Drugs Minus Two Amendments*, 1 (Jul. 2020).

<sup>268</sup> United States Sentencing Commission, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment*, 14–15 (May 2014).

<sup>269</sup> William Rhodes, Gerald G. Gaes, Ryan Kling, and Christopher Cutler, *Relationship Between Prison Length of Stay and Recidivism: A Study Using Regression Discontinuity and Instrumental Variables with Multiple Break Points*, *Criminal Public Policy* 17:731–69, 758–759 (2018).

<sup>270</sup> *Time Served: The High Cost, Low Return of Longer Prison Terms*, The Pew Center on the States, 35–38 (2012).

## INSIGHTS FROM OTHER JURISDICTIONS

As noted, after a change to the Federal Sentencing Guidelines in 2011, more than 7,500 people incarcerated in federal prison for some drug offenses received an average sentence reduction of 30 months without impacting recidivism rates.<sup>271</sup>

Between 2004 and 2009, New York State retroactively reduced sentences for drug offenses and allowed more than 1,500 people to be resentenced.<sup>272</sup> Analysis of the first cohort resentenced showed a low recidivism rate: About 4% of people returned to prison for a new offense within three years of release, compared to a return rate of 11% for people convicted of drug offenses who were released without being resentenced.<sup>273</sup>

In New Jersey, the state Sentencing and Disposition Commission recommended that their changes to sentencing law for nonviolent drug and property offenses be applied retroactively.<sup>274</sup>

The Kansas Sentencing Commission is also considering a recommendation that would allow for early release of people convicted of certain drug offenses.<sup>275</sup>

Delaware reformed its Three Strikes law in 2016 and allowed people convicted under the old version of the law to apply for sentence modification.<sup>276</sup>

In 2012, the Maryland Supreme Court ruled that an error in jury instructions should have retroactive effect, which resulted in more than 200 people who had received long or life sentences being released from prison.<sup>277</sup> Only seven of these people have had parole violations or reconviction since release.<sup>278</sup>

## ADDITIONAL CONSIDERATIONS

- Because both of these sentencing enhancements have been repealed in almost all cases, it would waste court, prison, and prosecutorial resources to involve courts in removing each enhancement. Instead, the Legislature should create a mechanism that would allow sentences with these enhancements to be reduced without returning to court, including a clear deadline for when the removal of the sentencing enhancements must be completed.
- Because the enhancements at issue here were widely used and 97% of felony cases are resolved with a guilty plea,<sup>279</sup> retroactive elimination of these enhancements could invite significant relitigation of resolved cases. To remove any doubt, the Legislature should specify that removing these sentencing enhancements is not a basis for disturbing plea bargains.<sup>280</sup>

<sup>271</sup> United States Sentencing Commission, *Recidivism Among Federal Offenders Receiving Retroactive Sentence Reductions*, 1 (Mar. 2018).

<sup>272</sup> "After the reforms, 1,697 inmates applied to be resentenced, and 1,630 were released," said Linda Foglia, the state Department of Corrections spokeswoman." (Bob Fredericks, *Just 67 Inmates Still Doing Time Under Rockefeller Drug Laws*, New York Post (Jul. 17, 2015).)

<sup>273</sup> William Gibney, *Drug Law Resentencing: Saving Tax Dollars With Minimal Community Risk*, Legal Aid Society, 8 (Jan. 13, 2010).

<sup>274</sup> New Jersey Sentencing and Disposition Commission, *Annual Report*, 24–26 (Nov. 2019). Relevant legislation was approved by the New Jersey legislature but is awaiting action by the governor. (Tracey Tulley, *It Was a Landmark Crime Bill. Then a State Senator Added a Special Favor*, New York Times (Dec. 17, 2020).)

<sup>275</sup> Minutes of the Kansas Sentencing Commission Zoom Meeting, 2 (Nov. 19, 2020).

<sup>276</sup> Jorge Renaud, *Eight Keys to Mercy: How to Shorten Excessive Prison Sentences*, Prison Policy Initiative, 5 (Nov. 2018); 11 Del. Code § 4214(f).

<sup>277</sup> Michael Millemann Rebecca Bowman Rivas, and Elizabeth Smith, *Digging Them Out Alive*, 25 Clinical L. Rev. 365, 367–69 (2019).

<sup>278</sup> Justice Policy Institute, *The Ungers, 5 Years and Counting: A Case Study in Safely Reducing Long Prison Terms and Saving Taxpayer Dollars*, 17 (Nov. 2018). Committee staff obtained the latest recidivism information in November 2020 from a Maryland public defender who is tracking it.

<sup>279</sup> Judicial Council of California, *Court Statistics Report, Statewide Caseload Trends, 2009–10 through 2018–19*, 85.

<sup>280</sup> *Stamps*, 9 Cal. at 703 (Legislature "may bind the People to a unilateral change in a sentence without affording them the option to rescind the plea agreement" (citation omitted)).

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# 8. Equalize Custody Credits for People Who Committed the Same Offenses, Regardless of Where or When They Are Incarcerated

# Equalize Custody Credits for People Who Committed the Same Offenses, Regardless of Where or When They Are Incarcerated

## RECOMMENDATION

People who committed the same crimes and have the same criminal histories receive different amounts of good conduct credits depending on whether they are housed in county jail, state prison, or state hospitals.

The Committee therefore recommends the following:

1. Equalize good conduct credits between jail, prison, and state hospitals.
2. Retroactively apply good conduct credits implemented by CDCR pursuant to Proposition 57 and toward youth offender and elderly parole dates.

## RELEVANT STATUTES AND REGULATIONS

Penal Code § 4019  
15 CCR § 3043.2

## BACKGROUND AND ANALYSIS

Most people incarcerated in county jails and prisons are eligible to earn “good conduct credits” which take time off their sentence if they follow institutional rules. But current law awards differing credits to different people, based solely on where they are incarcerated. For example, someone serving time on a violent offense who follows institutional rules currently earns 20% off their sentence if they are housed in state prison, but only 15% off if incarcerated in a county jail.<sup>281</sup> Someone who is found incompetent to stand trial and is confined to a state hospital does not get *any* good conduct credit,<sup>282</sup> which means that they may be incarcerated longer than someone whose offense was not related to mental illness.

## “GOOD CONDUCT” CREDITS IN CALIFORNIA JAILS AND PRISONS

CONVICTION TYPE	JAIL	PRISON
Nonviolent offense with no prior strike conviction	50%	50%
Nonviolent offense with a prior strike conviction	50%	33.3%
Violent offense	15%	20%

Source: Penal Code §§ 4019, 4019.1, 4019.4; 15 CCR §§ 3043.2, 3043.3, 3043.4, 3043.5.

<sup>281</sup> Compare 15 CCR § 3043.2(a)(2) (20% in prison) with Penal Code § 2933.1(c) (15% in jail).

<sup>282</sup> Penal Code § 4019(a)(8) (limiting good conduct credits for people found incompetent to stand trial to those confined only to “county jail treatment facilit[ies]”); *People v. Waterman*, 42 Cal.3d 565, 571 (1986).

Almost every incarcerated person can potentially benefit from good conduct credits. This means that equalizing credits between custody settings – even if the changes are small – could have a profound effect on the amount of overall incarceration and on the state budget.<sup>283</sup> For example, if nonviolent “second strikers” (people with a prior strike offense currently in prison for a nonviolent offense) earned the same credit in prison that they earned while in jail, each person would serve almost two less months per year in prison. As of June 2019, there were more than 18,000 nonviolent second strikers in CDCR custody.<sup>284</sup> If this group of people were allowed to earn the same credits for good conduct as other people convicted of nonviolent offenses, the cumulative impact would be approximately 3,000 fewer years of incarceration annually.<sup>285</sup>

Good conduct credits also incentivize positive rehabilitative programming and positive institutional behavior. In July 2020, James King appeared before the Committee to describe how increased credit eligibility by CDCR greatly increased the number of people in prison registering for educational, vocational, and rehabilitation programs, including drug treatment and victim awareness.<sup>286</sup>

#### “EARNED” CREDITS IN CALIFORNIA JAILS AND PRISONS

JAIL	PRISON
All earned credits capped at six weeks per year	Milestone Completion Credits: Up to 12 week reduction per year for various academic, vocational, or rehabilitative goals
	Rehabilitative Achievement Credits: Up to 40 day reduction per year for various self-help and public service activities
	Education Merit Credits: 180 day reduction for earning high school diploma and other educational achievements

Source: Penal Code § 4019.4; 15 CCR §§ 3043.3, 3043.4, 3043.5.

Part of the reason why prison and jail credits do not match is because credits in jail settings are determined by the Penal Code and prison credits are set by CDCR regulations. CDCR was given authority over credit rules with the passage of Proposition 57 in 2016. As a result of these dual sources of authority, there is no single body considering the credit-earning rules for each setting, and similarly situated people can receive less good conduct credit simply because of a difference in their custodial setting. As the California Supreme Court has acknowledged, in some cases, there are perverse incentives to delay transfer to prison and stay longer in county jail where there may be fewer services but better credit opportunities.<sup>287</sup>

There are also limits on how CDCR applies good conduct credits, depending on a person’s date of incarceration or how old they are. First, CDCR increased the credit-earning capacity for many people in its custody after the effective date of Proposition 57, but those rules only applied prospectively as of May 1, 2017.<sup>288</sup> Second, CDCR

283 Allison Lawrence, *Cutting Corrections Costs: Earned Time Policies for State Prisoners*, National Conference of State Legislators, 1 (Jul. 2009); *Department of Corrections: Administration of Earned Time*, Oregon Secretary of State Audit Report, 1, 15 (Dec. 2010).

284 CDCR Office of Research, *Offender Data Points — Offender Demographics for the 24-Month Period Ending June 2019*, Table 1.22 (Oct. 2020).

285 Data provided by CDCR Office of Research.

286 Written Submission of James King to Committee on Revision of the Penal Code, 2 (Jul. 23, 2020).

287 *People v. Thomas*, 21 Cal.4th 1122, 1126 (1999).

288 CDCR, *CDCR Issues Amended Proposition 57 Regulations*, News Release (Nov. 19, 2017).

conduct credits implemented following Proposition 57 do not currently apply when calculating parole hearings dates for people eligible for youth or elderly parole.<sup>289</sup>

While applying these credits to anyone who would be eligible – regardless of age or date of incarceration – may present technical administrative challenges at CDCR, the Committee reiterates its belief that peoples’ sentences and length of incarceration should not depend on the date they were convicted. We also reiterate that fundamental fairness demands that reforms with prospective application should generally be applied retroactively as well.

### **EMPIRICAL RESEARCH**

Studies of credit-earning systems in other states have shown that recidivism outcomes are not different for people who receive credits and end up serving less time incarcerated.<sup>290</sup> Other research has shown that people who have the opportunity to earn time off a sentence have fewer disciplinary violations.<sup>291</sup>

### **INSIGHTS FROM OTHER JURISDICTIONS**

The Model Penal Code recommends that good conduct credits be available to all incarcerated people at the same rate, regardless of the nature of their offense and where they are incarcerated.<sup>292</sup>

Different credits for the same people in jail and prison also present significant constitutional issues. More than twenty years ago, Washington state was found to have violated the federal Equal Protection Clause by offering different amounts of good conduct to people while they were in jail or prison.<sup>293</sup> California state courts have found equal protection violations in similar situations,<sup>294</sup> as has the Montana Supreme Court.<sup>295</sup>

In 2017, Louisiana retroactively applied changes to good conduct credits, which led to a 45% increase in the number of people released because of their good conduct credits.<sup>296</sup>

The federal system also recently made some good conduct credits retroactive, which led to the accelerated release of 3,100 people in July 2019, even though the change in credits was modest and amounted only to an extra week off a year.<sup>297</sup>

<sup>289</sup> Penal Code § 3051(b).

<sup>290</sup> See N.Y. Dept. of Corr. Services., *Merit Time Program Summary: October 1997–December 2006*, 1–iii (2007); E.K. Drake, R. Barnoski, and S. Aos, *Increased Earned Release From Prison: Impacts of a 2003 Law on Recidivism and Crime Costs, Revised*, Washington State Institute for Public Policy, 1, 7–8 (Apr. 2009).

<sup>291</sup> William D. Bales and Courtney H. Miller, *The Impact of Determinate Sentencing on Prisoner Misconduct*, *Journal of Criminal Justice* 40, 401–402 (2012).

<sup>292</sup> Model Penal Code: Sentencing § 11.01, Comment (b).

<sup>293</sup> *MacFarlane v. Walter*, 179 F.3d 1131 (9th Cir. 1999), judgment vacated and dismissed as moot, *Lehman v. MacFarlane*, 529 U.S. 1106 (2000).

<sup>294</sup> See e.g., *People v. Raygoza*, 2 Cal.App.5th 593, 602 n.4 (2016); *People v. Mobley*, 139 Cal.App.3d 320, 323 (1983); *People v. Lapaille*, 15 Cal.App.4th 1159, 1168–70 (1993); *People v. Sage*, 26 Cal.3d 498, 507 (1980).

<sup>295</sup> *MacPheat v. Mahoney*, 299 Mont. 46, 53 (2000).

<sup>296</sup> Louisiana Dept. of Public Safety & Corrections, Louisiana Commission on Law Enforcement, *Louisiana's Justice Reinvestment Reforms First Annual Performance Report*, 16, 42 (Jun. 2018). The spike in releases was caused by the “retroactive nature of some of the policies.” (Louisiana Dept. of Public Safety & Corrections, Louisiana Commission on Law Enforcement, *Louisiana's Justice Reinvestment Reforms 2019 Annual Performance Report*, 14 (Jun. 2012).)

<sup>297</sup> The United States Department of Justice, *Department of Justice Announces the Release of 3,100 Inmates Under First Step Act, Publishes Risk and Needs Assessment System* (Jul. 19, 2019); Ames Grawert, *What Is the First Step Act — And What's Happening With It?*, Brennan Center for Justice (Jun. 23, 2020).

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## 9. Clarify Parole Suitability Standards to Focus on Risk of Future Violent or Serious Offenses

## Clarify Parole Suitability Standards to Focus on Risk of Future Violent or Serious Offenses

### **RECOMMENDATION**

The statutes and regulations governing the parole release determinations by the Board of Parole Hearings (BPH) are not consistent with each other.

The Committee therefore recommends the following:

1. Clarify that the definitions of “danger to society” and “danger to public safety” mean “imminent risk that the parole candidate will commit a serious or violent felony if released.”
2. Establish a rebuttable presumption that a parole candidate is suitable for release (i.e., does not present an imminent risk to commit a serious or violent felony) if one or more of the following factors are true:
  - The commitment offense was nonviolent.
  - The commitment offense has a connection to mental illness.
  - The parole candidate is designated low-risk on a CDCR or BPH risk assessment.
  - The parole candidate has no violent prison rule violations in the past three years.
  - The parole candidate has average or above average performance in programming in the past three years.
  - The parole candidate’s criminal system involvement resulted from retaliation against an abuser or was a result of prior victimization, abuse, or trauma.
3. Specify that the presumption can be overcome if parole hearing officers nonetheless determine that the parole candidate presents an imminent risk to commit a serious or violent felony if released.
4. Specify that failure to qualify for one or more of the presumptions listed above shall not be construed as a checklist of prerequisites for a grant of parole.
5. Specify that a parole candidate’s failure to complete any recommended program or work assignment that is unavailable to them cannot be a basis for denial of parole.
6. Provide that, if parole release is denied, parole hearing officers may recommend housing with appropriate programming within CDCR.
7. Provide that parole hearing officers consider whether a parole candidate’s risk can be mitigated outside of prison, such as by mandating a halfway house, substance abuse treatment, mental health treatment, or other appropriate conditions. This release option is not intended to become BPH’s default decision.

- 8. Increase the standard for judicial review of parole decisions to “abuse of discretion,” and specify that a court can order a new hearing or grant release as the case may warrant.
- 9. Increase the data that BPH releases to the public.

**RELEVANT STATUTES AND REGULATIONS**

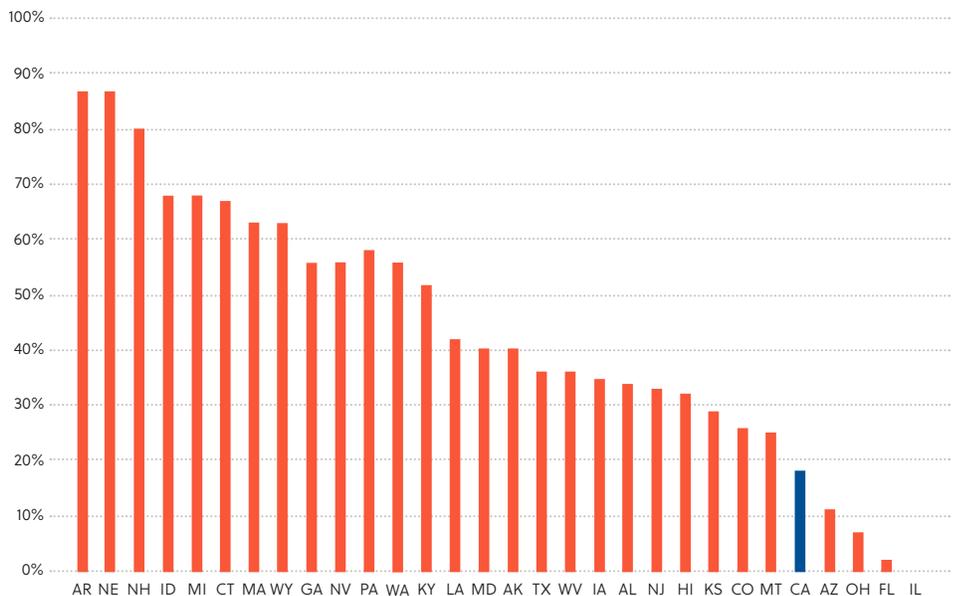
Penal Code § 3041(a) & (b)  
 15 CCR § 2281

**BACKGROUND AND ANALYSIS**

More than half of California’s prison population is eligible at some point for release by parole authorities.<sup>298</sup>

Compared to other states, California has among the lowest parole grant rates. In 2020, California’s parole grant was 16%.<sup>299</sup> The figure is especially low given that 82% of people up for review by California parole authorities score as “low risk” to reoffend,<sup>300</sup> according to an actuarial risk assessment tool developed and administered by CDCR and researchers at the University of California, Irvine.<sup>301</sup>

**PAROLE GRANT RATES BY STATE**



298 Board of Parole Hearings Executive Officer Jennifer Shaffer informed the Committee that 55% of the current CDCR population will go through a parole review process at some point. (Committee on Revision of the Penal Code, Meeting on Nov. 12, 2020, 1:34:52– 1:35:50.) This includes people sentenced to indeterminate life terms and people eligible for parole consideration under Proposition 57. (See 15 CCR §§ 3490(f) & (d), 2449.4(c).)

299 CDCR, BPH, Parole Suitability Hearing and Decision Information, available at CDCR website; Board of Parole Hearings, Report of Significant Events, 3 (2019).

300 Data provided by CDCR Office of Research.

301 See Susan Turner, James Hess, Jesse Jannetta, Development of the California Static Risk Assessment Instrument (CSRA), Center for Evidence-Based Corrections at the University of California, Irvine, 1 (Nov. 2009).

SOURCE: MARIEL E. APLER, BY THE NUMBERS: PAROLE RELEASE AND REVOCATION ACROSS 50 STATES, ROBINA INSTITUTE OF CRIMINAL LAW AND CRIMINAL JUSTICE (2016).

Furthermore, the relatively few people who have been granted parole by BPH have remarkably low recidivism rates.<sup>302</sup> According to the most recent CDCR Outcome Evaluation Report, only 2.3% of people found suitable by parole authorities and released from custody were convicted of a new crime, the majority of which were misdemeanors.<sup>303</sup>

### PAROLE HEARING OUTCOMES IN CALIFORNIA

	2017	2018	2019	2020
<b>NUMBER OF PAROLE GRANTS</b>	915	1,136	1,184	1,106
<b>TOTAL SCHEDULED HEARINGS</b>	5,335	5,226	6,061	6,932
<b>GRANT RATE</b>	17%	22%	20%	16%
<b>DENIAL RATE</b>	42%	34%	37%	29%
<b>HEARINGS NOT HELD</b>	41%	44%	43%	55%

Source: CDCR Office of Research.

Despite current efforts by BPH, former Governor Brown testified before the Committee that he supported additional measures that would result in “earlier parole for more people.”<sup>304</sup> And University of Southern California Law Professor Heidi Rummel, an expert in California’s parole process, emphasized that the low recidivism rate of parolees proved that California could release more people safely on parole without endangering public safety.<sup>305</sup>

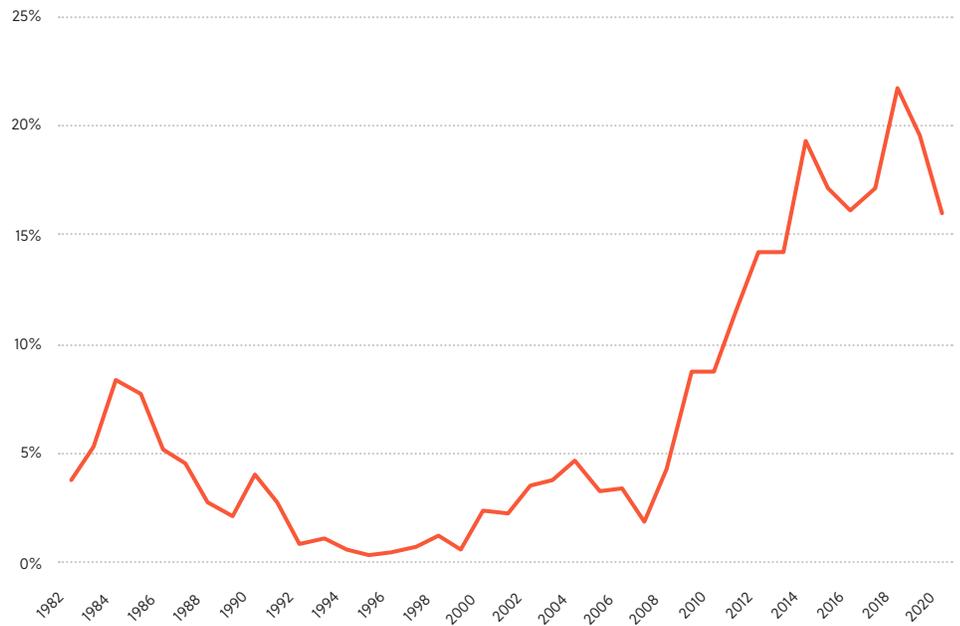
<sup>302</sup> California lifers have had a “miniscule” recidivism rate for serious offenses. (Jordan D. Segall, Robert Weisberg, and Debbie Mukamal, *Life in Limbo*, Stanford Criminal Justice Center, 17 (2011).)

<sup>303</sup> CDCR, Recidivism Report for Offenders Released from the California Department of Corrections and Rehabilitation in Fiscal Year 2014-15, viii (Jan. 2020). As of September 2011, among the 860 people convicted of murder in California paroled since 1995, only five individuals have returned to prison for new felonies since being released. (Jordan D. Segall, Robert Weisberg, and Debbie Mukamal, *Life in Limbo*, Stanford Criminal Justice Center, 17 (2011).)

<sup>304</sup> Committee on Revision of the Penal Code, Meeting on Sep. 17, 2020, 0:17:55–0:18:10.

<sup>305</sup> *Id.* at 0:13:21–0:14:21.

## CALIFORNIA PAROLE HEARING GRANT RATE BY YEAR



Source: CDCR Office of Research.

Part of the problem is that the various statutes and regulations governing California’s parole release standard are vague and internally inconsistent. They should be harmonized to provide better transparency and equal application.

For example, Penal Code Section 3041(a)(2) directs parole authorities to “normally grant parole.”<sup>306</sup> Another section of the governing statute instructs parole authorities to deny parole if the candidate poses a threat to “public safety.”<sup>307</sup> That term has never been defined by the Legislature.<sup>308</sup> Separately, BPH adopted regulations that parole should be denied if the candidate “pose[s] an unreasonable risk of danger to society.”<sup>309</sup> Again, this term has not been defined.<sup>310</sup>

Although these terms have never been squarely reconciled or addressed by courts or the Legislature, at least three courts of appeal have indicated the standards “danger to public safety” and “danger to society” combine to mean parole should be granted unless the parole candidate is at risk to commit a violent crime if released.<sup>311</sup> Likewise, the Penal Code utilizes similar language focused on an imminent risk of violence in other circumstances where authorities must determine whether people may be released from custodial settings into the community.<sup>312</sup>

BPH Executive Officer Jennifer Shaffer agreed that risk of violence was the principal concern considered by parole commissioners—and “wasn’t very far from where we are today” in terms of a de facto standard at suitability hearings—even though the statutes and regulations make no such specification.<sup>313</sup> She also acknowledged that the current statutory and regulatory parole release standards are “muddled.”<sup>314</sup>

<sup>306</sup> Penal Code § 3041(a)(2).

<sup>307</sup> Penal Code § 3041(b)(1).

<sup>308</sup> Some courts interpret this standard to mean “an unreasonable risk” to commit “future violence if granted release on parole.” (*In re Hunter*, 205 Cal.App.4th 1529, 1536 (2012).)

<sup>309</sup> 15 CCR § 2281(a); 15 CCR § 2402(a); 15 CCR § 2422(a); 15 CCR § 2432(a). Regulations also list a number of factors that must be considered. (See 15 CCR § 2281(c) (unsuitability) and (d) (suitability).)

<sup>310</sup> See *In re Rosenkrantz*, 29 Cal.4th 616, 626 (2002). BPH decisions to deny parole are upheld by a reviewing court if supported by “some evidence.” (*Lawrence*, 44 Cal.4th, 1218–1221)

<sup>311</sup> *Hunter*, 205 Cal.App.4th at 1536 (reversing a denial of parole because there was no evidence “tending to show that [the parole candidate would] pose an unreasonable risk of future violence”); *In re Jackson*, 193 Cal.App.4th 1376, 1388 (2011) (reversing a parole denial because parole candidate’s lack of attendance in self-help programs did not necessarily indicate a likelihood he would “commit violent crimes ... and [thus] does not constitute some evidence that [the candidate] is currently dangerous.”); *In re Morganti*, 204 Cal.App.4th 904, 921 (2012) (holding that the possibility that someone on parole might commit new nonviolent drug crimes did not support a finding of risk to society).

<sup>312</sup> See Penal Code § 1610 (providing that some people awaiting a decision about whether they should be sent to a secured state hospital may be incarcerated if they “pose an imminent risk of harm to [themselves] or to another”); Penal Code § 853.6(a)(2) (providing that someone arrested on a protective order violation in a domestic violence case may only be released by an arresting officer if doing so would not “imminently endanger[]” other people).

<sup>313</sup> Committee on Revision of the Penal Code, Meeting on Nov. 12, 2020, 58:18–0:58:25. Executive Officer Shaffer stated that the current standard the BPH uses to deny parole based on case law was “a current unreasonable risk to public safety.” (*Id.* at 0:30:19–0:30:30.)

<sup>314</sup> *Id.* at 0:28:30–0:30:00.

While the Committee appreciates that parole authorities continue to evaluate and refine its parole review process, including recently implementing a “structured decision making” evaluation process,<sup>315</sup> we urge legislative action because the ultimate release standard remains vague and inconsistent and the process involves a great deal of subjectivity, unpredictability, and concerns about inconsistency.

Research suggests that factors that currently play central roles in parole determinations may have little predictive value. For example, studies indicate that the severity of a person’s offense does not predict future recidivism risk.<sup>316</sup> Research also indicates that consideration by parole authorities of subjective factors, such as whether the parole candidate lacks “insight”<sup>317</sup> or “remorse,”<sup>318</sup> does not effectively predict recidivism. These issues are compounded for people with mental health issues who may be unable to articulate the appropriate presentation of insight or remorse.<sup>319</sup>

In addition, parole can often be denied because of failure to complete programs that were unavailable to the parole candidate.<sup>320</sup> For example, Shanae Polk, Director of Operations at 2nd Call, described to the Committee the great difficulties she faced in trying to fulfill BPH’s release requirements because of class unavailability and a lack of assistance in preparing for her parole hearing.<sup>321</sup> Now that she has been released, and frustrated by the lack of appropriate programming, Ms. Polk volunteers to teach the only domestic violence class offered at a women’s prison.<sup>322</sup>

## EMPIRICAL RESEARCH

The most robust data on recidivism prediction shows that older people are less likely to commit new crimes compared to younger people.<sup>323</sup> This is particularly relevant in the context of parole because most parole candidates are older, having served a considerable sentence prior to becoming eligible for release consideration. As noted above, research indicates that a person’s period of criminal involvement generally lasts less than 10 years.<sup>324</sup>

Studies of other states show that, as in California, people with the most serious convictions tend to have the lowest recidivism rates.<sup>325</sup> For example, in Michigan, 2.7% of 2,558 homicide parolees returned to prison for committing any new crime.<sup>326</sup> In New York, 0.9% of people released from prison in 2012 after a murder conviction returned to prison for a new offense within three years, well below the average 9.2% rate for all offenses.<sup>327</sup>

In addition, research has found that there is no difference in violence between people with mental illness and their non-mentally ill neighbors,<sup>328</sup> and more specifically that formerly incarcerated people with mental illness are rearrested or reincarcerated at a rate similar to (and sometimes lower than) non-mentally ill people.<sup>329</sup> According to researchers, the risk of violence society ascribes to mental illness “vastly exceeds the actual risk presented.”<sup>330</sup>

Studies also show that actuarial risk assessment tools are particularly reliable in identifying low-risk individuals.<sup>331</sup> For example, a violence prediction tool developed by the Pennsylvania Sentencing Commission in 2018 is 98% accurate in predicting which people are at low risk for committing a new violent crime.<sup>332</sup>

315 Written Submission of Jennifer Shaffer to Committee on Revision of the Penal Code, 24–25 (Nov. 12, 2020).

316 Danielle Sered, *Accounting for Violence: How to Increase Safety and Break our Failed reliance on Mass Incarceration*, Vera Institute of Justice, 19 (2017); Patrick Langan and David Levin, *Recidivism of Prisoners Released in 1994*, U.S. Department of Justice, Bureau of Justice Statistics, 1 (2002); Tracy Velazquez, *The Pursuit of Safety: Sex Offender Policy in the United States*, Vera Institute of Justice, 6 (2008).

317 See *In re Shaputis*, 53 Cal.4th 192, 217–221 (2011). Proof of insight may include “acknowledg[ing] the material aspects of [the person’s] conduct and offense, show[ing] an understanding of its causes, and demonstrat[ing] remorse.” (*In re Ryner*, 196 Cal.App.4th 533, 549 (2011).)

318 15 CCR § 2281(d)(3), Committee on Revision of the Penal Code, Meeting on Nov. 12, 2020, 0:7:00–0:8:05, 0:9:58–0:10:38, 0:53:50–0:55:35, 1:05:44–1:06:55.

319 *Id.* at 1:05:44–1:06:55, 0:53:50–0:55:35; Jeremy Isard, *Under the Cloak of Brain Science: Risk Assessments, Parole, and the Powerful Guise of Objectivity*, California Law Review, vol. 105, n. 4 (2017).

320 Committee on Revision of the Penal Code, Meeting on Nov. 12, 2020, 0:8:37–0:8:46, 1:18:00–1:18:23.

321 *Id.* at 1:25:25–1:28:30, 1:33:46–1:35:28.

322 *Id.* at 1:31:36–1:33:45.

323 Robert Weisberg, Debbie Mukamal, and Jordan Segall, *Life in Limbo*, Stanford Law School Criminal Justice Center, 17 (2011).

324 Alex R. Piquero, J. David Hawkins, Lila Kazemian, David Pechuch, *Bulletin 2: Criminal Career Patterns (Study Group on the Transitions between Juvenile Delinquency and Adult Crime)* (2013).

325 Jordan D. Segall, Robert Weisberg, and Debbie Mukamal, *Life in Limbo*, Stanford Criminal Justice Center, 17 (2011).

326 Citizens Alliance on Prisons and Public Spending, *Denying Parole at First Eligibility: How Much Public Safety Does It Actually Buy?*, 4 (Aug. 2009).

327 New York State Department of Corrections and Community Supervision, *2012 Inmate Releases, Three Year Post-Release Follow Up*, Table 5, Appendix C (Dec. 2016) (noting that between 1985 and 2012, the return rate for a new offense for people who had been released from prison after being convicted of murder was 1.9%).

328 See E. Fuller Torrey, Jonathan Stanley, John Monahan, Henry J. Steadman, *The MacArthur Violence Risk Assessment Study Revisited; Two Views Ten Years After Its Initial Publication*, *Psychiatry Serv* 59, 147–52 (2008); H.J. Steadman, E.P. Mulvey, J. Monahan, et al.: *Violence by People Discharged From Acute Psychiatric Inpatient Facilities and by Others in the Same Neighborhoods*, *Archives of General Psychiatry* 55, 393–401 (1998).

329 See J.A. Wilson and P.B. Wood, *Dissecting the Relationship Between Mental Illness and Return to Incarceration*, *J. Crim. Just.* 42, 527–37 (2014); Kristen M. Zgoba, Rusty Reeves, Anthony Tamburello, and Lisa DeBilio, *Criminal Recidivism in Inmates With Mental Illness and Substance Use Disorders*, *Journal of the American Academy of Psychiatry and the Law Online* 3913–3920 (Feb. 2020) (finding that formerly incarcerated people with mental illness and no substance abuse disorders were arrested less frequently than those with no mental illness); J. Bonta, M. Law, and K. Hanson, *The Prediction of Criminal and Violent Recidivism Among Mentally Disordered Offenders: A Meta-analysis*, *Psychological Bulletin*, 123(2), 123–142 (1998).

330 E. Fuller Torrey, Jonathan Stanley, John Monahan, Henry J. Steadman, *The MacArthur Violence Risk Assessment Study Revisited; Two Views Ten Years After Its Initial Publication*, *Psychiatry Serv* 59, 147–52 (2008).

331 Model Penal Code: Sentencing § 6.11, Commentary at 296 (citing Brian J. Ostrom et al., *Offender Risk Assessment in Virginia: A Three-Stage Evaluation* (2002) (noting that actuarial risk assessment tools were less accurate in predicting high risk of violence); Hennessey D. Hayes and Michael R. Geerken, *The Idea of Selective Release*, 14 *Just. Quarterly*, 353, 368–369 (1997); Kathleen Auerhahn, *Selective Incapacitation and the Problem of Prediction*, 37 *Criminology* 703 (1999) (same).

332 Pennsylvania Commission on Sentencing, *Revisions to the Proposed Risk Assessment Instrument*, 3, Table 1 (2018).

Three risk assessment tools used by BPH and CDCR were also found to be extremely accurate in predicting which people were low risk for future violence.<sup>333</sup> One study of over 24,000 people conducted over 50 months found that 91% of people evaluated as low risk of future violence did not go on to commit a violent crime.<sup>334</sup>

## INSIGHTS FROM OTHER JURISDICTIONS

Several states, including Nevada, Hawaii, Maryland, Arkansas, Michigan, and Louisiana, rely on risk assessment scores as an important factor in parole determination.<sup>335</sup> For example, In Hawaii, the parole statute requires release for people deemed “low-risk” by a validated risk assessment tool.<sup>336</sup> In Nevada, if a parole candidate is assessed as low-risk and their offense was of low or medium severity, the parole board is directed to grant parole “at the initial eligibility date” for a low- or medium-severity crime, and at the “first or second meeting” for a high-severity crime.<sup>337</sup> Maryland uses a combination of risk assessment score and offense type to determine a presumptive guidelines release range.<sup>338</sup>

In Norway (which many experts see as a model for modern criminal law),<sup>339</sup> the standard for preventive detention mandates that there must exist “an imminent risk that the offender will again commit” a “serious violent felony.”<sup>340</sup> Parole systems in New Jersey and Washington make a similar inquiry about future harm to others in some contexts.<sup>341</sup> For example, in New Jersey, the juvenile release standard requires in part that someone be paroled if they “will not cause injury to persons.”<sup>342</sup>

Some jurisdictions presume that people convicted of nonviolent offenses shall be granted parole. For example, Louisiana, Oklahoma, and Pennsylvania presumptively grant parole to many people.<sup>343</sup> In 2017, Louisiana authorized release without a hearing to people convicted of nonviolent offenses who served 25% of their sentences when certain conditions are met.<sup>344</sup>

Many states focus on in-prison programming as a gateway to early release. For example, Mississippi and Maryland grant release without a hearing at the earliest parole release date for some people who have met the requirements of their case plans.<sup>345</sup> For others, including Arkansas, Washington, and Louisiana, in-prison disciplinary behavior is a key parole factor.<sup>346</sup>

## ADDITIONAL CONSIDERATIONS

- Parole authorities should be encouraged to release more data concerning their process and parole hearing outcomes. BPH currently releases information about the number of scheduled parole hearings and their outcomes.<sup>347</sup> They also release an annual Report of Significant Events that includes additional information and provide to members of the public free transcripts of any parole hearings.<sup>348</sup> These efforts are an excellent start to providing transparency into BPH’s operations, but BPH should release on a routine basis additional information about who is and who is not granted parole, including the parole hearing outcomes for sentence type, type of parole hearing, and important demographic information such as race, gender, and county of commitment.

333 Three tools that California’s BPH uses to assess risk were all evaluated in this study, including the HCR-20 (violence risk), PCL-R (any criminal offending risk), and the Static-99 (sexual offending risk), among others. (Seena Fazel, Jay P. Singh, and Helen Doll, *Use of Risk Assessment Instruments to Predict Violence and Antisocial Behaviour in 73 Samples Involving 24,827 People: Systematic Review and Meta-Analysis*, 345 BR. MED. J. e4692 (2012).)

334 *Id.*

335 Arkansas Code Ann. § 16-93-615 (a)(1)(B) (providing that parole decisions “shall be made by reviewing information such as the result of the risk-needs assessment”); Louisiana Stat. Ann. § 15:574.2(C) (2)(f) (providing that parole can be granted by just a majority of the committee when the person “has obtained a low-risk level designation determined by a validated risk assessment instrument”); MCLS § 791.233e(3)(a) (providing that “statistical risk” is one of eight factors that determine a probability of parole score); *Michigan Department of Corr. Policy Directive: Parole Guidelines*, Attachment A, available at State of Michigan website; *Monroe City Prosecuting Attorney v. Wilkins* (In re Parole of Frederick Wilkins), 2020 Mich. LEXIS 1801, \*1-2 (Oct. 21, 2020) (holding that the parole candidate must be released if he or she receives a “high” probability of parole score absent “substantial and compelling reasons”).

336 “Except for good cause shown to the paroling authority, a person who is assessed as low risk for re-offending [via a validated risk assessment tool] shall be granted parole upon completing the minimum sentence [of an indeterminate sentence].” (Hawaii Stat. Ann. § 706-670(1)). This requirement can be overcome if the person has committed serious misconduct in prison, among other reasons. (*Id.*)

337 Nevada Ann. Code § 213.516, § 213.514 (2020). Nevada uses a matrix based on a person’s risk assessment and offense severity to calculate release. (Nevada Ann. Code § 213.516 (2020).)

338 Alexis Lee Watts, Brendan Delaney, and Edward E. Rhine, *Profiles in Parole Release and Revocation: Maryland*, Robina Institute of Criminal Law and Criminal Justice, 5 (2018).

339 See, e.g., Henrik Pryser Libell and Matthew Haag, *New York’s Jails Are Failing. Is the Answer 3,600 Miles Away?*, *New York Times* (Nov. 12, 2019).

340 Norwegian Penal Code § 39 c (1) (“There must be deemed to be an imminent risk that the offender will again commit” a “serious violent felony, sexual felony, unlawful imprisonment, arson or other serious felony impairing the life, health or liberty of other persons . . .”).

341 Washington Rev. Code § 9.95.420(3)(a) (In Washington, people convicted of sex offenses must be released when their minimum sentence has expired unless “it is more likely than not that the offender will commit sex offenses if released.”)

342 New Jersey Rev. Stat. § 30:4-123.53(b) (“A juvenile inmate shall be released on parole when it shall appear that the juvenile, if released, will not cause injury to persons or substantial injury to property.”)

343 HB 2286 (Oklahoma Reg. Session 2018) (creating an administrative parole process for people convicted of nonviolent offenses); 37 Pa. Code § 96.1 (“Eligible offenders generally are low-risk offenders who have not committed personal injury crimes . . .”); Louisiana Rev. Stat. § 15:574.4; Senate Bill 139 (Louisiana Reg. Session 2017).

344 Louisiana’s 2017 *Criminal Justice Reforms*, The Pew Trust (Mar. 1, 2018).

345 In Mississippi, an incarcerated person also must meet requirements including a discharge plan, no serious or major violation reports within six months, and no hearing request by a victim. (Mississippi Code Ann. § 47-7-18(1) (2020).) In Maryland, an incarcerated person also cannot have committed a “category 1 rule violation,” nor can a victim have requested a hearing. (Maryland Correctional Services Code Ann. § 7-301.1(g) (2020).)

346 Arkansas Code § 16-93-101(3)(D)(i); Washington Rev. Code § 9.94A.730(1); Louisiana Stat. Ann. § 15:574.2(C)(2)(b).

347 See BPH, *Parole Suitability Hearing and Decision Information*, available at CDCR website.

348 BPH, *Request for Parole Suitability Hearing Transcript*, available at CDCR website.

- The parole standard recommended by the Committee – that a parole candidate shall be awarded parole unless there is “imminent risk that the parole candidate will commit a serious or violent felony if released” – is borrowed from Norwegian criminal law,<sup>349</sup> which has been recognized internationally as a model system.
- Parole release is currently a binary decision: The person is either going to stay incarcerated or be released to the community with supervision. The Committee’s recommendation is to create additional types of release scenarios for parole candidates that BPH concludes are close to being entitled to full release but may still need additional structure, supervision, or programming prior to full release.<sup>350</sup>
- Courts reviewing parole release decisions must currently apply an extremely deferential standard of review and may not intervene in parole decisions if there is “some evidence” supporting a parole denial.<sup>351</sup> This standard does not come from a statute.<sup>352</sup> The Committee recommends that parole decisions should instead be reviewed for “abuse of discretion.” This standard of review, which is well-defined in other judicial contexts, would give appropriate deference to BPH’s role in making parole decisions while providing an important safety valve.

<sup>349</sup> Norwegian Penal Code § 39(c)(1). This standard is used for “preventive detention” and is intended to retain the most dangerous people if they continue to be a risk to society but is seldom used. (*Anders Breivik: Just How Cushy Are Norwegian Prisons?*, BBC (Mar. 16, 2016).) For example, only 112 people total were imprisoned in Norway pursuant to “preventive detention” as of 2018. (Norway Statistics, *Imprisonment* (Jun. 29, 2020).)

<sup>350</sup> For example, in Canada, “day parole” allows someone to “to participate in community-based activities in preparation for full parole or statutory release.” (Government of Canada, Parole Board, *Types of Conditional Releases*.)

<sup>351</sup> The origin of the “some evidence” standard was the United States Supreme Court’s decision in *Superintendent, Mass. Correctional Institution at Walpole v. Hill*, 472 US 445 (1985). The Court there explained that all that was required was a “modicum” of evidence and that due process was only violated “if the decision is not supported by any evidence.” (*Id.* at 455 (emphasis added).)

<sup>352</sup> *Rosenkrantz*, 29 Cal.4th at 652.

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# 10. Establish Judicial Process for “Second Look” Resentencing

## Establish Judicial Process for "Second Look" Resentencing

### RECOMMENDATION

The administrations of Governor Newsom and former Governor Brown and the Legislature have expanded the use of "second look" sentencing by authorizing courts to revisit sentences of selected incarcerated people when recommended by law enforcement authorities. This practice should be clarified and expanded.

The Committee therefore recommends the following:

1. Establish judicial procedures for evaluating resentencing requests.
  - In all cases, require notice, initial conference within 60 days, and written reasons for court decisions.
  - For all cases initiated by law enforcement, require appointment of counsel.
2. Establish that resentencing is presumed if law enforcement officials recommend resentencing because a sentence is unjust or because of a person's exceptional rehabilitative achievement while incarcerated.
3. Expand "second look" sentencing opportunities by allowing any person who has served more than 15 years to request a reconsideration of sentence by establishing that "continued incarceration is no longer in the interest of justice."

### RELEVANT STATUTES

Penal Code § 1170(d)

### BACKGROUND AND ANALYSIS

California has a special provision in the Penal Code that allows certain law enforcement officials, including the Secretary of CDCR or any elected district attorney, to request that a person be resentenced at any time for any reason. A court that receives such a request is vested with authority to recall the person's sentence and issue a new, reduced punishment, if "circumstances have changed since the inmate's original sentencing so that the inmate's continued incarceration is no longer in the interest of justice."<sup>353</sup>

The law has existed for decades but was given new life in 2018 when then-Governor Brown allocated resources to CDCR to identify incarcerated people who demonstrated records of rehabilitation and deserved a reevaluation of their sentence in court. The law was then expanded to allow prosecutors to make similar resentencing requests.<sup>354</sup> Prosecutors and CDCR do not make requests for resentencing lightly. CDCR has an extensive set of regulations guiding the process.<sup>355</sup> Hillary Blout, Executive Director of For the People, described to the Committee the resource-intensive procedures that some prosecutors are beginning to use to review old cases.<sup>356</sup> Although the requests for resentencing are made by law enforcement authorities, the ultimate decision to recall a person's sentence and reduce their punishment remains with the courts.

<sup>353</sup> Penal Code § 1170(d)(1).

<sup>354</sup> AB 2942 (Ting, 2018).

<sup>355</sup> See 15 CCR § 3076.1.

<sup>356</sup> Committee on Revision of the Penal Code, Meeting on Nov. 12, 2020, 0:10:05–0:10:38, 0:51:05–0:52:07; Written Submission of Hillary Blout to Committee on Revision of the Penal Code, 2 (Nov. 10, 2020).

Despite these expansions to the resentencing statute, current law has failed to protect many important interests at stake. For example, because the Penal Code does not provide any rules, many trial courts provide virtually no process while considering these requests, including denying resentencing requests without providing notice to the parties, appointing counsel, or giving parties an opportunity to be heard.<sup>357</sup> The law does not require a court to give any specific reason for denying a resentencing request.<sup>358</sup>

### RESENTENCING REFERRALS BY CDCR (2019-20)

	EXCEPTIONAL CONDUCT	CHANGE IN LAW	TOTAL
<b>REFERRALS</b>	155	1,448	1,603
<b>COURT RESPONSES</b>	110	1,023	1,133
<b>% COURT RESPONSES</b>	71%	71%	71%
<b>RESENTENCINGS</b>	64	411	475
<b>% RESENTENCED</b>	41%	28%	30%

Source: CDCR Office of Research.

Placer County Superior Court Judge Richard Couzens, a leading expert on California's criminal law, appeared before the Committee in November to encourage better process and expanded use of California's "second look" sentencing law.<sup>359</sup> He told the Committee that the current process is "amazingly sparse," "largely unstructured," and that it would be appropriate to require courts to issue "affirmative responses, even if just in writing."<sup>360</sup> Without such guidance, many requests for resentencing have gone unanswered by the courts or have been denied without any meaningful input from the person who is to be resentenced.<sup>361</sup>

Judge Couzens also endorsed wider use of the resentencing process to allow prisoners who have served a significant portion of their sentence to petition courts for reevaluation of their punishment and early release: "[I]t seems to me fundamentally fair that if a person has been in custody for 15 years, that it's not unreasonable to say, 'Hey, has this person changed?' That's just not unreasonable."<sup>362</sup> Sam Lewis, Executive Director of the Anti-Recidivism Coalition, also supported the proposal to encourage and incentivize rehabilitation for people sentenced to long prison terms.<sup>363</sup>

As of June 2020, almost 30,000 people had served more than fifteen years in CDCR custody.

<sup>357</sup> *People v. McCallum*, 55 Cal.App.5th 202 (2020); *People v. Frazier*, 55 Cal.App.5th 858 (2020).

<sup>358</sup> "[N]othing in section 1170, subdivision (d)(1), requires the court to state its reasoning when declining to exercise its discretion in response to the Secretary's recommendation. It is a fundamental tenet of appellate review that we presume on a silent record the court properly exercised its discretion." (*Id.* at 814.)

<sup>359</sup> Committee on Revision of the Penal Code, Meeting on Nov. 12, 2020, 0:17:37–0:19:45, 0:44:07–0:44:19.

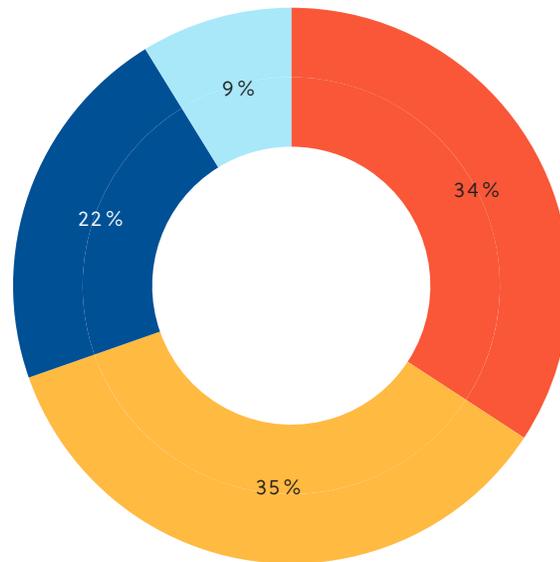
<sup>360</sup> *Id.*

<sup>361</sup> Committee on Revision of the Penal Code, Meeting on Nov. 12, 2020, 0:10:05–0:10:38; 0:51:05–0:52:07; Written Submission of Hillary Blout to Committee on Revision of the Penal Code, 2 (Nov. 10, 2020).

<sup>362</sup> Committee on Revision of the Penal Code, Meeting on Nov. 12, 2020, 0:42:07–0:42:20.

<sup>363</sup> *Id.* at 1:19:15–1:21:30.

### PERCENTAGE OF PEOPLE CURRENTLY IN PRISON WHO HAVE SERVED MORE THAN 15 YEARS BY RACE (2020)



● BLACK ● LATINX ● WHITE ● OTHER

Source: CDCR Office of Research.

This idea, and the Committee's recommendation, mirrors a proposal from United States Senator Cory Booker and Congresswoman Karen Bass, who in 2019 introduced legislation that would allow any person in federal prison who had served 10 years of incarceration to apply for resentencing.<sup>364</sup>

### EMPIRICAL RESEARCH

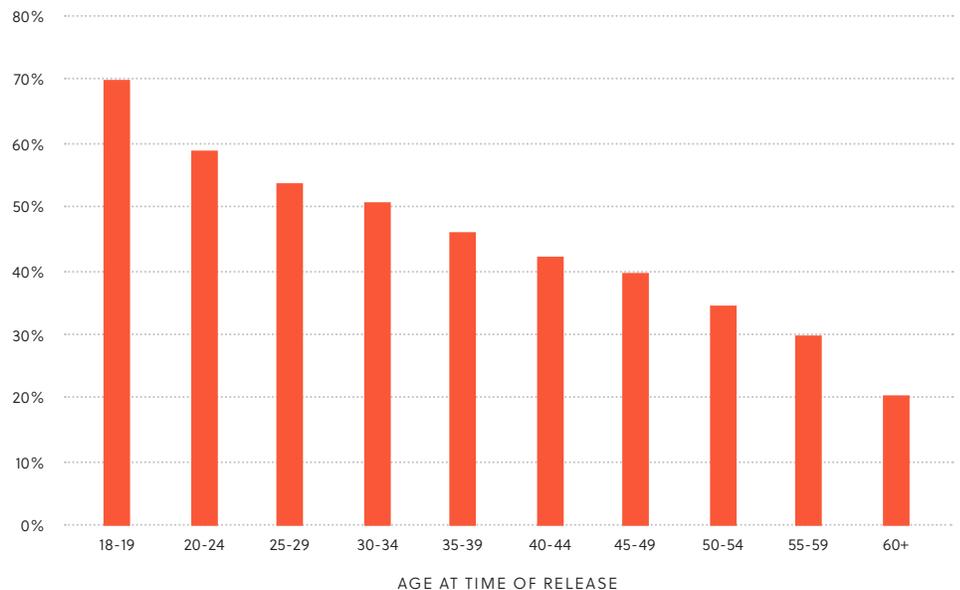
As noted elsewhere in this report, empirical research has long established that the older someone is, the less likely they are to commit offenses.<sup>365</sup> The recidivism rate for California's prison population bears this out: Older people simply do not commit as many crimes as younger people do.<sup>366</sup> This data supports the conclusion that, after some period of time, a sentence may deserve reevaluation.

<sup>364</sup> H.R. 3795 — Second Look Act of 2019. To qualify for relief, someone would need to show that they were "not a danger to the safety of any person or the community," a "readiness for reentry," and that "the interests of justice warrant a sentence modification." (*Id.*; proposed Sec. 3627(a)(3)(A)(i), (ii) & (a)(3)(B).)

<sup>365</sup> "The strong correlation between age and crime is one of the most tested and established in the field of criminology." (*In re Ivan Von Staich*, 56 Cal.App.5th 53, 77 (2020), review granted and cause transferred back to appellate court by California Supreme Court, 2020 WL 7647921 (2020).)

<sup>366</sup> CDCR Office of Research, *Appendix to the Recidivism Report for Offenders Released From the California Department of Corrections and Rehabilitation in Fiscal Year 2014–15*, Figure 18 (Jan. 2020).

### THREE-YEAR RECIDIVISM RATE BY AGE AT TIME OF RELEASE FROM PRISON



Source: CDCR Office of Research, *Appendix to the Recidivism Report for Offenders Released from the California Department of Corrections and Rehabilitation in Fiscal Year 2014–15*, Figure 1 (Jan. 2020).

### INSIGHT FROM OTHER JURISDICTIONS

In 2018, Congress enacted the federal First Step Act, which allowed people incarcerated in federal prison to request sentence reduction with a motion to the trial court.<sup>367</sup> More than 2,000 of these requests have been granted by federal courts around the country, including many to help combat the speed of COVID-19 in federal prisons.<sup>368</sup>

In the District of Columbia, any person who was under 18 years old at the time of their offense and has served at least 15 years in prison may request a new sentence.<sup>369</sup> The court must issue a reduced sentence if it concludes that “the defendant is not a danger to the safety of any person or the community and that the interests of justice warrant a sentence modification.”<sup>370</sup> The law was recently expanded to anyone who was under 25 years of age at the time of their offense and who has served at least 15 years.<sup>371</sup> Approximately 50 people have been recently resentenced in the District of Columbia for offenses committed before they were 18. None of those released have been reconvicted of a new violent crime.<sup>372</sup>

The Model Penal Code suggests that states enact “second look” sentencing that allows someone to ask a judge for resentencing after serving 15 years of imprisonment.<sup>373</sup> The New Jersey Sentencing & Disposition Commission also recently unanimously agreed that “second look” sentencing laws were important reforms.<sup>374</sup>

<sup>367</sup> See 18 U.S.C. § 3582(c) (providing that a federally incarcerated applicant must show that “extraordinary and compelling reasons” warrant a sentence reduction).

<sup>368</sup> Federal Bureau of Prisons, *First Step Act*, available at Federal Bureau of Prisons website.

<sup>369</sup> D.C. Code § 24-403.03(a).

<sup>370</sup> *Id.*

<sup>371</sup> Hailey Fuchs, D.C., *Passes Bill to Give Young Offenders Chance at Reduced Sentences*, New York Times (Dec. 15, 2020).

<sup>372</sup> *Id.*

<sup>373</sup> Model Penal Code: Sentencing § 305.6, Comment (a) (“[This] provision reflects a profound sense of humility that ought to operate when punishments are imposed that will reach nearly a generation into the future, or longer still. A second-look mechanism is meant to ensure that these sanctions remain intelligible and justifiable at a point in time far distant from their original imposition.”).

<sup>374</sup> New Jersey Sentencing and Disposition Commission, *Annual Report*, 35 (Nov. 2019).

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# 2020 Administrative Report

## 2020 Administrative Report

The inaugural year of the Committee on Revision of the Penal Code ended on January 1, 2021. The following report summarizes its activities during the past year from an administrative standpoint and briefly describes the Committee's future plans.

### CREATION OF THE COMMITTEE

On January 1, 2020, the Committee on Revision of the Penal Code was formed.<sup>375</sup>

For administrative and budgetary purposes, the Committee was located within the California Law Revision Commission. There is no substantive overlap in the work of the two bodies. By law, no person can serve on both the Commission and the Committee simultaneously.<sup>376</sup> Neither body has any authority over the substantive work of the other.<sup>377</sup> The two bodies have different statutory duties.<sup>378</sup>

The Committee has seven members. Five are appointed by the Governor for four-year terms.<sup>379</sup> One is an assembly member selected by the speaker of the assembly; the last is a senator selected by the Senate Committee on Rules.<sup>380</sup> The Governor selects the Committee's chair.<sup>381</sup>

### FUNCTION AND PROCEDURE OF THE COMMITTEE

The principal duties of the Committee are to:

1. Simplify and rationalize the substance of criminal law.
2. Simplify and rationalize criminal procedures.
3. Establish alternatives to incarceration that will aid in the rehabilitation of offenders.
4. Improve the system of parole and probation.<sup>382</sup>

The Committee is required to prepare an annual report for submission to the Governor and the Legislature.<sup>383</sup>

The Committee conducts its deliberations in public meetings, subject to the Bagley-Keene Open Meeting Act.<sup>384</sup> In 2020, it held eight meetings, five of which were two-day meetings. Its first meeting was held in the State Capitol. As a result of the COVID-19 pandemic, its remaining meetings were conducted entirely by teleconference.<sup>385</sup>

<sup>375</sup> See 2019 Cal. Stat. ch. 25; Gov't Code § 8280(b).

<sup>376</sup> See Gov't Code § 8281.5(d).

<sup>377</sup> "The approval by the commission of any recommendations by the committee is not required." (Gov't Code § 8290(c).) The Commission and Committee submit their reports and recommendations directly to the Governor and legislature, not to each other. (Gov't Code § 8291.)

<sup>378</sup> Compare Gov't Code §§ 8289, 8290 (duties of Commission) with Gov't Code § 8290.5 (duties of Committee).

<sup>379</sup> Gov't Code § 8281.5(a), (c).

<sup>380</sup> Gov't Code § 8281.5(a).

<sup>381</sup> Gov't Code § 8283.

<sup>382</sup> Gov't Code § 8290.5(a).

<sup>383</sup> Gov't Code § 8293(b).

<sup>384</sup> Gov't Code §§ 11120–11132.

<sup>385</sup> This was made possible by Executive Orders N-25-20 and N-29-20.

## **PERSONNEL OF THE COMMITTEE**

In 2020, the following persons were members of the Committee:

### **CHAIR**

Michael Romano

### **LEGISLATIVE MEMBERS**

Senator Nancy Skinner

Assemblymember Sidney Kamlager-Dove

### **GUBERNATORIAL APPOINTEES**

Hon. John Burton

Hon. Peter Espinoza

Hon. Carlos Moreno

L. Song Richardson

The following persons are on the Committee's legal staff:

Thomas M. Nosewicz

*Legal Director*

Rick Owen

*Staff Attorney*

The following persons provide substantial support for the Committee's legal work:

Lara Hoffman

Nick Stewart-Oaten

Natasha Minsker

Daniel Seeman

The following persons are staff of the California Law Revision Commission who also provide managerial and administrative support for the Committee:

Brian Hebert

*Executive Director*

Barbara Gaal

*Chief Deputy Director*

Debora Larrabee

*Associate Governmental Program Analyst*

This report was copyedited by Nicole Antonio and designed by Taylor Le.

### **COMMITTEE BUDGET**

In the 2019-20 state budget, \$576,000 was added to the California Law Revision Commission's budget to offset the costs associated with the new Committee on Revision of the Penal Code. An equivalent amount was included in the 2020-21 state budget.

Most of that amount goes toward staff salaries and benefits. The remainder is used for operating expenses.

### **PLANNED ACTIVITIES FOR 2021**

In 2021, the Committee expects to follow the same general deliberative process that it established in 2020. It will hold frequent public meetings with speakers representing all groups that have an interest in reform of the criminal justice system. At those meetings, the Committee will identify, debate, and develop reforms that would reduce unnecessary levels of incarceration and increase public safety.

The Committee will also continue its work to establish a secure compendium of empirical data from various law enforcement and correctional sources in California. That data will be used by the Committee as a tool in evaluating the effect of possible reforms.

### **ACKNOWLEDGMENTS**

Many individuals and organizations participated in Committee meetings in 2020 or otherwise contributed towards this report. The Committee is deeply grateful for their assistance.

The keynote speakers and panelists are listed below. Inclusion of an individual or organization in this list in no way indicates that person's view on the Committee's recommendations.

Many other persons testified during the public comment portion of Committee meetings, submitted written comments, or otherwise assisted in the work of the Committee. It is not possible to list everyone here, but the Committee thanks all of them for their efforts and encourages them to continue to participate in the Committee's work going forward.

## **KEYNOTE SPEAKERS**

(in order of appearance)

HON. GAVIN NEWSOM  
*Governor of California*

PROF. CRAIG HANEY  
*University of California, Santa Cruz*

KEELY BOSLER  
*Director, California Department of Finance*

HON. EDMUND G. BROWN, JR.  
*Former Governor of California*

XAVIER BECERRA  
*Attorney General of California*

GEORGE GASCÓN  
*District Attorney, Los Angeles County*

HON. THELTON E. HENDERSON  
*United States District Court, Northern District of California*

## **PANELISTS**

(in alphabetical order)

ANTHONY ADAMS  
*Deputy Public Defender, Mendocino County*

SUJATHA BALIGA  
*Director, Restorative Justice Project, Impact Justice  
Collaborative Fellow, Just Beginnings*

CATHLEEN BELTZ  
*Assistant Inspector General, Inspector General, Los Angeles County*

NINA SALARNO BESSELMAN  
*President, Crime Victims United*

PROF. MIA BIRD  
*Goldman School of Public Policy, University of California, Berkeley*

HILLARY BLOUT  
*Executive Director, For the People*

HON. LAWRENCE BROWN  
*Superior Court of California, County of Sacramento  
Vice Chair, Collaborative Justice Courts Advisory Committee,  
Judicial Council of California*

CHARLES CALLAHAN  
*Deputy Director (A), Facility Support – Division of Adult Institutions,  
California Department of Corrections & Rehabilitation*

BRIDGET CERVELLI  
*Legal Services for Prisoners with Children*

HON. J. RICHARD COUZENS (RET.)  
*Superior Court of California, County of Placer*

KATIE DIXON  
*Community Rights Organizer, Legal Aid at Work*

AARON FISCHER  
*Disability Rights California*

NEIL FLOOD  
*Vice President, California Correctional Peace Officers Association*

SEAN GARCIA-LEYS  
*Civil Rights Attorney*

OBED GONZALEZ  
*California City Correctional Facility*

PROF. RYKEN GRATTET  
*Chair, Department of Sociology, University of California, Davis*

DEAN GROWDON  
*Sheriff of Lassen County  
First Vice President, California State Sheriffs' Association*

KORY L. HONEA  
*Sheriff of Butte County  
Second Vice President, California State Sheriffs' Association*

MAX HUNTSMAN  
*Inspector General, Los Angeles County*

ANNE IRWIN  
*Director, Smart Justice California*

JAY JORDAN  
*Executive Director, Californians for Safety and Justice*

JOHN KEENE  
*Chief of Probation, San Mateo County*  
*Secretary/Treasurer and Legislative Chair, Chief Probation Officers of California*

ADNAN KHAN  
*Executive Director, Re:Store Justice*

JAMES KING  
*Ella Baker Center*

NICOLE KIRKALDY  
*Program Coordinator, Yolo County District Attorney's Neighborhood Court Program*

PROF. CHARIS E. KUBRIN  
*Department of Criminology, Law & Society, University of California, Irvine*

SAM LEWIS  
*Executive Director, Anti-Recidivism Coalition*

JARED LOZANO  
*Associate Director, High Security (Males),*  
*California Department of Corrections & Rehabilitation*

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### **PHILANTHROPIC AND OTHER SUPPORT**

The Committee is also deeply grateful to Arnold Ventures and the Chan-Zuckerberg Initiative for providing generous support relating to the Committee's research and data analysis. The Committee also extends special thanks to the personnel at the California Department of Corrections and Rehabilitation who assisted the Committee's data-gathering efforts and facilitated the testimony of Obed Gonzalez, as well as the California Department of Motor Vehicles for other data assistance. We also greatly appreciate additional research support provided by Rio Scharf and Emma Briger. The Committee also received generous support from staff and faculty at Stanford Law School in developing our recommendations and drafting this report.

The Committee regrets any errors or omissions made in compiling these acknowledgments.

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# Appendix

## Appendix A: Biographies of 2020 Committee Members

Michael Romano, of San Francisco, serves as chair of the Committee on Revision of the Penal Code. Romano teaches criminal justice policy and practice at Stanford Law School and has been director of the Stanford Justice Advocacy Project since 2007. Romano has collaborated with numerous local, state, and federal agencies, including the United States Department of Justice and Office of White House Counsel under President Obama. He has also served as counsel for the NAACP Legal Defense and Educational Fund and other civil rights organizations. Romano was a law clerk for the Honorable Richard Tallman at the United States Court of Appeals for the Ninth Circuit from 2003 to 2004 and a legal researcher for the Innocence Project from 2000 to 2001. He earned a juris doctor degree with honors from Stanford Law School and a master of laws degree from Yale Law School.

John L. Burton, of San Francisco, has been a partner and consultant for public affairs at Burton and the Brains since 2018. Burton was an attorney at John Burton Attorney at Law from 2004 to 2018. He was chairman of the California Democratic Party from 1973 to 1974 and 2009 to 2017. Burton founded John Burton Advocates for Youth in 2005. He was a senator in the California State Senate from 1996 to 2004. Burton served as a representative in the United States House of Representatives from 1974 to 1983. He served as a member of the California State Assembly from 1965 to 1974. He earned a juris doctor degree from the University of San Francisco School of Law.

Peter Espinoza, of Los Angeles, has served as director of the Office of Diversion and Reentry at the Los Angeles County Department of Health Services since 2016. He served as a commissioner and judge at the Los Angeles County Superior Court from 1990 to 2016. Espinoza was an attorney at Peter Espinoza Attorney at Law from 1984 to 1990. Espinoza was a deputy public defender at the Orange County Public Defender's Office from 1981 to 1983. He earned a juris doctor degree from the University of California, Los Angeles, School of Law.

Assemblymember Sydney Kamlager, of Los Angeles, has been a member of the Assembly since 2018. She represents the 54th Assembly District, encompassing Baldwin Hills, the Crenshaw community, all of Culver City, Ladera Heights, Leimert Park, Mar Vista, Mid-City Los Angeles, Palms, Pico-Union, Westwood, and Windsor Hills. As chair of the Select Committee on Incarcerated Women, Assemblymember Kamlager is focused on reviewing and reforming policies to support the health, dignity, and rehabilitation of women in prison. She also sits on the Assembly Public Safety Committee and Speaker Rendon's Select Committee on Police Reform. In 2020, Assemblymember Kamlager passed AB 1950, which reformed the California probation system by setting maximum terms of two years for felony offenses and one year for misdemeanor offenses. She earned a master's degree in arts management from the Heinz College at Carnegie Mellon University.

Carlos Moreno, of Los Angeles, has been a self-employed JAMS arbitrator since 2017. Moreno was United States Ambassador to Belize from 2014 to 2017. He was of counsel at Irell & Manella LLP from 2011 to 2013. Moreno was an associate justice of the California Supreme Court from 2001 to 2011 and served as a judge at the United States District Court, Central District of California, from 1998 to 2001. Moreno was a judge at the Los Angeles County Superior Court from 1993 to 1998 and at the Compton Municipal Court from 1986 to 1993. Moreno was senior associate at Kelley, Drye & Warren from 1979 to 1986. He was a deputy city attorney at the Los Angeles City Attorney's Office from 1975 to 1979. Moreno earned a juris doctor degree from Stanford Law School.

L. Song Richardson, of Irvine, is dean at the University of California, Irvine, School of Law, from 2018 to July 2021, and was a professor of law there from 2014 to 2017. She was a professor of law at the University of Iowa College of Law from 2012 to 2014. Richardson was an associate professor of law at American University from 2011 to 2012 and at DePaul University of Law from 2006 to 2011. Richardson was a partner at Schroeter, Goldmark and Bender from 2001 to 2006. She was assistant public defender at The Defender Association from 1999 to 2001. Richardson was an assistant federal public defender at the Federal Public Defender's Office, Western District of Washington, from 1997 to 1999. She was assistant counsel at the NAACP Legal Defense and Educational Fund from 1995 to 1997. She was a Skadden Public Interest fellow at the National Immigration Law Center in Los Angeles from 1994 to 1995 and at the Legal Aid Society's Immigration Law Unit in Brooklyn from 1993 to 1994. Richardson is a member of the American Law Institute and the executive committee of the Association of American Law Schools. She earned a juris doctor degree from Yale Law School.

Senator Nancy Skinner, of Berkeley, has been a member of the Senate since 2016. She was a member of the Assembly from 2006 to 2014. Senator Skinner represents California's 9th Senate District, which includes Oakland, Berkeley, and Richmond, and chairs the Senate Budget Committee. Senator Skinner is a longtime justice reform advocate and the author of two landmark California laws: SB 1421, which made police misconduct records available to the public for the first time in 40 years, and SB 1437, which reformed the state's felony murder rule so that people who do not commit murder can't be convicted of that crime. She also authored bills to reduce gun violence and allow people with prior felony convictions to serve on juries. Her legislative efforts have resulted in cuts to the number of juveniles incarcerated in state facilities by half; established a new, dedicated fund to reduce prison recidivism; reduced parole terms; and banned the box for higher education. She earned a master's degree in education from the University of California, Berkeley.

## Appendix B: Additional Data

### Cost of Misdemeanor Citations in Traffic Court

#### COST OF MISDEMEANOR CITATIONS IN TRAFFIC COURT

STATUTE	ASSESSMENT	AMOUNT OWED
Maximum misdemeanor fine	\$1,000	\$1,000
State penalty assessment (Penal Code § 1464)	\$10 for every \$10 base fine	\$1,000
State criminal surcharge (Penal Code § 1465.7)	20% surcharge on base fine	\$200
Court operations assessment (Penal Code § 1465.8)	\$40 fee per fine	\$40
Court construction (Gov't Code § 70372)	\$5 for every \$10 in base fine	\$500
County fund (Gov't Code § 76000)	\$7 for every \$10 in base fine	\$700
DNA Fund (Gov't Code § 76104.6 and 76104.7)	\$5 for every \$10 in base fine	\$500
Emergency Medical Air Trans. Fee (Gov't Code § 76000.10)	\$4 fee per fine	\$4
EMS Fund (Gov't Code § 76000.5)	\$2 for every \$10 in base fine	\$200
Conviction assessment (Gov't Code § 70373)	\$30 per fine for misdemeanor	\$30
Night court assessment (Vehicle Code § 42006)	\$1 per fine	\$1
<b>ACTUAL COST OF CITATION</b>		<b>\$4,175</b>
DMV Warrant/hold assessment fee (Vehicle Code § 40508.6)	Up to \$10 fee (may vary by county)	+\$10
Fee for failing to appear (Vehicle Code § 40508.5)	\$15 fee	+\$15
Civil assessment for failure to appear/pay (Penal Code § 1214.1)	\$300 fee	+\$300
<b>COST OF CITATION IF INITIAL DEADLINE IS MISSED</b>		<b>\$4,500</b>

Source: Source: Stopped, Fined, Arrested, Back on the Road California, 23 (Apr. 2016).

## Number of People Who Served Less than One Year in CDCR by County

### NUMBER OF PEOPLE WHO SERVED LESS THAN ONE YEAR IN CDCR BY COUNTY

COUNTY	2017	2018	2019
Alameda	287	220	203
Alpine	no data given	no data given	no data given
Amador	22	27	29
Butte	80	86	97
Calaveras	14	23	18
Colusa	19	23	23
Contra Costa	142	165	142
Del Norte	22	27	17
El Dorado	46	45	63
Fresno	681	743	764
Glenn	16	12	18
Humboldt	40	57	87
Imperial	58	70	90
Inyo	7	6	7
Kern	527	495	544
Kings	153	140	134
Lake	51	45	43
Lassen	10	21	23
Los Angeles	3,613	3,865	4,124
Madera	76	82	122
Marin	23	31	22
Mariposa	3	10	5
Mandocino	45	43	41
Merced	107	89	98
Modoc	1	5	7
Mono	3	3	4
Monterey	161	149	165
Napa	54	52	53
Nevada	10	11	12
Orange	776	826	935
Placer	141	120	109
Plumas	9	10	11

## Number of People Who Serve Less than One Year in CDCR by County

(CONTINUED)

COUNTY	2017	2018	2019
Riverside	908	969	916
Sacramento	561	583	546
San Benito	20	14	15
San Bernardino	1,583	1,645	1,560
San Diego	951	955	957
San Francisco	51	39	68
San Joaquin	331	321	332
San Luis Obispo	83	100	95
San Mateo	183	188	188
Santa Barbara	105	118	103
Santa Clara	433	401	379
Santa Cruz	34	45	63
Shasta	81	91	120
Sierra	0	2	1
Siskiyou	10	11	13
Solano	173	168	118
Sonoma	97	98	112
Stanislaus	281	276	257
Sutter	65	60	46
Tehama	36	51	48
Trinity	2	7	9
Tulare	162	143	163
Tuolumne	19	12	5
Ventura	243	197	237
Yolo	63	70	54
Yuba	58	69	92
<b>TOTAL</b>	<b>13,730</b>	<b>14,134</b>	<b>14,507</b>

Source: CDCR Office of Research.

## Number of People Currently in Prison with One- and Three- Year Sentence Enhancements (2020)

### NUMBER OF PEOPLE CURRENTLY IN PRISON WITH ONE- AND THREE-YEAR SENTENCE ENHANCEMENTS (2020)

COUNTY OF SENTENCING	1-YEAR ENHANCEMENT	3-YEAR ENHANCEMENT
Alameda	369	4
Alpine	0	0
Amador	19	1
Butte	149	2
Calaveras	10	0
Colusa	9	0
Contra Costa	177	3
Del Norte	27	0
El Dorado	43	1
Fresno	564	3
Glenn	6	0
Humboldt	37	0
Imperial	27	0
Inyo	2	0
Kern	727	13
Kings	139	1
Lake	43	0
Lassen	22	0
Los Angeles	3885	68
Madera	57	2
Marin	36	0
Mariposa	14	0
Mendocino	63	2
Merced	125	0
Modoc	3	0
Mono	1	0
Monterey	141	5
Napa	28	1
Nevada	9	0
Orange	609	11

## Number of People Currently in Prison with One- and Three- Year Sentence Enhancements (2020)

(CONTINUED)

COUNTY OF SENTENCING	1-YEAR ENHANCEMENT	3-YEAR ENHANCEMENT
Placer	111	5
Plumas	5	0
Riverside	1450	35
Sacramento	563	18
San Benito	17	2
San Bernardino	823	12
San Diego	1147	25
San Francisco	83	0
San Joaquin	216	8
San Luis Obispo	106	5
San Mateo	118	4
Santa Barbara	159	9
Santa Clara	507	10
Santa Cruz	67	1
Shasta	188	12
Sierra	1	0
Siskiyou	40	3
Solano	93	2
Sonoma	102	6
Stanislaus	243	2
Sutter	30	1
Tehama	58	4
Trinity	2	0
Tulare	342	4
Tuolumne	47	4
Ventura	210	7
Yolo	129	5
Yuba	26	0

Source: Source: Data provided by CDCR Office of Research.

## Number of People Currently in Prison with Gang Enhancements by County (2020)

### NUMBER OF PEOPLE CURRENTLY IN PRISON WITH GANG ENHANCEMENTS BY COUNTY (2020)

COUNTY	NUMBER
Alameda	369
Amador	19
Butte	149
Calaveras	10
Colusa	9
Contra Costa	177
Del Norte	27
El Dorado	43
Fresno	564
Glenn	6
Humboldt	37
Imperial	27
Inyo	2
Kern	727
Kings	139
Lake	43
Lassen	22
Los Angeles	3885
Madera	57
Marin	36
Mariposa	14
Mendocino	63
Merced	125
Modoc	3
Mono	1
Monterey	141
Napa	28
Nevada	9

## Number of People Currently in Prison with Gang Enhancements by County (2020)

(CONTINUED)

COUNTY	NUMBER
Orange	609
Placer	111
Plumas	5
Riverside	1450
Sacramento	563
San Benito	17
San Bernardino	823
San Diego	1147
San Francisco	83
San Joaquin	216
San Luis Obispo	106
San Mateo	118
Santa Barbara	159
Santa Clara	507
Santa Cruz	67
Shasta	188
Sierra	1
Siskiyou	40
Solano	93
Sonoma	102
Stanislaus	243
Sutter	30
Tehama	58
Trinity	2
Tulare	342
Tuolumne	47
Ventura	210
Yolo	129
Yuba	26

Source: CDCR Office of Research.

Percentage  
of People  
Currently  
in Prison  
with Gang  
Enhancement  
by County and  
Race (2020)

**PERCENTAGE OF PEOPLE CURRENTLY IN PRISON WITH GANG ENHANCEMENT  
BY COUNTY AND RACE (2020)**

COUNTY	BLACK	LATINX	WHITE	OTHER
Alameda	42%	45%	1.56%	3.125
Amador	0%	16.66%	33.33%	50%
Butte	0%	50%	30%	20%
Calaveras	0%	0%	0%	100%
Colusa	0%	75%	0%	25%
Contra Costa	48.12%	44.37%	2.5%	5%
Del Norte	0%	100%	0%	0%
El Dorado	0%	0%	100%	0%
Fresno	21.97%	63.22%	2.69%	12.1%
Glenn	0%	100%	0%	0%
Humboldt	0%	100%	0%	0%
Imperial	0%	100%	0%	0%
Kern	34.19%	63.22%	1.61%	0.96%
Kings	13.2%	79.24%	5.66%	1.88%
Lake	20%	40%	40%	0%
Lassen	0%	100%	0%	0%
Los Angeles	32.11%	63.65%	1.22%	3.3%
Madera	11.42%	85.71%	2.85%	0%
Marin	0%	100%	0%	0%
Mendocino	0%	66.66%	0%	33.33%
Merced	8.27%	82.75%	4.13%	4.82%
Monterey	2.36%	92.91%	0%	4.72%
Napa	0%	92%	8%	0%
Orange	6.36%	80.18%	6.48%	6.95%
Placer	100%	0%	0%	0%
Riverside	26.72%	67.24%	4.16%	1.26%
Sacramento	47.57%	35.92%	3.55%	12.94%
San Benito	0%	100%	0%	0%
San Bernardino	35.85%	57.41%	5.08%	1.64%
San Diego	28.46%	60.57%	2.5%	8.461%

## Percentage of People Currently in Prison with Gang Enhancement by County and Race (2020)

(CONTINUED)

COUNTY	BLACK	LATINX	WHITE	OTHER
San Francisco	68.75%	25%	6.25%	0%
San Joaquin	23.25%	58.13%	1.66%	16.94%
San Luis Obispo	17.64%	76.47%	5.88%	
San Mateo	10.9%	83.63%	3.63%	1.81%
Santa Barbara	6%	87.33%	5.33%	1.33%
Santa Clara	9.07%	78.5%	1.77%	10.64%
Santa Cruz	0%	97.56%	2.43%	0%
Shasta	0%	71.42%	14.28%	14.28%
Siskiyou	0%	25%	3%	0%
Solano	14.28%	71.42%	14.28%	0%
Sonoma	1.53%	84.61%	6.15%	7.69%
Stanislaus	2.46%	79.01%	4.93%	13.57%
Sutter	7.14%	82.14%	7.14%	3.57%
Tehama	0%	80%	0%	20%
Tulare	2.38%	90.88%	1.95%	4.77%
Tuolumne	0%	66.6%	33.3%	%0
Ventura	5.31%	87.76%	6.38%	0.53%
Yolo	3.12%	89.06%	4.68%	3.12%
Yuba	12%	64%	8%	16%

Source: CDCR Office of Research.

March 12, 2021

## Memorandum 2021-04

**Capital Punishment in California**

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**I. Introduction**

Consistent with its mandate to “simplify and rationalize the substance of criminal law,” the Committee on the Revision of the Penal Code undertakes this analysis of the state’s death penalty system to determine if there is a rational path forward that will ensure justice and fairness for all Californians. It is the first examination of the death penalty in California by a state agency or organization since 2008.

California has the largest death row in the country, currently numbering 707 people, and has sentenced more than 1,000 people to death since 1977. Yet, no executions have occurred in the last 15 years and only 13 total executions have taken place since reinstatement of the death penalty. Currently, 363 people on death row – more than half – are still awaiting appointment of post-conviction counsel and it now averages more than 30 years for people convicted of capital offenses to exhaust their appeals. Indeed, most people die of natural causes before their appeals are resolved. It is estimated that the state has spent more than \$5 billion tax dollars on the death penalty since it was reinstated in 1977. At the same time, a majority of death cases to be fully litigated in California have been reversed on appeal or in other post-conviction proceedings.<sup>1</sup>

Meanwhile, over the past decade, California voters have (narrowly) signaled support for the death penalty in three separate ballot measures.<sup>2</sup> No area of criminal law in California is more deeply confounding politically, legally, and morally.

California has made several attempts to make the state’s death penalty system work. The state has enacted statutes and constitutional provisions to prioritize death penalty cases, to expedite record review, and to provide victims a right to speedy resolution of

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<sup>1</sup> Data compiled by the Office of the State Public Defender.

<sup>2</sup> *California Proposition 34, Abolition of the Death Penalty Initiative (2012)*, Ballotpedia. At: [https://ballotpedia.org/California\\_Proposition\\_34,\\_Abolition\\_of\\_the\\_Death\\_Penalty\\_Initiative\\_\(2012\);](https://ballotpedia.org/California_Proposition_34,_Abolition_of_the_Death_Penalty_Initiative_(2012);) *California Proposition 62, Repeal of the Death Penalty (2016)*, Ballotpedia. At: [https://ballotpedia.org/California\\_Proposition\\_62,\\_Repeal\\_of\\_the\\_Death\\_Penalty\\_\(2016\)#cite\\_ref-65;](https://ballotpedia.org/California_Proposition_62,_Repeal_of_the_Death_Penalty_(2016)#cite_ref-65;) *California Proposition 66, Death Penalty Procedures (2016)*, Ballotpedia. At: [https://ballotpedia.org/California\\_Proposition\\_66,\\_Death\\_Penalty\\_Procedures\\_\(2016\).](https://ballotpedia.org/California_Proposition_66,_Death_Penalty_Procedures_(2016).)

cases.<sup>3</sup> The state has dedicated two state agencies<sup>4</sup> and contracts with a third agency<sup>5</sup> to provide defense services to individuals on death row. At the federal level, the Anti-Terrorism and Effective Death Penalty Act was enacted in 1996 in an effort to expedite review of death penalty cases.<sup>6</sup>

It has been 13 years since a state commission undertook a deep analysis of the death penalty. In 2008, the California Commission on the Fair Administration of Justice conducted an exhaustive review of the state's death penalty system. The Commission found that California's death penalty system was dysfunctional and identified three paths forward to address the dysfunction: (1) dramatically increase funding for the death penalty system; (2) narrow the scope of the death penalty; or (3) repeal the death penalty altogether.<sup>7</sup> The state has yet to choose one of these paths.

Since the 2008 study, much has changed. Now, a majority of states in the U.S. and the overwhelming majority of nations do not have the death penalty in law or practice. In 2019, Governor Newsom declared a moratorium on executions and late last year took the unprecedented step of filing an amicus brief in the California Supreme Court arguing that the death penalty is unconstitutional and applied in a racially biased manner. District Attorneys in Los Angeles, Santa Clara, and other large California counties have openly declared that their offices will not seek the death penalty and likewise have asserted in the California Supreme Court that the state's death penalty should be struck down.<sup>8</sup> A group of nearly 100 current and former elected prosecutors, Attorneys General, and law enforcement leaders, including the District Attorneys of Contra Costa, San Francisco, Santa Clara, and Los Angeles Counties, recently stated, "[m]any have tried for over forty years to make America's death penalty system just. Yet the reality is that our nation's use of this sanction cannot be repaired, and it should be ended."<sup>9</sup>

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<sup>3</sup> Assem. Bill No. 195 (1995-96 Reg. Sess.); Penal Code sections 190.6 and 190.8; Cal. Const. Art. 1, sec. 28(a)(6).

<sup>4</sup> The Habeas Corpus Resource Center is completely dedicated to death penalty work. The Office of the State Public Defender was completely dedicated to death penalty work until July 1, 2020, when the mandate of the office was expanded to also provide training and technical assistance to county indigent defense providers.

<sup>5</sup> The California Appellate Project is a non-profit that is under contract with the Judicial Council of California to provide assistance to attorneys appointed to represent individuals on death row.

<sup>6</sup> The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

<sup>7</sup> Cal. Com. on the Fair Administration of Justice, Final Report, Death Penalty pp. 112-182.

<sup>8</sup> Death Penalty Information Center, *California Governor, 6 District Attorneys File Briefs Saying State's Death Penalty is Arbitrary and 'Infected by Racism'* (October 28, 2020); see also San Francisco District Attorney's Office, Press Release (Jul. 7, 2020) ("My office has not sought and will not seek the death penalty, and I am pleased that we have been able to ensure that no one previously sentenced in San Francisco will remain on death row either."); Los Angeles District Attorney's Office, Special Directive 2011 (Dec. 7, 2020) ("A sentence of death is never an appropriate resolution in any case."); Salonga, *Exclusive: Santa Clara DA Abandoning Death Penalty Pursuit in all Cases*, Mercury News (Jul. 21, 2020).

<sup>9</sup> Fair and Just Prosecution, Joint Statement By Criminal Justice and Law Enforcement Leaders in Opposition to Application of the Federal Death Penalty (Dec. 2020).

Nevertheless, the voters of California remain conflicted on the issue and some prosecutors continue to pursue death sentences and to actively seek the return of executions, arguing that it provides justice for the victims. A recent poll conducted by U.C. Berkeley's Institute for Government Studies found that a majority of Californians supported the Governor's action in imposing a moratorium on executions.<sup>10</sup> The very same poll found 61 percent of Californians supported keeping the death penalty as a possible punishment for serious crimes.<sup>11</sup>

Against this convoluted and conflicted backdrop, the Committee undertakes this analysis of the current state of the death penalty. This memo reviews the extensive literature on California's death penalty and considers several new studies and data not previously available.

## II. Legal and Historical Background

### A. California's modern death penalty law

California's original death penalty was struck down in 1972 by the California Supreme Court in *People v. Anderson*, (1972) 6 Cal.3d 628. In *Anderson*, the Court ruled that the death penalty violated the California state constitution's prohibition against cruel or unusual punishment. The Court stated, "We have concluded that capital punishment is impermissibly cruel. It degrades and dehumanizes all who participate in its processes. It is unnecessary to any legitimate goal of the state and is incompatible with the dignity of man and the judicial process."<sup>12</sup>

The *Anderson* ruling was short lived. Less than a year later, voters approved an initiative amending the California Constitution to say, "The death penalty [...] shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article 1, Section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution."<sup>13</sup>

The death penalty did not immediately return to California because of the actions of the United States Supreme Court. In June 1972, the Court ruled in *Furman v. Georgia* (1972) 408 U.S. 238, that the death penalty as then administered in the country was inconsistent with the Eight Amendment prohibition against cruel and unusual punishment.<sup>14</sup> The crux of the ruling lay in the plurality's conclusion that the death penalty had been applied in an arbitrary manner, summarized in the oft-quoted

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<sup>10</sup> Willon, *Poll finds Californians support the death penalty - and Newsom's moratorium on executions*, Los Angeles Times (Jun. 17, 2019).

<sup>11</sup> *Id.*

<sup>12</sup> *People v. Anderson*, 6 Cal.3d 628, 656 (1972).

<sup>13</sup> *California Proposition 17, Death Penalty in the California Constitution (1972)*. Ballotpedia. At: [https://ballotpedia.org/California\\_Proposition\\_17,\\_Death\\_Penalty\\_in\\_the\\_California\\_Constitution\\_\(1972\)](https://ballotpedia.org/California_Proposition_17,_Death_Penalty_in_the_California_Constitution_(1972)).

<sup>14</sup> *Furman v. Georgia*, 408 U.S. 238 (1972).

statement of Justice Potter Stewart that the death penalty is “cruel and unusual in the same way that being struck by lightning is cruel and unusual.”<sup>15</sup>

The *Furman* decision invited the states to try again, allowing that the death penalty might be found constitutional if the statutory scheme effectively delineated the narrow few who deserved the ultimate punishment of death from the many who did not. The states proceeded in two ways: some adopted statutes that mandated the death penalty in specific circumstances (California chose this path)<sup>16</sup> and others adopted the discretionary death penalty statute proposed by the American Law Institute in its Model Penal Code.<sup>17</sup>

Four years after the *Furman* ruling, the U.S. Supreme Court approved a discretionary statute in *Gregg v. Georgia*, thus officially inaugurating America’s “modern” death penalty era.<sup>18</sup>

In 1977, the California Legislature approved a death penalty statute modeled on the Model Penal Code statute approved by the U.S. Supreme Court in *Gregg*.<sup>19</sup> Then-Governor Jerry Brown vetoed the bill, but the Legislature overrode his veto, marking the death penalty’s official return to California.<sup>20</sup> The following year, California voters approved a sweeping initiative to expand the death penalty. The initiative was dubbed the “Briggs Initiative” after its proponent Senator John Briggs and officially identified as Proposition 7. The initiative expanded the scope of California’s death penalty to effectively encompass nearly all homicides.<sup>21</sup> As described in the voter materials, the initiative “was intended to ‘give Californians the toughest death-penalty law in the country,’” one that would “apply to every murderer.”<sup>22</sup>

In the years that followed, California’s death penalty statute was expanded several more times.<sup>23</sup> Subsequent amendments expanded the law to allow a sentence of death or life in prison with no possibility of parole even if the defendant did not kill nor intend to kill, and removed a judge’s discretion to dismiss the special circumstances, making life without the possibility of parole the mandatory minimum punishment for anyone convicted of first degree murder with special circumstances.<sup>24</sup> Other initiatives

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<sup>15</sup> *Id.* at 309 (conc. opn. of Stewart, J.).

<sup>16</sup> Stats. 1973, ch. 719, at 1297.

<sup>17</sup> Covey, *Exorcizing Wechsler’s Ghost: The Influence of the Model Penal Code on Death Penalty Sentencing Jurisprudence* 31 *Hastings Const. L.Q.* 189, 207 (2004) (hereinafter *Exorcizing Wechsler’s Ghost*).

<sup>18</sup> *Gregg v. Georgia*, 428 U.S. 153, 193-195 (1976) (joint op. of Stewart, Powell, and Stevens, JJ.)

<sup>19</sup> *Exorcizing Wechsler’s Ghost, supra*, at 207.

<sup>20</sup> Turner, *California Legislature Overrides Veto of Death Penalty*, *New York Times* (Aug 12, 1977). At: <https://www.nytimes.com/1977/08/12/archives/california-legislature-overrides-veto-of-death-penalty.html>.

<sup>21</sup> Shatz, et al., *The California Death Penalty Scheme: Requiem for Furman?*, 72 *N.Y.U. L.Rev.* 1283, 1310 & n. 154 (1997) (quoting State of California, Voter’s Pamphlet 34 (1978).)

<sup>22</sup> *Id.*

<sup>23</sup> Grosso, et al., *Death by Stereotype: Race, Ethnicity, and California’s Failure to Implement Furman’s Narrowing Requirement*, 66 *UCLA L.Rev.* 1394, 1406 (2019).

<sup>24</sup> *California Proposition 115, the “Crime Victims Justice Reform Act”* (1990). Ballotpedia. At: [https://ballotpedia.org/California\\_Proposition\\_115,\\_the\\_22Crime\\_Victims\\_Justice\\_Reform\\_Act22\\_\(1](https://ballotpedia.org/California_Proposition_115,_the_22Crime_Victims_Justice_Reform_Act22_(1)

added more special circumstances – killing a juror, “car-jacking”, “drive-by-shootings,” and “gang related” murders – and expanded the definitions of kidnapping and arson under the felony murder special circumstance.<sup>25</sup>

Twice in recent years, voters have been presented the opportunity to repeal the death penalty and both times narrowly rejected that path. Instead, in 2016 voters approved Prop. 66 to “speed up” the review of death penalty judgements in an effort to “fix” the system.<sup>26</sup> As described below, four years after the passage of Proposition 66, the pace of litigations in death penalty cases has only slowed further.

## **B. California’s challenges with executions**

For the 25-year period from 1967 until 1992, California did not carry out any executions.<sup>27</sup> Robert Alton Harris became the first person executed during the modern death penalty era when he was put to death in the gas chamber in 1992.<sup>28</sup> The state carried out one additional execution by lethal gas before the courts found that method of execution cruel and inhumane.<sup>29</sup>

Like the rest of the nation, California switched to lethal injection as the primary form of execution and proceeded to carry out eleven more executions using this method.<sup>30</sup> The last person executed using this method in California was Clarence Ray Allen, executed in January of 2006.

Following this execution, a federal district court ruled that “California’s lethal-injection protocol – as actually administered in practice – create[d] an undue and

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990). (Proposition 115 overrode the California Supreme Court opinions in *Carlos v. Superior Court*, 35 Cal. 3d 131 (1983), and *People v. Anderson*, 43 Cal. 3d 1104 (1987).)

<sup>25</sup> *California Proposition 195, Special Circumstances Punishable by the Death Penalty* (1996). Ballotpedia. At: [https://ballotpedia.org/California Proposition 195, Special Circumstances Punishable by the Death Penalty \(1996\)](https://ballotpedia.org/California_Proposition_195,_Special_Circumstances_Punishable_by_the_Death_Penalty_(1996)); *California Proposition 196, Murders Committed by Firing from Vehicles are Punishable by Death* (1996), Ballotpedia. At: [https://ballotpedia.org/California Proposition 196, Murders Committed by Firing from Vehicles are Punishable by Death \(1996\)](https://ballotpedia.org/California_Proposition_196,_Murders_Committed_by_Firing_from_Vehicles_are_Punishable_by_Death_(1996)); *California Proposition 21, Treatment of Juvenile Offenders* (2000), Ballotpedia. At: [https://ballotpedia.org/California Proposition 21, Treatment of Juvenile Offenders \(2000\)](https://ballotpedia.org/California_Proposition_21,_Treatment_of_Juvenile_Offenders_(2000)).

<sup>26</sup> In 2012, California voters rejected Proposition 34, with 52 percent opposed and 48 percent in support. Four years later, voters rejected Proposition 62, with 53 percent opposed and 47 percent in support. By an even narrower margin, in 2016 the voters approved Proposition 66, an initiative intended to speed up litigation in death penalty cases, supported by 51 percent of voters. (*California Proposition 34, Abolition of the Death Penalty Initiative* (2012), Ballotpedia. At: [https://ballotpedia.org/California Proposition 34, Abolition of the Death Penalty Initiative \(2012\)](https://ballotpedia.org/California_Proposition_34,_Abolition_of_the_Death_Penalty_Initiative_(2012)); *California Proposition 62, Repeal of the Death Penalty* (2016), Ballotpedia. At: [https://ballotpedia.org/California Proposition 62, Repeal of the Death Penalty \(2016\)#cite\\_ref-65](https://ballotpedia.org/California_Proposition_62,_Repeal_of_the_Death_Penalty_(2016)#cite_ref-65); *California Proposition 66, Death Penalty Procedures* (2016), Ballotpedia. At: [https://ballotpedia.org/California Proposition 66, Death Penalty Procedures \(2016\)](https://ballotpedia.org/California_Proposition_66,_Death_Penalty_Procedures_(2016)).)

<sup>27</sup> California Department of Corrections and Rehabilitation, *History of Capital Punishment in California*, At: <https://www.cdcr.ca.gov/capital-punishment/history/>.

<sup>28</sup> Death Penalty Information Center, *Execution Database*, <https://deathpenaltyinfo.org/executions/execution-database?filters%5Bstate%5D=California>.

<sup>29</sup> *Fierro v. Gomez* (9th Cir. 1996) 77 F.3d 301.

<sup>30</sup> *Supra* note 28.

unnecessary risk that an inmate will suffer pain so extreme that it offends the Eighth Amendment.”<sup>31</sup> This ruling resulted in a court-imposed moratorium on executions while the state sought to devise a new procedure. Although that case has since been settled by the parties, active litigation continues as discussed further below.

As noted above, shortly after taking office in 2019, Governor Newsom issued an executive order imposing a moratorium on all executions, stating “California’s death penalty system is unfair, unjust, wasteful, protracted and does not make our state safer.”<sup>32</sup> The Governor also noted, “death sentences are unevenly and unfairly applied to people of color, people with mental disabilities, and people who cannot afford costly legal representation.”<sup>33</sup> In addition to granting a reprieve to all individuals on death row, the Governor ordered the death chamber dismantled and halted all steps to devise a new method of execution.<sup>34</sup> The Governor stopped short of initiating a clemency process for everyone on death row.

In light of the Governor’s moratorium, the parties settled the court challenge to California’s execution protocol, with the proviso that the case will automatically be reinstated should the moratorium be lifted.<sup>35</sup>

However, three elected prosecutors have attempted to intervene in the case, in an effort to set aside the settlement and to advocate that the state’s lethal injection protocol is constitutional.<sup>36</sup> District Attorneys Michael Hestrin of Riverside County, Jason Anderson of San Bernardino County, and Steve Wagstaffe of San Mateo County, alleged that the California Department of Corrections and Attorney General have failed to effectively advocate for the execution of death sentences and that they should be allowed to intervene in the litigation to advance this perspective.<sup>37</sup>

### **C. Potential legal infirmities with California’s death penalty system**

California’s death penalty system has been criticized for several legal infirmities unique to California.

#### **1) Failure to narrow**

As discussed above, in order for a state’s death penalty statute to be constitutional and consistent with the U.S. Supreme Court mandate in *Furman*, the statute must meaningfully narrow death eligibility to those most culpable for committing the gravest offenses. Many scholars have criticized California’s death penalty statute for failing to meaningfully narrow death eligibility, noting that nearly all homicides fit under one or

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<sup>31</sup> *Supra* note 27.

<sup>32</sup> Governor’s Exec. Order N-09-19 (Mar. 13, 2019) <<https://www.gov.ca.gov/wp-content/uploads/2019/03/3.13.19-EO-N-09-19.pdf>> (as of Feb. 3, 2021).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Morales v. Diaz*, 3:06-cv-00219-RS (N.D. Cal. Jul. 24, 2020), ECF No. 755.

<sup>36</sup> See Brief of Appellants - Proposed Intervenors filed in case of *Cooper v. Brown*, No. 18-16547, Nov. 21, 2018, 2018 WL 6200616 (9th Cir. 2018).

<sup>37</sup> *Id.*

more special circumstance.<sup>38</sup> This issue has yet to be addressed by the California Supreme Court on a factual record.

Recently, the current District Attorneys of Contra Costa, Los Angeles, Santa Clara, San Francisco, and San Joaquin counties, and former District Attorney Gil Garcetti filed an amicus brief in the California Supreme Court asserting this view.<sup>39</sup> The prosecutors stated, “[n]either California’s list of the “special circumstances” that make murderers eligible for the death penalty nor its penalty phase list of “aggravating factors” fulfills [the narrowing] function. As a result, the selection of defendants that receive the death penalty is influenced both by irrelevant factors, such as geography and whether the defendant is represented by a public defender or a court-appointed lawyer, and impermissible factors, such as the race and ethnicity of the defendant and the victim.”<sup>40</sup>

## **2) Failure to instruct on reasonable doubt and unanimity in penalty phase**

Currently, California juries are not required to unanimously agree on aggravating factors during penalty phase deliberations of a death penalty trial and are not required to find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors or that death is the appropriate punishment.<sup>41</sup> As a result, individual jurors could have different assessments of the truth or weight of the aggravating and mitigating factors and some jurors might vote for death, despite lingering concerns consistent with reasonable doubt as to the appropriate punishment.

The California Supreme Court recently requested briefing on whether this practice contravenes the state constitution, asking: “Do Penal Code section 1042 and article I, section 16 of the California Constitution require that the jury unanimously determine beyond a reasonable doubt factually disputed aggravating evidence and the ultimate penalty verdict?”<sup>42</sup> Governor Newsom took the unprecedented step of filing an amicus brief urging the Supreme Court to answer this question in the affirmative.<sup>43</sup> The Governor noted that “[n]ationally and in California, non-unanimous verdicts have been intended to entrench White jurors’ control of deliberations.”<sup>44</sup> The District Attorneys’ amicus brief discussed above was filed in the same case, arguing that the failure to

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<sup>38</sup> See Baldus, et al., *Furman at 45: Constitutional Challenges from California’s Failure to (Again) Narrow Death Eligibility* 16(4) J. Emp. Legal Studies 693 (2019); Grosso et al., *Death by Stereotype: Race, Ethnicity, and California’s Failure to Implement Furman’s Narrowing Requirement*, 66 UCLA L.Rev. 1394 (2019); Shatz, et al., *The California Death Penalty Scheme: Requiem for Furman?* 72 N.Y.U. L.Rev. 1283 (1997); Note, *The “Most Deserving” of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes* 46 Harv. C.R.-C.L. L.Rev. 223 (2011).

<sup>39</sup> Amicus brief filed in the case of *People v. McDaniels*, No. S171393, filed October 26, 2020.

<sup>40</sup> *Id.* at 20-21.

<sup>41</sup> See briefing documents in *People v. McDaniels*, No. S171393, available here: <https://www.ospd.ca.gov/legal-developments/>

<sup>42</sup> *Id.*

<sup>43</sup> Amicus brief in the case of *People v. McDaniels*, No. S171393, filed October 26, 2020.

<sup>44</sup> *Id.* at 22.

instruct on unanimity and beyond a reasonable doubt amplify the arbitrariness in application of California's death penalty.

### 3) Overall dysfunction

In 2014, the overall dysfunction of California's death penalty led a Federal District Court Judge in Santa Ana, Cormac Carney, to conclude that the death penalty as administered in California is unconstitutional. Judge Carney stated, "systemic delay has made execution so unlikely that the death sentence carefully and deliberately imposed by the jury has been quietly transformed into one no rational jury or legislature could ever impose: life in prison, with the remote possibility of death."<sup>45</sup> This ruling was later reversed by the Ninth Circuit on the procedural grounds of failure to exhaust in state court.<sup>46</sup> The issue has yet to be addressed by the California Supreme Court on a record that includes the evidence presented to Judge Carney.

### 4) Lack of proportionality review

Proportionality review – that is, comparing the facts and circumstances across defendants to ensure fair and proportional sentencing – is an important safeguard to address bias in the criminal legal system. There are two forms of proportionality review: *inter*-case review compares outcomes across individuals in different cases while *intra*-case review compares outcomes among defendants involved in the same event. California is one of only a handful of states that does not require inter-case proportionality review of death sentences across different cases.<sup>47</sup>

While California law generally requires intra-case proportionality review of the sentences of co-defendants in the same event, the California Supreme Court has said, "the sentence an accomplice receives has little bearing on the individualized consideration of a capital defendant's penalty."<sup>48</sup> In practice, no California death sentence has been found invalid despite stark examples of disproportionality, including multiple cases in which an accomplice who did not kill was sentenced to death while the individual who actually committed the murder received a lesser sentence.<sup>49</sup>

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<sup>45</sup> *Jones v. Chappell*, 31 F.Supp.3d 1050, 1053 (C.D. Cal. 2014) revd. *sub nom. Jones v. Davis*, 806 F.3d 538, 543 (9th Cir. 2015).

<sup>46</sup> *Jones v. Davis*, 806 F.3d 538, 543 (9th Cir. 2015).

<sup>47</sup> See *People v. Riel*, 22 Cal.4th 1153, 1223 (2000); *People v. Taylor*, 47 Cal.4th 850, 900 (2009); *People v. Arias*, 13 Cal.4th 92, 193 (1996); *Pulley v. Harris*, 465 U.S. 37, 50–51 (1984); Submission by the ACLU of Northern California to the California Commission on the Fair Administration of Justice (Jan. 9, 2008); Timothy V. Kaufman-Osborn, *Capital Punishment, Proportionality Review, and Claims of Fairness (With Lessons from Washington State)*, 79 Wash. L. Rev. 775, 790-792 (2004).

<sup>48</sup> *People v. McDermott*, 28 Cal.4th 946, 1005 (2002).

<sup>49</sup> For example, Jarvis Masters was sentenced to death for allegedly producing a weapon that was used to kill a correctional officer, while the individuals responsible for the killing received lesser sentences. *In re*

Although this legal issue has been rejected by the California Supreme Court in the past<sup>50</sup>, the Court has not recently been presented with the growing evidence of stark disparities in California death sentences. For example, the most prolific serial killer in California history was sentenced to life in prison without the possibility of parole, while individuals who did not kill nor intend to kill remain on death row under felony murder special circumstances.<sup>51</sup> In some cases, the accomplice who did not kill remains on death row while the actual killer has already been released on parole.<sup>52</sup>

### III. Evidence That Application of California's Death Penalty is Racially and Geographically Biased

#### A. Racial bias

In many ways, capital punishment concentrates racial bias that pervades the entire criminal legal system.

When discussing capital punishment today, America's history of racial violence against people of color, particularly through the practice of lynching cannot be ignored.<sup>53</sup>

While lynching was more prominent in the southern states, the practice also existed in western states, including California. Lynchings in California mirrored that of southern states in that ethnic minorities were disproportionately targeted for violence.<sup>54</sup> Like Blacks in the south, Mexican and Mexican Americans in the west were often lynched after being accused of victimizing a white person, with little process and no trial.<sup>55</sup>

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*Masters*, 7 Cal.5th 1054 (2019). See also *People v. Howard*, 51 Cal. 4th 15, 39–40 (2010); *People v. McDermott* 28 Cal.4th 946 (2002).

<sup>50</sup> See cases cited in notes 48 and 49.

<sup>51</sup> Compare Wamsley, *Golden State Killer Sentenced To Life In Prison Without Possibility Of Parole*, National Public Radio (Aug. 21, 2020), at: <https://www.npr.org/2020/08/21/904744564/golden-state-killer-sentenced-to-life-in-prison> with Ewing, *I've Made My Share of Wrongs, But I Haven't Killed No One*, The Appeal (Feb. 9, 2019) (discussing the case of Demetrius Howard who was sentenced to death as an accomplice in a robbery while the actual killer received a lesser sentence), at: <https://theappeal.org/ive-made-my-share-of-wrongs-but-i-havent-killed-no-one/>.

<sup>52</sup> *People v. Gordon*, 50 Cal.3d 1223 (1990). Patrick Gordon was the getaway driver who waited in the car while two other individuals entered a K-Mart and killed an armored truck driver. Gordon was sentenced to death while the other two individuals were sentenced to life without parole. Michael Caputo, the admitted trigger man, had his sentence commuted to life with parole and was released on parole in 2019. (Communication from counsel for Mr. Gordon.)

<sup>53</sup> According to a study by the Equal Justice Initiative, between 1865 and 1950, at least 6,400 people were lynched in the United States. Equal Justice Initiative, *Reconstruction in America: Racial Violence after the Civil War, 1865-1876*, 44 (2020) (hereinafter *Reconstruction in America*).

<sup>54</sup> Delgado, *The Law of the Noose: A History of Latino Lynching*, 44 Harv. Civil Rights-Civil Liberties L.Rev. 297, 301 (2009) (citing Carrigan, et al., *The Lynching of Persons of Mexican Origin or Descent in the United States, 1848 to 1928*, 37 J. Soc. Hist. 411, 415 (2003)).

<sup>55</sup> Equal Justice Initiative, *Lynching in America: Confronting the Legacy of Racial Terror*, 56 (2017) (hereinafter *Lynching in America*).

Although lynching was an extra-judicial process, the practice was closely tied to the criminal legal system in that it regularly occurred in response to an allegation of serious crime.<sup>56</sup> Black people who were accused of committing a crime were often executed without receiving any trial or process.<sup>57</sup> The targeting of Black people for lynching served to reinforce “a view that African Americans were dangerous criminals who posed a threat to innocent white citizens.”<sup>58</sup>

As the country shifted away from the practice of lynching in the mid-twentieth century, the promise of swift, officially sanctioned executions were offered as a compromise.<sup>59</sup> Indeed, United States Supreme Court Justice Potter Stewart acknowledged the role of capital punishment in curtailing lynching, writing that the, “expression of society’s moral outrage” channeled by capital punishment “is essential in an ordered society that asks its citizens to rely on legal processes, rather than self-help to vindicate their wrongs.”<sup>60</sup> However, the legal process considered by Justice Stewart was often markedly different for people of color charged with capital offenses.<sup>61</sup> Death sentences imposed against people of color after expedited criminal processes have been dubbed “legal lynching” by some experts.<sup>62</sup>

It was against this historical backdrop that the United States Supreme Court considered the various challenges to capital punishment in the 1950’s through the 1970’s.<sup>63</sup> The constitutional challenges often explicitly alleged some form of racism as their basis.<sup>64</sup> Although notable decisions amended capital laws and procedures, the Court, “fail[ed] to address forthrightly the death penalty’s racialized history.”<sup>65</sup>

## **1) The California data**

### **a. Data shows racial disparities in California based on race of defendant**

Data indicates that the race of the defendant may impact whether the death penalty will be imposed in California. Specifically, Black and Latinx defendants are disproportionately sentenced to death. Despite accounting for only 6.5 percent of

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<sup>56</sup> Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 L. and Soc. Rev. 793, 810-820 (2005).

<sup>57</sup> *Reconstruction in America, supra*, at 67.

<sup>58</sup> *Lynching in America, supra*, at 61.

<sup>59</sup> Death Penalty Information Center, *Enduring Justice: The Persistence of Racial Discrimination in the U.S. Death Penalty*, 12 (2020).

<sup>60</sup> *Gregg*, 428 U.S. at 183.

<sup>61</sup> Steiker, et al., *The American Death Penalty and the (In)visibility of Race*, 82 Univ. Chicago L.Rev. 243, 251-252 (2015).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 244.

<sup>64</sup> *Id.*

<sup>65</sup> Steiker, et al., *Courting Death*, 78-115 (2016).

California's population,<sup>66</sup> over one third of people on death row in the state are Black.<sup>67</sup> While Latinx people accounted for less than half of homicide arrests in the state between 2005 and 2019,<sup>68</sup> all eight of the people sentenced to death in the state in 2018 and 2019 were Latinx.<sup>69</sup> In 2020, three of the five people sentenced to death in California were Latinx.<sup>70</sup>

The data from individual counties is also concerning. In Los Angeles County from 2012 to 2019, none of the 22 people sentenced to death were white.<sup>71</sup> Indeed, of the 222 people currently on death row who were convicted in Los Angeles County, nearly 50 percent are Black, nearly 29 percent are Latinx and less than 15 percent are white.<sup>72</sup>

In San Bernardino County, although Black people accounted for less than 10 percent of the county's population, they accounted for 43 percent of the 14 death sentences pronounced between 2006-2015.<sup>73</sup> Of the 39 people currently on death row who were sentenced in San Bernardino County, 49 percent are people of color.<sup>74</sup>

Between 2010-2015 Orange County's capital sentencing rate was 5.4 times the rest of the state per 100 homicides.<sup>75</sup> During the same time period, 89 percent of the individuals sentenced to death in the county were people of color.<sup>76</sup> Of the 60 individuals currently on death row who were sentenced in Orange County, nearly 62 percent are people of color.<sup>77</sup>

In Riverside County, 76 percent of people sentenced to death between 2010-2015 were people of color.<sup>78</sup> While only 7 percent of the county's population is Black, Black people accounted for 24 percent of those sentenced to death in that time frame.<sup>79</sup> Of the

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<sup>66</sup> U.S. Census Bureau, Quick Facts California (2019).

<sup>67</sup> Data provided by CDCR Office of Research.

<sup>68</sup> Cal. Dept. of Justice, *Homicide in California* 36 (2014); Cal. Dept. of Justice, *Homicide in California* 38 (2019).

<sup>69</sup> Cal. Dept. of Justice, *Homicide in California*, 2 (2019); Cal. Dept. of Justice, *Homicide in California*, 2 (2018).

<sup>70</sup> Data provided by CDCR Office of Research.

<sup>71</sup> ACLU, *The California Death Penalty Is Discriminatory, Unfair, and Officially Suspended: So Why Does Los Angeles District Attorney Jackie Lacey Seek to Use It*, 2 (2019).

<sup>72</sup> Data provided by CDCR Office of Research; According to 2019 U.S. Census estimates, Los Angeles County's population is 48.6% Hispanic or Latinx, 26.1% non-Hispanic white, 15.4% Asian, 9% Black.

<sup>73</sup> Fair Punishment Project, *Too Broken to Fix Part II: An In-depth Look at America's Outlier Death Penalty Counties*, 18-19 (2016) (hereinafter *FPP II*).

<sup>74</sup> Data provided by CDCR Office of Research.

<sup>75</sup> *FPP II*, *supra*, at 39.

<sup>76</sup> *Id.* at 43.

<sup>77</sup> Data provided by CDCR Office of Research; According to 2019 U.S. Census estimates, Orange County's population is 39.8% non-Hispanic white, 34% Hispanic or Latinx 21.7% Asian, 2.1% Black.

<sup>78</sup> Fair Punishment Project, *Too Broken to Fix: Part I: An In-depth Look at America's Outlier Death Penalty Counties*, 35 (2016) (hereinafter *FPP I*).

<sup>79</sup> *Id.*

92 people currently on death row who were sentenced in Riverside County, 76 percent are people of color.<sup>80</sup>

### **b. Data shows racial disparities in California based on race of victim**

Available data indicates that the race of the victim also impacts who is sentenced to death in California. In a statewide study of death sentences imposed in California in the decade of 1990, researchers Glenn Pierce and Michael Radelet found that Black and Latinx defendants who kill white victims were more likely to be sentenced to death than those who kill Black or Latinx victims.<sup>81</sup> They determined that people convicted of killing white victims receive the death penalty at a rate of 1.75 per 100 victims, while those convicted of killing Black or Latinx victims are sentenced to death at a rate of .47 per 100 victims and .369 per 100 victims, respectively.<sup>82</sup>

Studies of the use of capital punishment in specific California counties have resulted in similar findings. In a study of the effects of race on the application of the death penalty in San Diego County, researchers found that race of the victims and defendants impacted capital charging decisions.<sup>83</sup> While controlling for a number of variables, researchers determined that the District Attorney was over seven times more likely to seek the death penalty in cases with a Latinx defendant and a white victim than in cases with a Black or Latinx victim.<sup>84</sup> Similarly, the District Attorney was over six and a half times more likely to seek the death penalty in cases with a Black defendant and a white victim as in cases with a Black or Latinx victim.<sup>85</sup>

In a study of capital cases in Los Angeles County, researchers found that “defendants accused of killing White victims are more likely to be charged with a death-eligible offense than those accused of killing minority victims.”<sup>86</sup> An earlier Los Angeles Times report examined 9,442 willful homicides in Los Angeles county and found that 15 percent of cases with white victims were charged capitally, while only 7 percent of Black victim cases and 6 percent of Latinx victim cases were.<sup>87</sup> A study of charging practices in San Joaquin County found that the likelihood of being charged with a special circumstance for defendants in cases with a Black victim was one-fifth the

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<sup>80</sup> Data provided by CDCR Office of Research; According to 2019 U.S. Census estimates, Riverside County’s population is 50% Hispanic or Latinx, 34.1% non-Hispanic white, 7.3% Black and 7.2% Asian.

<sup>81</sup> Pierce, et al., *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999*, 46 Santa Clara L.Rev. 1, 19-20 (2005).

<sup>82</sup> *Id.*

<sup>83</sup> Shatz, et al., *Race, Ethnicity, and the Death Penalty in San Diego County: The Predictable Consequences of Excessive Discretion*, 51 Colum. Hum. Rts. L.Rev. 1070, 1096 (2020).

<sup>84</sup> *Id.* at 1095.

<sup>85</sup> *Id.*

<sup>86</sup> Petersen, *Examining the Sources of Racial Bias in Potentially Capital Cases: A Case Study of Police and Prosecutorial Discretion*, 7(1) Race & Justice 7, 23 (2016).

<sup>87</sup> Rohrlich, et al., *Not All L.A. Murder Cases Are Equal*, Los Angeles Times (Dec. 3, 1996).

likelihood in cases with a white victim.<sup>88</sup> In cases with Latinx victims, the likelihood was one-twentieth of that for cases with white victims.<sup>89</sup>

Despite the many studies suggesting that the race of the victim impacts the likelihood of a death sentence, some scholars suggest that evidence of racial bias in capital sentencing is exaggerated.<sup>90</sup> According to this view, charging decisions can never be fully explained through a reliance on mathematical models and any statistical differences in charging or conviction rates do not prove discrimination or racial animus, but can be explained by other variables which the studies failed to account for.<sup>91</sup> Indeed, in *McCleskey v. Kemp* (1987) 481 U.S. 279, one of the most prominent studies alleging disproportionate sentencing based on the race of the victim was rejected by the trial court (the U.S. Supreme Court accepted the findings of the study as true for the purposes of its constitutional analysis but nonetheless accepted the state's practice of executions despite its biased application).<sup>92</sup>

According to University of California, Los Angeles professor Sherod Thaxton, the criticisms of statistical models are often misplaced and courts have “inappropriately reject[ed] extremely probative statistical evidence of intentional discrimination.”<sup>93</sup> Professor Thaxton asserts that “[n]early all social scientists acknowledge, at the outset, that omitted variable bias is possible,” but also acknowledge that “[r]esearchers need not control for every conceivable variable possibly influencing the outcome of interest.”<sup>94</sup>

### **c. Data shows pronounced racial disparities for particular special circumstances**

Recent research shows marked racial disparities in application of six of the 22 special circumstances that make a person eligible for the death penalty in California.<sup>95</sup>

In 2019, a team of researchers that included professors Catherine Grosso and David Baldus, found that the special circumstances of multiple victims, lying in wait, robbery / burglary felony murder, torture, drive by shooting, and gang membership

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<sup>88</sup> Lee, *Hispanics and the death penalty: Discriminatory charging practices in San Joaquin County, California*, 35 J. Crim. Justice 17, 21 (2007).

<sup>89</sup> *Id.*

<sup>90</sup> See e.g., Scheidegger, *Rebutting the Myths About Race and the Death Penalty*, 10 Ohio St. J. Crim. L. 147, 150 (2012). Mr. Scheidegger also asserts that, “[t]he days of racial exclusion from voting and jury service are long behind us.” (*Id.* at 164.)

<sup>91</sup> *Id.* at 150.

<sup>92</sup> *McCleskey v. Kemp*, 481 U.S. 279, 290 (1987) (The “Baldus study” was offered by the defendant at trial to show that the odds of receiving a death sentence were greater for those whose victims were white than for those whose victims were Black.)

<sup>93</sup> Thaxton, *Disentangling Disparity: Exploring Racially Disparate Effect and Treatment in Capital Charging*, 45 Am.J.Crim.L. 95, 115 (2018).

<sup>94</sup> *Id.* at 117.

<sup>95</sup> Grosso, et al., *Death by Stereotype: Race, Ethnicity, and California's Failure to Implement Furman's Narrowing Requirement*, 66 UCLA L.Rev. 1394 (2019).

were not applied evenly across all races and ethnicities.<sup>96</sup> White defendants had a higher representation in cases with the multiple murder and torture special circumstances compared to Black and Latinx defendants.<sup>97</sup> Black defendants were disproportionately impacted by the robbery/burglary felony murder special circumstance.<sup>98</sup> Latinx defendants were substantially overrepresented among those impacted by the drive-by and gang-related special circumstance, representing more than half of the individuals sentenced to death with those special circumstances.<sup>99</sup> Latinx defendants were also overrepresented in cases with the lying in wait special circumstance, though to a lesser extent.<sup>100</sup>

The researchers further analyzed the data controlling for level of culpability and offense year and found evidence of significantly disparate application for five of the special circumstances.<sup>101</sup> “A model of the likelihood that the gang member special circumstance would be found or present reported that Latinx defendants faced 7.8 higher odds than other similarly situated defendants and Black defendants face 4.8 higher odds than other similarly situated defendants even after controlling for culpability and year.”<sup>102</sup> For the drive-by special circumstance, researchers found “Black and Latinx defendants faced odds 3.5 higher than the odds faced by similarly situated defendants of other race or ethnicities.”<sup>103</sup> For the robbery/burglary special circumstance, “Black defendants face odds 2.2 times higher than the odds faced by other defendants.”<sup>104</sup> For torture murder, “white defendants face odds 2.3 times higher than other similarly situated defendants.”<sup>105</sup> Finally, “Latinx defendants face odds of having the special circumstance for lying in wait found or present that are 1.6 the odds of similarly situated defendants of other race or ethnicities.”<sup>106</sup>

## 2) Sources of bias

Like other areas of the criminal legal system, many sources contribute to racially biased practices and outcomes.

### a. Policing

Racial disparities in policing may contribute to disproportionate capital sentencing. In California, between 2010-2019, only 59-65 percent of homicides were solved each

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<sup>96</sup> *Id.* at 1426.

<sup>97</sup> *Id.* at 1429.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 1435.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

year.<sup>107</sup> According to researchers, homicides involving minority victims are less likely to be solved.<sup>108</sup> In 2018, the Washington Post analyzed homicide arrest data from 52 large cities across the U.S. and found that in more than 18,600 of the approximately 26,000 unsolved cases, the victim was black.<sup>109</sup> The lower arrest rate in cases involving minority victims means that people who kill minority victims are less likely to face the death penalty.<sup>110</sup>

#### **b. Broad discretion given to prosecutors**

The broad discretion afforded prosecutors in determining when to seek the death penalty is another explanation for the disproportionate sentencing patterns in the state. Research has shown that “the narrower the category of those eligible for the death penalty, the less the risk of error, and the lower the rate of racial or geographic variation.”<sup>111</sup>

In California, prosecutors can choose from a list of 22 different “special circumstances” that make a first-degree murder eligible for the death penalty, including “felony murder” which lists 13 different felonies that can serve as the predicate for a capital sentence even if the death was accidental.<sup>112</sup> The sweeping list of enumerated circumstances was created with the intention of giving Californians the toughest death penalty law in the country and to apply the death penalty to every murderer.<sup>113</sup> The circumstances encompass a wide range of factual scenarios, including when a death occurs in the course of a robbery, when a murder was committed after “lying in wait”, and when a murder is committed to further the activities of a criminal street gang.<sup>114</sup>

Though state laws allow prosecutors broad discretion to decide when to seek the death penalty, very little is known about how they make that decision. In 2008, the California Commission on the Fair Administration of Justice sent surveys to the District Attorneys of all 58 counties seeking information on the process each office uses to decide whether to charge a case capitally.<sup>115</sup> Despite numerous follow-up attempts,

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<sup>107</sup> State of California Department of Justice, *Homicide in California*, Table 28 (2019).

<sup>108</sup> Lee, *The value of life in death: multiple regression and event history analysis of homicide clearance in Los Angeles County*, *Journal of Criminal Justice*, 33, 527-534 (2005); See also Nick Petersen, *Neighbourhood context and unsolved murders: the social ecology of homicide investigations*, *Policing and Society* 27:4, 372-392 (2015).

<sup>109</sup> Lowery, et al., *Murder with Impunity: An Unequal Justice*, *The Washington Post* (Jul. 25, 2018).

<sup>110</sup> Petersen, *Examining Sources of Racial Bias in Potentially Capital Cases*, 7(1) *Race & Justice* 7 (2016).

<sup>111</sup> Cal. Comm. on the Fair Administration of Justice, *Final Report, Death Penalty*, 138 (2008) (citing Liebman, et al., *Less Is Better: Justice Stevens and the Narrowed Death Penalty*, 74 *Fordham L.Rev.* 1607 (2006)).

<sup>112</sup> Penal Code § 190.2.

<sup>113</sup> Shatz, et al., *The California Death Penalty Scheme: Requiem for Furman?*, 72 *N.Y.U. L.Rev.* 1283, 1310 & n. 154 (1997) (quoting State of California, *Voter's Pamphlet* 34 (1978)).

<sup>114</sup> Penal Code §§ 190.2(14), 190.2(17)(A), 190.2(22).

<sup>115</sup> Cal. Comm. on the Fair Administration of Justice, *Final Report, Death Penalty*, 152 (2008).

twenty counties never responded and fourteen declined to participate.<sup>116</sup> Of the counties that did complete the survey, very few indicated they had written policies in place and only one agreed to provide a copy.<sup>117</sup> After reviewing data from other sources, the Commission concluded that there was, “great variation in the practices for charging special circumstances....” and recommended that the Legislature require “courts, prosecutors and defense counsel to collect and report all data needed to determine the extent to which the race of the defendant, the race of the victim, geographic location and other factors affect decisions to implement the death penalty ....”<sup>118</sup> This recommendation has not been acted upon.

Committee staff have been unable to find published practices or policies from any District Attorney office throughout the state.

### **c. Racially discriminatory jury selection practices**

The jury selection process for capital offenses may also contribute to the disproportionate sentencing of people of color. Though both the California and United States Supreme Courts have adopted rules to prevent racial bias from impacting who serves on a jury,<sup>119</sup> juries in California continue to be disproportionately white.<sup>120</sup> This is especially true in capital cases where the process of “death qualification” and the use of peremptory challenges work to “whitewash the jury box”.<sup>121</sup>

In capital cases, jurors are allowed to be questioned about their attitudes toward the death penalty and if a juror expresses an opinion against the death penalty so strong that it can “substantially impair” their ability to consider all the sentencing options in the case, they are excluded from serving.<sup>122</sup> This process has been shown to disproportionately exclude Black people because they are more likely to be opposed to the death penalty than are white people.<sup>123</sup> Even when potential jurors survive the death qualification process, prosecutors can use peremptory challenges to excuse those who were indecisive about the penalty.<sup>124</sup> Furthermore, research has shown that prosecutors use peremptory challenges disproportionately against people of color and in many

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 154-155.

<sup>119</sup> *People v. Wheeler*, 22 Cal. 3d 258 (1978); *Batson v. Kentucky*, 476 U.S. 79 (1986).

<sup>120</sup> Berkeley Law Death Penalty Clinic, *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors*, 3-5 (2020).

<sup>121</sup> *Id.*

<sup>122</sup> Lynch, et al., *Death Qualification in Black and White: Racialized Decision Making and Death-Qualified Jurors*, 40 *Law & Pol’y* 148 (2018) (citing *Morgan v. Illinois*, 504 U.S. 719, 738 (1992); *Wainwright v. Witt*, 469 U.S. 412, 424 (1985)).

<sup>123</sup> Unnever, et al., *Race, Racism, and Support for Capital Punishment*, 37 *Crime & Just.* 45, 54 (2008); See also Lynch, et al., *Death Qualification in Black and White: Racialized Decision Making and Death-Qualified Jurors*, 40 *Law & Pol’y* 148, 153-159 (2018).

<sup>124</sup> Lynch, et al., *Death Qualification in Black and White: Racialized Decision Making and Death-Qualified Jurors*, 40 *Law & Pol’y* 148, 166 (2018).

instances, their “race-neutral” reasons for excusing jurors of color correlate with racial stereotypes.<sup>125</sup>

#### **d. Confusing jury instructions and implicit bias of jurors**

Confusing jury instructions and implicit racial bias of jurors may also play a role in disproportionate capital sentencing. According to some scholars, penalty phase instructions are “notoriously difficult for jurors to understand and apply,”<sup>126</sup> and research has shown that most jurors do not understand the instructions.<sup>127</sup> When jurors do not fully comprehend the instructions, they are more likely to allow bias to impact their decisions.<sup>128</sup> Indeed, researchers have found that jurors with the poorest comprehension of the instructions were the most prone to deciding based on racial bias.<sup>129</sup>

In addition, California prosecutors have been allowed to use racially coded language in court, exacerbating implicit bias of jurors. As noted in the Legislative intent of the Racial Justice Act of 2020, “courts have upheld convictions in cases where prosecutors have compared defendants who are people of color to Bengal tigers and other animals, even while acknowledging that such statements are ‘highly offensive and inappropriate.’”<sup>130</sup> Research has shown that animal imagery effectively triggers implicit bias and have observed the likely impact this has on jurors deciding capital cases.<sup>131</sup>

Other research has found that the more “stereotypically black” a defendant looked to independent raters, the more likely it was that the person had received a death sentence.<sup>132</sup>

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<sup>125</sup> Berkeley Law Death Penalty Clinic, *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors*, 14 (2020).

<sup>126</sup> Lynch, et al., *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the “Empathic Divide,”* 45 Law & Soc. Rev. 69, 74 (2011) (hereinafter *White Male Capital Juror*).

<sup>127</sup> Lynch, et al., *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination*, 33 Law & Hum. Behav. 481, 482 (2009).

<sup>128</sup> *White Male Capital Juror*, *supra*, at 74.

<sup>129</sup> Lynch, et al., *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 Law & Hum. Behav. 337, 344-45 (2000).

<sup>130</sup> Assem. Bill. No. 2542 (2019-2020 Reg. Sess.) citing *Duncan v. Ornoski*, 286 Fed. Appx. 361, 363 (9th Cir. 2008) and *People v. Powell*, 6 Cal.5th 136, 182-83 (2018).

<sup>131</sup> Goff, et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, *Journal of Personality and Social Psychology* Vol. 94, No. 2, 292-293 (2008); Prasad, *Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response*, 86 *Fordham Law Review* 3091, 3105-06 (2018).

<sup>132</sup> *White Male Capital Juror*, *supra*, at 74, citing Eberhardt et al. *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital Sentencing Outcomes*, 17 *Psychological Science* 383-6 (2000).

### 3) Impact of the Racial Justice Act of 2020

In 2020, the Legislature enacted the Racial Justice Act, which aims to eliminate racial bias and racially discriminatory practices in the criminal justice system.<sup>133</sup> Its provisions prohibit racial animus, racially discriminatory language, and disparate charging and sentencing based on race.<sup>134</sup> If the defendant can make a prima facie showing that the law has been violated, the court is required to hold an evidentiary hearing.<sup>135</sup> At the hearing, the defendant has the burden of proving a violation by a preponderance of the evidence.<sup>136</sup> If the defendant meets this burden in a capital case, the “defendant shall not be eligible for the death penalty.”<sup>137</sup> Currently, the Racial Justice Act only applies prospectively, to cases that were not final on January 1, 2021, though a bill has been introduced to make the Act retroactive.<sup>138</sup>

The Racial Justice Act also applies to all criminal prosecutions, not just death penalty cases.

#### B. Geographic bias

Data indicates that geographic bias also impacts who is sentenced to death in California.

According to a report by the ACLU of Northern California, whether someone is sentenced to death in California, “depends largely on where in the state the crime occurred, not on the facts or other common criteria.”<sup>139</sup> Research has shown that the differences in sentencing rates between counties can be explained by factors such as the racial composition of the county, the predilection of particular prosecutors and political pressures.<sup>140</sup>

According to data provided to the Committee by CDCR, the majority of death judgments in California are imposed by a select few counties. Between 2015 and 2019, a total of six counties imposed 89 percent of the death sentences in the state. Moreover, a total of six counties account for approximately 70 percent of all people currently on death row.<sup>141</sup>

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<sup>133</sup> Assem. Bill. No. 2542 (2019-2020 Reg. Sess.).

<sup>134</sup> Penal Code § 745(a)(1)-(4).

<sup>135</sup> Penal Code § 745(c)(1).

<sup>136</sup> Penal Code § 745(c)(2).

<sup>137</sup> Penal Code § 745(e)(3).

<sup>138</sup> See Penal Code § 745(j). Assembly Bill 256 (Kalra), (introduced Jan. 14, 2021).

<sup>139</sup> ACLU of Northern California, *Death by Geography: A County by County Analysis of the Road to Execution in California*, 3 (2009).

<sup>140</sup> *Glossip v. Gross*, 576 U.S. 863, 918-920 (2015) (dis. opn. of Breyer, J.).

<sup>141</sup> Data provided by CDCR Office of Research. The counties are Los Angeles, Riverside, Orange, Alameda, San Bernardino and San Diego; Data provided by CDCR Office of Research.

At least one California county sentences people to death so frequently that it has become a national outlier. According to the Death Penalty Information Center, in 2017, nearly one-third of new death penalty sentences in the United States came from one of just three counties, Riverside, California; Clark, Nevada; and Maricopa, Arizona.<sup>142</sup> According to a 2016 report by the Fair Punishment Project, “Riverside county has become the nation’s leading producer of death penalty cases.” In fact, in 2015, Riverside County sentenced more people to death than every other state in the country, except for Florida and all of California.<sup>143</sup> In 2020, Riverside County was responsible for three of the five death sentences pronounced in the state.<sup>144</sup>

#### IV. Mitigating Factors Have Not Effectively Narrowed the Scope of Defendants Eligible for Death

In theory, a critical feature of the modern death penalty is that it is both narrowly targeted to “the worst of crimes,”<sup>145</sup> and applied specifically to individuals who possess “a consciousness materially more depraved” than that of the “typical” individual who commits homicide.<sup>146</sup> In other words, as commonly phrased, the modern death penalty is only to be imposed on “the worst of the worst.”<sup>147</sup>

Modern death penalty statutes thus require individualized sentencing to ensure that only those with extreme culpability face execution, with courts and jurors evaluating mitigating factors that could demonstrate diminished culpability, including intellectual disabilities, youth, severe mental illness, and chronic childhood trauma.<sup>148</sup> The United States Supreme Court has also categorically excluded people with intellectual disability and people who committed their crimes before the age of 18 from death eligibility,<sup>149</sup> finding that their execution violated the Eighth Amendment’s prohibition on cruel and unusual punishment, and served “no legitimate penological purpose” due to the limited deterrent effect and their diminished culpability.<sup>150</sup>

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<sup>142</sup> Death Penalty Information Center, *DPIC Year End Report: New Death Sentences Demonstrate Increasing Geographic Isolation* (Dec. 15, 2017).

<sup>143</sup> FPP I, *supra*, at 31.

<sup>144</sup> Data provided by CDCR Office of Research.

<sup>145</sup> *Kennedy v. Louisiana*, 554 U.S. 407, 2661 (2008).

<sup>146</sup> *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (reversing a death sentence because “The petitioner’s crimes cannot be said to have reflected a consciousness materially more “depraved” than that of any person guilty of murder”); *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (“the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State.”)

<sup>147</sup> *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (dis. opn. of Souter, J.) (“within the category of capital crimes, the death penalty must be reserved for ‘the worst of the worst’”).

<sup>148</sup> Penal Code § 190.3 subd. (d), (h), & (i). Sentencing factors include whether defendant is “under the influence of extreme mental or emotional disturbance,” and whether the “capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the effects of intoxication,” and “[t]he age of the defendant at the time of the crime.” (*Id.*)

<sup>149</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002) (intellectual disability); *Roper v. Simmons*, 543 U.S. 551 (2005) (youth).

<sup>150</sup> *Hall v. Florida*, 572 U.S. 701, 708 (2014), citing *Atkins*, 536 U.S. at 320 (“No legitimate penological purpose is served by executing the intellectually disabled.”).

These categorical exemptions, combined with the individualized consideration of mitigating factors for death-eligible defendants, are designed to narrow the death penalty's application to only those with "extreme culpability."<sup>151</sup>

However, many people remain on California's death row despite having been diagnosed with intellectual disability and many others have cognitive characteristics and deficits comparable to those of people with intellectual disability and juveniles. These issues raise the question of whether California's death penalty scheme effectively identifies people with extreme culpability for execution.

### **A. California has sentenced people with intellectual disabilities to death**

In *Atkins v. Virginia* (2002) 536 U.S. 304, the U.S. Supreme Court held that the execution of people with intellectual disabilities was unconstitutional, as their "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others" reduced their culpability such that they did not fit in the narrow category of "only the most deserving of execution."<sup>152</sup> Furthermore, they are not capable of the kind of "premeditation," "deliberation, or "cold calculus that precedes the decision of other potential murderers" that would make them deterred by the death penalty.<sup>153</sup>

Yet, people diagnosed with intellectual disability remain on California's death row. Of the currently 175 petitions for writ of habeas corpus pending in the California Supreme Court or the Superior Courts, at least 40 percent and potentially as many as 50 percent raise *Atkins* claims.<sup>154</sup> Additional claims are pending in federal court, including one individual whose adjusted IQ score was below 70 on four of five tests, indicating that he had "significant intellectual deficits that meet the criteria for mild mental retardation."<sup>155</sup> Described as "childlike" and having "garbled, unintelligible, and bizarre speech," his behaviors prior to his offense included hoarding and eating garbage.<sup>156</sup> Neurological reports showed evidence of brain damage, which doctors believe could have resulted from his extremely premature birth and also from the severe beatings he received from his father.<sup>157</sup> He has been on death row since 1986, where he "rolls his feces into little balls, hoards food in the toilet, rarely bathes and speaks in a low, rambling, incoherent string of mumbles."<sup>158</sup>

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<sup>151</sup> *Kennedy*, 554 U.S. at 420.

<sup>152</sup> *Atkins*, 536 U.S. at 319.

<sup>153</sup> *Id* at 319, citing *Enmund v. Florida*, 458 U.S. 782, 799 (1982) and *Gregg*, 428 U.S. at 186.

<sup>154</sup> Habeas Corpus Resource Center, *Annual Report 2020* (2020), at 11; communication with Federal Public Defender.

<sup>155</sup> *In re Horace Edwards Kelly*, Riverside Superior Court Case No. RIC 438403, Post-Hearing Brief (April 3, 2006), at 17.

<sup>156</sup> *Id* at 40, 5.

<sup>157</sup> *Id* at 40.

<sup>158</sup> Terry, *Killer of 3 Is Mentally Fit to Be Executed, a California Jury Finds*, *New York Times* (May 15, 1998). At: <https://www.nytimes.com/1998/05/15/us/killer-of-3-is-mentally-fit-to-be-executed-a-california-jury-finds.html>

Still more intellectually disabled people are likely awaiting appointment of qualified habeas counsel to file their own petitions: currently 85 people on death row have been waiting for appointment of habeas counsel for more than 20 years.<sup>159</sup>

Furthermore, California continues to allow people with severely low intellectual functioning to be sentenced to death because the clinical definition of intellectual disability is limited to onset during a young age, thereby excluding people who have suffered traumatic brain injury (TBI) or dementia.<sup>160</sup> TBI is strongly associated with “perpetration of domestic and other kinds of violence,” “uninhibited or impulsive behavior, including problems controlling anger,” and for incarcerated people, connected to “significantly higher levels of alcohol and/or drug use during the year preceding their current incarceration.”<sup>161</sup> The American Psychological Association, the National Alliance of the Mentally Ill, and the American Bar Association’s Task Force on Mental Disability and the Death Penalty all adopted recommendations that the categorical exclusion from the death penalty for people with intellectual disabilities should be extended to include TBI and dementia.<sup>162</sup>

For those charged with the death penalty, juries are directed to consider a person’s capacity to “appreciate the criminality of his conduct or to conform his conduct to the requirements of law” as a mitigating factor.<sup>163</sup> Studies show this may not be effective in practice.<sup>164</sup> Indeed, in *Atkins* the Court found that the categorical exemption of people with intellectual disabilities was necessary to guard against juries failing to properly consider intellectual functioning in mitigation, due to defendants’ behavior in the courtroom, their challenges cooperating with defense counsel, and the risk of juries finding that their intellectual disability actually renders them more dangerous.<sup>165</sup> These factors are likely to also impact the outcomes of cases involving defendants with TBI, dementia, and levels of intellectual impairment that may not reach the clinical standard for intellectual disability.

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<sup>159</sup> Habeas Corpus Resource Center, *Annual Report 2020* (2020), at 9.

<sup>160</sup> “Intellectual disability means the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the end of the developmental period, as defined by clinical standards.” Cal. Pen. Code § 1076, subd. (a)(1).

<sup>161</sup> Centers for Disease Control, Department of Health & Human Services, (2013) *Traumatic Brain Injury in Prisons and Jails: An Unrecognized Problem*.

<sup>162</sup> ABA Task Force on Mental Disability and the Death Penalty, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, supra, 30 Mental & Physical Disability L.Rep. at p. 669.

<sup>163</sup> Penal Code § 190.3 subd (h).

<sup>164</sup> Sundby, *The True Legacy of Atkins and Roper: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty’s Unraveling*, 23 Wm. & Mary Bill Rts. J. 487, 518-519 (2014).

<sup>165</sup> *Atkins*, 536 U.S. at 320–21, citing *Penry v. Lynaugh*, 492 U.S. 302, 323–25 (1989) (people with intellectual disabilities “face a special risk of wrongful execution” due not only to “the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes... [M]oreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury.”)

A related issue concerns people on death row who are “permanently incompetent” – that is, those whose intellectual functioning or psychological conditions have deteriorated so dramatically during their incarceration that they have become gravely disabled and have little likelihood of regaining competency. In *Ford v. Wainwright* (1986) 477 U.S. 399, the Supreme Court found that it is cruel and unusual punishment to execute people who do not understand their impending punishment or the reason for it.<sup>166</sup> California’s Attorney General has recognized seven people on death row as “permanently incompetent;”<sup>167</sup> six remain on death row, while the seventh died in 2019.<sup>168</sup> Many of these people suffer from age-related dementia. Another case, involving an individual with advanced dementia due to Parkinson’s disease, is pending in Los Angeles County Superior Court.<sup>169</sup> California courts have yet to recognize permanent incompetence as a basis for removing someone from death row.

## **B. California has sentenced people who committed crimes as young adults to death**

In *Roper v. Simmons* (2005) 543 U.S. 551, the Supreme Court extended the findings in *Atkins* to people who were under the age of 18 at the time of their crimes, finding that because of juveniles’ “impetuous and ill-considered actions and decisions,” their vulnerability or susceptibility to “negative influences and outside pressures, including peer pressure,” and their “underdeveloped sense of responsibility,” they “cannot reliability be classified among the worst offenders,” and that “[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.”<sup>170</sup>

Although *Roper* set the line at age 18, research shows that these same qualities also characterize young adults; in fact, risky decision-making may actually peak in young adults, not juveniles.<sup>171</sup> Technological advances in neuroscience have found correlates for this extended maturation process in the brain, demonstrating that parts of the brain critical to decision-making, reward-seeking, and impulse-control continue developing at least through the early twenties.<sup>172</sup> Sentencing young adults to the death penalty,

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<sup>166</sup> *Ford v. Wainwright*, 477 U.S. 399 (1986) (“Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment.”)

<sup>167</sup> *In Re McPeters*, California Supreme Court Case No. S2269918, *In Re Jeffrey Jones*, Sacramento Superior Court Case No. 19HC00474; *In Re Billy Riggs*, Riverside Superior Court Case No. RIC1821277; *In Re David Welch*, Alameda Superior Court Case No. HC 103289-1; *In Re Justin Merriman*, Ventura County Superior Court Case No. CR46564; *In Re Ronald Bell*, California Supreme Court Case No. S244042; and *In Re Darren Stanley*, Alameda County Superior Court Case No. HC103289-1.

<sup>168</sup> California Department of Corrections and Rehabilitation, *News Release: Condemned Inmate Ronald Bell Dies*. March 11, 2019. At: <https://www.cdcr.ca.gov/news/2019/03/11/condemned-inmate-ronald-bell-dies/>

<sup>169</sup> *In Re Robert Carrasco*, Los Angeles Superior Court Case No. LA BA109453.

<sup>170</sup> *Roper*, 543 U.S. at 569, 589, 572.

<sup>171</sup> Shulman, et al., *Deciding in the Dark: Age Differences in Intuitive Risk Judgment*, 50 *Developmental Psychology* 167, 172-173 (2014).

<sup>172</sup> See, e.g., Steinberg, *Adolescent Brain Science and Juvenile Justice Policymaking* 23(4) *Psychology, Public Policy, and Law* 410, 413-414 (2017); Casey et al., *The Adolescent Brain*, 1124(1) *Ann. N.Y. Acad. of Sci* 111, 121-122 (2008); Steinberg, et al., *Age Differences in Future Orientation and Delay Discounting*, 80 *Child*

then, may similarly violate the idea that only defendants with “extreme culpability” are to be executed.<sup>173</sup>

Yet forty-five percent of the people currently sentenced to death in California – or 318 people — were 25 or under at the time of their offense, according to data provided to the Committee by CDCR.<sup>174</sup> 167 of them were 21 or younger.<sup>175</sup> Twenty-four were only 18 years old.<sup>176</sup>

The racial disparities pervasive throughout the state’s capital punishment system are especially pronounced with young people: while 68 percent of all people on death row are people of color, the figure jumps to 80 percent for people who were 21 or younger.<sup>177</sup>

The California legislature has recognized that the extended cognitive maturation process confers diminished culpability and deterrability and greater capacity for change on young adults, passing legislation to require that anyone who was 25 or younger at the time of their offense, with limited exceptions, must be given an opportunity for parole after 15 to 25 years of incarceration, depending on the original term.<sup>178</sup> This reform excludes young adults sentenced to death or life without parole.

Although age is a factor that can be used in mitigation in determining whether to sentence someone to death in California,<sup>179</sup> it often fails to protect many young defendants and worse yet, can also be used as a factor in aggravation. The California Supreme Court has ruled that “age” may legally be used either as a mitigating or as an aggravating factor in a death penalty case.<sup>180</sup> When advanced as mitigation, there is “an unacceptable likelihood” that the nature of the crime “would overpower mitigating arguments based on youth.... Even where the juvenile offender’s objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than

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Development 28, 39 (2009); Steinberg, et al., *Age Difference in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report Evidence for a Dual Systems Model*, 44 *Developmental Psychology* 1764, 1774-1776 (2008); Johnson, et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, *Journal of Adolescent Health* (Sept. 2009).

<sup>173</sup> See *Simmons*, 543 U.S. at 571 (“Retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.”).

<sup>174</sup> Data provided by CDCR Office of Research.

<sup>175</sup> *Id.*

<sup>176</sup> California Department of Corrections and Rehabilitation, *Condemned Inmate List*. At: <https://www.cdcr.ca.gov/capital-punishment/condemned-inmate-list-secure-request/>

<sup>177</sup> Data provided by CDCR Office of Research.

<sup>178</sup> Penal Code § 3551, amended by AB 1308 (2018).

<sup>179</sup> Penal Code § 190.3 subd (i).

<sup>180</sup> *People v. Hawthorne*, 4 Cal. 4th 43, 77-79 (1992); *People v. Lucky*, 45 Cal.3d 259, 302 (1988); *People v. Rodriguez*, 42 Cal.3d 789 (1986); see also *Roper* 543 US, 573, noting that age can be “counted against” a young person facing a death sentence.

death.”<sup>181</sup> Young people also have difficulties working with defense counsel that can put them at a significant disadvantage during the trial.<sup>182</sup>

### C. California has sentenced people with severe mental illness to death

Currently on California’s death row, there are at least 242 individuals being treated for severe mental illness, just over one-third of the death row population. As of February 2021, 153 are in treatment for “serious mental disorders,” including schizophrenia, psychotic disorders, and bipolar disorder; 71 more are being treated for “acute onset or significant decompensation, including delusional thinking, hallucinations, and vegetative affect,” and 18 are receiving inpatient care due to “acute exacerbation of a chronic major mental illness, marked impairment, and dysfunction in most areas.”<sup>183</sup>

The American Bar Association, the American Psychiatric Association, the American Psychological Association, the National Alliance on Mental Illness, and Mental Health America have all recommended prohibiting the execution of those with severe mental illness, determining that, as with juveniles and people with intellectual disabilities, “this population simply does not have the requisite moral culpability.”<sup>184</sup> Further, while noting that “the theory that the death penalty can deter potential murderers is controversial and unsupported by conclusive evidence,” they also found that “any possible deterrent effects are further diminished among people who suffer from impairments that affect their cognition, emotion regulation, or behavior.”<sup>185</sup> Ohio recently adopted a statute based on these recommendations, excluding individuals with severe mental illness from being sentenced to death,<sup>186</sup> and Kentucky appears poised to do the same.<sup>187</sup>

As with intellectual disability and youth, the symptoms of serious mental illness can also interfere with an individual’s ability to receive a fair trial. People with mental

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<sup>181</sup> *Roper* 543 US, 573.

<sup>182</sup> *Graham v. Florida* (2010) 130 U.S. 2011, 2032 (“[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense. Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense. These factors are likely to impair the quality of a juvenile defendant’s representation.”)

<sup>183</sup> Communication with Rosen Bien Galvan & Grunfeld LLP, attorneys representing plaintiffs in *Coleman v. Newsom*, March 1, 2021. Definitions in Stanford Justice Advocacy Project, “The Prevalence and Severity Of Mental Illness Among California Prisoners On The Rise” (2017).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> Death Penalty Information Center, *Ohio Bars Death Penalty for People with Severe Mental Illness*, Jan 11, 2021. At: <https://deathpenaltyinfo.org/news/ohio-passes-bill-to-bar-death-penalty-for-people-with-severe-mental-illness>.

<sup>187</sup> Death Penalty Information Center, *With Overwhelming Bipartisan Support, Kentucky House Passes Bill to Ban Death Penalty for Defendants with Serious Mental Illness*, Mar 3, 2021. At: <https://deathpenaltyinfo.org/news/with-overwhelming-bipartisan-support-kentucky-house-passes-bill-to-ban-death-penalty-for-defendants-with-serious-mental-illness>.

illness may not be able to cooperate with or assist their attorneys; some may resist being labeled as “mentally ill,” impeding the ability of their attorney to present the condition as a mitigating factor, and still others with deep psychosis or depression may actually want to be killed.<sup>188</sup> Defendants may have outbursts in the courtroom and make inappropriate comments or gestures, or, conversely, be placed on antipsychotic medication that controls overt symptoms but also deadens their affect – in either case, jurors may interpret their behavior as demonstrating a dangerous lack of remorse.<sup>189</sup> These challenges, combined with the sometimes bizarre and gruesome nature of the crimes committed by people with severe mental illness, often result in their illness serving improperly as an aggravating factor, despite being constitutionally mitigating.<sup>190</sup>

Individuals with severe mental illness have also represented themselves in death penalty trials with predictable results. According to the Office of the State Public Defender, the number of individuals representing themselves at trial in death penalty cases has grown each decade to more than 5 percent of cases.<sup>191</sup> More than a dozen individuals represented themselves at death penalty trials despite serious doubts about their competency, including some previously found incompetent for criminal proceedings, or other evidence that the defendant suffered from severe mental illness.<sup>192</sup>

#### **D. California has sentenced people with chronic childhood trauma to death**

The majority of people sentenced to death in the United States have experienced chronic violence and trauma as children, including extreme levels of physical and sexual abuse, according to researchers.<sup>193</sup> A recent report from the California Surgeon General shows that “Adverse Childhood Experiences” (ACEs), including physical and sexual abuse as well as childhood poverty and the experience of having close family members who were incarcerated or who experienced mental illness, substance dependence, and intimate partner violence, can cause neurological, psychological, and hormonal changes that can, like youth and mental illness, link to lawbreaking and violent behaviors. Traumatic life experiences thus raise similar questions about culpability and deterrability for these populations.<sup>194</sup>

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<sup>188</sup> Sundby, *supra*. discussing *United States v. Kaczynski* (9th Cir. 2001) 239 F.3d 1108, 1111–13 (defendant repeatedly tried to dismiss his attorneys because they wanted to present his mental illness as mitigation); *Godinez v. Moran* (1993) 509 U.S. 389, 410, 416–17 (Blackmun, J., dissenting) (explaining how the defendant’s depression caused him to fire his lawyers and seek the death penalty).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> Communication from the Office of the State Public Defender.

<sup>192</sup> See appellate briefing and opinions on file with California Supreme Court in of the cases of James Robert Acrement, S110804; James Nelson Blair, S011636; Robert Maurice Bloom, S095223, Bill Bradford, S005707; William John Clark, S004662; Jonathan Daniel D’Arcy, S060500; Melvin Earl Forte, S193769; Gerald Armond Gallego, S004561; Jonathan Sampson George, S047868; Herbert Harris Koontz, S036450; Christopher Charles Lightsey, S048440; Kurt Michaels, S016924; Keith Desmond Taylor, S054774; Billy Ray Waldon, S025520; Edward Mathew Wycoff, S178669.

<sup>193</sup> Channah, et al., *What Lisa Montgomery Has in Common With Many on Death Row: Extensive Trauma*, The Marshall Project (Jan. 8, 2021), citing Death Penalty Information Center.

<sup>194</sup> Office of the Surgeon General (2020) Roadmap for Resilience: The California Surgeon General’s Report on Adverse Childhood Experiences, Toxic Stress, and Health. (“High doses of adversity, occurring early

Specifically, the Surgeon General’s report found that responses to these ACEs include impairment of impulse control and increased risk of cognitive impairment, mental illness, and substance use disorders.<sup>195</sup> Data show that incarcerated people have nearly four times as many ACEs in childhood as non-incarcerated people, and that people with most severe ACE profiles experience the highest risk of incarceration.<sup>196</sup>

When competently investigated and presented, adverse childhood experiences can provide effective mitigation in a death penalty trial. This level of legal representation, however, is far from a given, as detailed below, and individuals with histories of severe child abuse and trauma who have been sentenced to death and ultimately do obtain legal relief generally only do so after years or even decades of appeals.<sup>197</sup>

Further, as with intellectual disability, youth, and severe mental illness, even when childhood violence is extreme it may not be understood as sufficiently mitigating. For example, Robert Alton Harris, who in 1992 became the first person executed after California reinstated the death penalty, suffered extreme physical abuse as a child. For Harris, the abuse started in utero: he was born with severe Fetal Alcohol Syndrome.<sup>198</sup> When he was two years old, his father hit him so hard he fell out of his highchair, began to convulse, and bled profusely from his nose, mouth, and ears; Harris’s father then tried to choke him with a tablecloth. Harris’s father beat Harris into unconsciousness several times.<sup>199</sup> Yet Governor Pete Wilson denied his clemency request, stating “as great as is my compassion for Robert Harris the child, I cannot excuse nor forgive the choice made by Robert Harris the man.”<sup>200</sup>

## V. Innocence

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in life, without adequate buffering protections of trusted caregivers and safe, stable environments, may lead to prolonged activation of the biological stress response and changes in brain structure and function, how genes are read and transcribed, functioning of the immune, metabolic, and endocrine systems, and growth and development. These changes comprise what is now known as the toxic stress response.”)

<sup>195</sup> *Id.* at 210.

<sup>196</sup> Reavis, et al., *Adverse Childhood Experiences and Adult Criminality: How Long Must We Live Before We Possess Our Own Lives?*, 17 *The Permanente J.* 44, 44-48 (2013); Roos, et al., *Linking Typologies of Childhood Adversity to Adult Incarceration: Findings from a Nationally Representative Sample*, 86 *American Journal of Orthopsychiatry* 584, 591 (2016).

<sup>197</sup> See, e.g., *Stankewitz v. Wong*, 698 F.3d 1163, 1168, 1174 (9th Cir. 2012) (defendant was sentenced to death in 1978 and was granted relief in 2012, after the court found that his attorney “failed to conduct even the most basic investigation of Stankewitz’s background,” including: being born into a “poverty-stricken home described by police and probation reports as dirty, covered in cockroaches and fleas, and without electricity or running water”; a mother who “had been an alcoholic since she was a child,” was “severely intellectually impaired,” shot and killed a man, and who “would regularly drink three to four six packs of beer or two fifths of a gallon of whiskey in a night, including while she was pregnant with Stankewitz”; a father who severely beat his mother while she was pregnant with Stankewitz, kicking her stomach several times, and who, in Stankewitz’s presence, beat, shot at, and attempted to kill their mother by driving over her with a car. Both parents “regularly beat all of their children.”)

<sup>198</sup> *Harris v. Vasquez*, 961 F.2d 1449, 1550 (9th Cir. 1990).

<sup>199</sup> *Id.* at 939; Smith, et al., *The Failure of Mitigation?*, 65 *Hastings L.J.* 1221 (2014).

<sup>200</sup> Morain, et al., *Wilson Rejects Plea of Mercy for Harris*, *Los Angeles Times* (Apr. 17, 1992). At: <https://www.latimes.com/archives/la-xpm-1992-04-17-mn-706-story.html>.

## A. Innocent people have been sentenced to death in California

Five innocent men on death row have been fully exonerated and released since California's reinstatement of the death penalty, after serving a combined total of 87 years in prison for murders they did not commit.<sup>201</sup> All five are people of color. The first to be exonerated in 1981 was Shujaa Ernest Graham.<sup>202</sup> While in prison as a young man, he became a leader in the Black Panther Party and an activist for prisoner's rights.<sup>203</sup> In 1973, Graham was accused of murdering a prison guard.<sup>204</sup> His conviction was ultimately overturned by the California Supreme Court because the prosecutor had systematically excluded all African American jurors from his trial.<sup>205</sup> After a second retrial, a jury exonerated Graham in 1981.<sup>206</sup>

Troy Jones and Oscar Morris were both wrongly convicted of murder and sentenced to death in 1982 and 1983 respectively.<sup>207</sup> A critical witness later recanted her false testimony against Jones, stating that it had been coerced by the police, and another man confessed to the murder.<sup>208</sup> In Morris's case, the prosecution's star witness, who had received undisclosed benefits from the prosecution, ultimately recanted his false testimony on his deathbed.<sup>209</sup> Jones was freed after fourteen years on death row in 1996,<sup>210</sup> and Morris was freed after seventeen years in 2000.<sup>211</sup>

Most recently, Vincente Benavides Figueroa was exonerated in 2018.<sup>212</sup> He had been sentenced to death in 1993 for the sexual assault and murder of his girlfriend's 21-month-old daughter.<sup>213</sup> After 25 years, the California Supreme Court overturned his conviction after the prosecution agreed that the convictions were based on false

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<sup>201</sup> Death Penalty Information Center, Innocence Database (2021). A sixth man, Jerry Bigelow, was acquitted of murder after being sentenced to death, is also no longer on death row. *See Bigelow v. Superior Court*, 256 Cal.Rptr. 528, 536 (1989). Because his related convictions for kidnapping and robbery were affirmed, he has not been included in some exoneration lists. *See, e.g.,* The National Registry of Exonerations, University of Michigan School of Law (2021).

<sup>202</sup> Witschge, *After Death Row: An Unlikely Love Story*, Al Jazeera (Mar. 7, 2017).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*; Death Penalty Information Center, Innocence Database (2021).

<sup>206</sup> *Id.*

<sup>207</sup> *Troy Lee Jones*, The National Registry of Exonerations, University of Michigan School of Law.

<sup>208</sup> *Id.*

<sup>209</sup> *A Matter of Life and Death*, Pasadena Weekly (Oct. 13, 2016).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* Patrick Croy was also acquitted of murder and removed from death row, and then later acquitted for related conspiracy and assault charges in 2005 after having spent 26 years incarcerated. Death Penalty Information Center, Innocence Database (2021); *Patrick Croy*, The National Registry of Exonerations, University of Michigan School of Law (2021).

<sup>212</sup> *In re Figueroa*, 4 Cal.5th 576, 579 (2018).

<sup>213</sup> *Id.*

evidence of sexual assault and strong evidence that the child's death was an accident that did not involve Benavides at all.<sup>214</sup> Prosecutors subsequently dropped all charges.<sup>215</sup>

Finally, serious questions have been raised about the innocence of people currently on California's death row.<sup>216</sup>

## B. Common causes of wrongful convictions

Since 1973, 156 people sentenced to death have been exonerated nationwide.<sup>217</sup> In 2014, a team of researchers and statisticians led by University of Michigan law professor Samuel Gross estimated that at minimum, 4 percent of people who have been sentenced to death were innocent, after studying 7,482 death-sentenced cases.<sup>218</sup> Gross's team surmised that "it was all but certain" that innocent people had already been wrongfully executed since the early 1970s.<sup>219</sup> If Gross's analysis holds in California, 28 people currently on California's death row may be innocent.

When examining 325 wrongful convictions later exonerated by DNA testing, criminologists found that the leading cause of false convictions was eyewitness misidentification (occurring in 72 percent of DNA exoneration cases).<sup>220</sup> The procedures that most commonly elicited eyewitness misidentification included photo arrays, in-court identifications, and live line-ups.<sup>221</sup> Cross-racial eyewitness misidentification accounted for 41 percent of these cases, 15 percent involved misidentifications of people

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<sup>214</sup> *Id.* at 588-589.

<sup>215</sup> Vicente Benavides, *Sentenced to Death by False Forensics, to Be Freed after 26 Years on Death Row*, Death Penalty Information Center (Apr. 18, 2018).

<sup>216</sup> See Bazelon, *As COVID-19 Ravages California's Death Row, the State's Attorney General Fights to Keep it Packed*, Slate (Jul. 27, 2020) (discussing the case of Michael Hill who asserts his innocence) at <https://slate.com/news-and-politics/2020/07/california-death-row-covid-misconduct-becerra.html>. See also Kristof, *Is An Innocent Man Still Languishing on Death Row?* New York Times (Jan. 23, 2021) (discussing the case of Kevin Cooper who asserts his innocence), at <https://www.nytimes.com/2021/01/23/opinion/sunday/kevin-cooper-dna.html>. See also Sheff, *The Buddhist on Death Row: How One Man Found Light in the Darkest Place* (Jan. 23, 2020) (discussing the life and case of Jarvis Masters who asserts his innocence).

<sup>217</sup> National Coalition to End the Death Penalty, *Exonerations of Innocent Men and Women* (last visited Mar. 1, 2021); Dina Fine Maron, *Many Prisoners on Death Row Are Wrongfully Convicted*, Scientific American (Apr. 28, 2014).

<sup>218</sup> Gross, et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, Proceedings of the National Academy of Sciences (May 20, 2014) (hereinafter *Rate of False Conviction*); see also West, et al. *Innocence Project: DNA Exonerations, 1989-2014: Review of Data and Findings From the First 25 Years*, 79 Alb. L.Rev. 717, 720, 732 (2016) (hereinafter *DNA Exonerations*) (noting that there were 325 DNA exonerations in the United States between 1989-2014).

<sup>219</sup> *Rate of False Conviction, supra*.

<sup>220</sup> *DNA Exonerations, supra*, 720, 732-735.

<sup>221</sup> *Id.* at 739.

known to the victim, and 33 percent involved multiple witnesses misidentifying the same person.<sup>222</sup>

Misapplication of forensic science (47 percent of false convictions) was the second highest cause of wrongful convictions, including those falsely convicted due to errors predominantly in the disciplines of serology, hair microscopy, bite-mark, DNA, dog scent, and fingerprint analysis.<sup>223</sup> Some of these disciplines (i.e., DNA and serology) are well validated but were misapplied due to “scientific error, overstatement, gross negligence, or other misconduct,” while other disciplines are disputed or lack scientific foundation (i.e., bite mark analysis).<sup>224</sup>

False confessions (27 percent of false convictions) and use of informants who received rewards or incentives in exchange for their testimony (15 percent of false convictions) were the third and fourth highest causes of wrongful convictions.<sup>225</sup> Indeed, the use of informants was found to be the leading cause of wrongful capital convictions (the cause of 51 out of 111 wrongful capital convictions) by the Northwestern University School of Law’s Center on Wrongful Convictions.<sup>226</sup> Finally, as described below, more than half of the 70 reversed California death sentences in federal court were overturned due to ineffective assistance of trial counsel.<sup>227</sup>

## VI. Costs and Dysfunction

### A. Data on costs

The Legislative Analyst’s Office estimated in 2016 that eliminating the death penalty in California would save the state over \$150 million per year.<sup>228</sup>

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<sup>222</sup> *Id.* at 737.

<sup>223</sup> *Id.* at 745.

<sup>224</sup> *Id.* at 744.

<sup>225</sup> *See id.* at 733. The percentages among eyewitness misidentification (72%), misapplication of forensic science (47%), false confessions (27%), and use of informants (15%) add up to more than 100% because some wrongful convictions were caused by more than one of these factors. *See id.*

<sup>226</sup> *The Snitch System: How Snitch Testimony Sent Randy Steidl and other Innocent Americans to Death Row*, Northwestern University School of Law Center on Wrongful Convictions, 3 (Winter 2004-05) (discussing that 51 of 111 death row exonerations nationally since capital punishment was resumed in the 1970s “were based in whole or part on the testimony of witnesses with incentives to lie”). Erroneous eyewitness identification (25.5% of cases), false confessions (14.4%), and false or misleading scientific evidence (9.9%) comprised the second, third, and fourth leading causes of wrongful capital convictions nationwide. *Id.*

<sup>227</sup> Data provided by the Office of the State Public Defender. This data further breaks down as follows: of 25 capital murder convictions reversed by federal courts, state misconduct accounted for 32% of reversals (eight reversals), trial court error - 28% (seven reversals), ineffective assistance of counsel - 24% (six reversals), and other reasons - 16% (four reversals). Of 45 federal reversals of death judgments only, ineffective assistance of counsel accounted for 68% of reversals (31 reversals), trial court error - 13.3% (six reversals), state misconduct - 11.1% (five reversals), and other reasons - 6.6% (three reversals).

<sup>228</sup> Legislative Analyst’s Office, *Proposition 62: Death Penalty. Initiative Statute* (Nov. 8, 2016).

Professor Paula Mitchell and Ninth Circuit Judge Arthur Alarcon similarly calculated in 2011 that death penalty costs totaled billions more tax dollars than life without possibility of parole (LWOP) cases since the late 1970s, and concluded that capital punishment is “a multibillion-dollar fraud on California taxpayers.”<sup>229</sup> According to Professor Mitchell and Judge Alarcon, California spent a total of \$4 billion exclusively on the death penalty from 1978 through 2011, but executed only 13 people.<sup>230</sup> Professor Mitchell and Judge Alarcon forecasted that continuing the current death penalty system from 2013 through 2050 would cost taxpayers “an additional \$5 billion to \$7 billion over the cost of LWOP,”<sup>231</sup> while nearly all inmate deaths on death row would result from natural causes or suicide rather than by state execution.<sup>232</sup>

Proponents of the death penalty argue that executions can save the state money. The backers of Proposition 66 pledged that it would bring costs down by executing people convicted of capital offenses more quickly, “after five to ten years” of time to appeal.<sup>233</sup> They argue that swift executions would save California taxpayers money on death row inmates’ “meals, healthcare, privileges and endless legal appeals” under the current system.<sup>234</sup>

In reality little has changed since the passage of Proposition 66. As explained below, costs are significantly greater at every stage of death penalty litigation compared to LWOP cases, as are prison expenditures to house people on death row.

*Trial costs.* Researchers have calculated a death penalty trial alone adds between \$500,000<sup>235</sup> and \$1.2 million<sup>236</sup> to the costs of a murder trial for a number of reasons, which haven’t changed since the passage of Proposition 66: Two court-appointed lawyers typically represent individuals facing the death penalty,<sup>237</sup> the juror selection

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<sup>229</sup> Alarcon, et al., *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature’s Multi-Billion Dollar Death Penalty Debacle*, 44 Loy. L.A. L. REV. S41 (2011) (hereinafter *Death Penalty Debacle*).

<sup>230</sup> *Id.* at S41.

<sup>231</sup> Alarcon, et al., *Costs of Capital Punishment in California: Will Voters Choose Reform This November?*, 46 Loy. L.A. L. Rev. S1, S4 (2012) (hereinafter *Costs of Capital Punishment*).

<sup>232</sup> *See id.*

<sup>233</sup> *See Voter Information Guide: Argument in Favor of Proposition 66*, Cal. Secretary of State, Elections Division, 108-9 (Nov. 8, 2016) (“Together, these reforms will save California taxpayers over \$30,000,000 annually . . .”).

<sup>234</sup> *Id.*

<sup>235</sup> CCFJAJ Report, *supra*, at 145 (finding this to be a conservative estimate).

<sup>236</sup> *Death Penalty Debacle, supra*, at S74 (discussing the results of a 1993 study). Some death penalty trials are much more costly, including those of Charles Ng (\$10.9 million), Donald Bowcutt (\$5 million), and Scott Peterson (\$3.2 million excluding defense costs since he retained his own counsel). *Id.* at S74-75 (discussing the results of an ACLU study of homicide trials).

<sup>237</sup> Pursuant to Penal Code § 987(d) and *Keenan v. Superior Court*, 31 Cal.3d 424 (1982), two trial defense attorneys are permitted to represent people facing the death penalty. The American Bar Association guidelines require “no fewer than two [qualified] attorneys . . . an investigator, and a mitigation specialist.” *See* ABA Guidelines, Guideline 4.1.A.1.

process takes longer and requires a greater number of people in the initial pool to find “death qualified” jurors who are open to all potential punishments, the trial lasts longer and thus judiciary and jail costs are higher, and the separate “penalty phase” trial requires supplemental experts and extensive investigation generally unrelated to the “guilt phase” of a death penalty trial.<sup>238</sup> Clerical expenditures are also greater since California law mandates that transcripts be created for all death penalty trials – which average over 9,000 pages in length.<sup>239</sup> On the other hand, death penalty advocates argue that cost savings may be partially offset if elimination of the death penalty leads some defendants to choose trial who otherwise would have pled guilty to LWOP.<sup>240</sup>

*Appellate costs.* The subsequent direct appeals and habeas corpus proceedings in death penalty cases are also time consuming and costly. In 2008, the California Commission on the Fair Administration of Justice estimated that at least \$54 million per year was spent on “post-trial review of death cases in California.” Current budget totals for *solely defense expenditures* on these appellate cases is now \$43.2 million annually.<sup>241</sup> This amount does not include the costs to prosecute these cases, nor does it include any appellate court expenditures. Thus, current costs likely exceeded those in 2008, despite Proposition 66’s cost-cutting promises.

*Federal habeas costs.* Additionally, because federal law requires that attorneys be appointed to represent people sentenced to death in their federal habeas proceedings, millions of federal taxpayer dollars are also spent on investigating and litigating California death penalty cases in federal court. Federal expenditures for California death penalty cases averaged a total of \$635,000 per case in the 194 federal cases closed before 2010 – not including costs associated with the Capital Habeas Units of the Federal Defender in the Eastern and Central Districts of California which were estimated to be around \$1.58 million per case.<sup>242</sup> In total, federal expenditures for California death penalty cases were estimated to exceed \$775 million from the 1970s through 2010.<sup>243</sup>

*Prison costs.* It costs around \$40,000 more each year to house an inmate on death row than to house an LWOP inmate, primarily because California death row includes

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<sup>238</sup> Legislative Analyst’s Office, *Proposition 62: Death Penalty. Initiative Statute* (Nov. 8, 2016)

<sup>239</sup> Penal Code § 190.9 (mandating transcripts for all death penalty cases); *Death Penalty Debacle, supra*, at S78.

<sup>240</sup> Legislative Analyst’s Office, *Proposition 62: Death Penalty. Initiative Statute* (Nov. 8, 2016).

<sup>241</sup> The current annual budgets for (1) the Habeas Corpus Resource Center (a publicly funded California organization dedicated to capital habeas defense in state and federal court), is \$16.8 million, (2) capital defense at the Office of the State Public Defender is \$15 million, (3) the California Appellate Project (publicly funded organization that provides assistance for death penalty defense) is \$5.8 million, and (4) Court Appointed Counsel (CAC) is \$5.6 million. (Staff interviews with Michael Hersek, Executive Director, Habeas Corpus Resource Center; Mary McComb, State Public Defender; Joe Schlesinger, Executive Director, California Appellate Project; Tina Carroll, California Judicial Council (2021).)

<sup>242</sup> *Death Penalty Debacle, supra*, at S94, S97.

<sup>243</sup> *Id.* at S98-S99.

additional security measures and personnel.<sup>244</sup> The backers of Proposition 66 asserted they would reduce death row housing costs by giving the California Department of Corrections and Rehabilitation authority to move individuals into other housing. Four years since passage of the initiative, only 44 individuals on death row are housed outside of San Quentin – and half of them (22 people) appear to be housed in medical facilities<sup>245</sup> where infirm people on death row had been previously housed before the passage of Proposition 66.<sup>246</sup>

## **B. Length of post-conviction review and sources of delay**

In total, a person sentenced to death in California can expect to wait more than 30 years before their case moves through all phases of post-conviction review.<sup>247</sup> In reality, most people die before their appeals are concluded: Since 1978, a total of 149 people on death row have died from natural causes, suicide, COVID-19, or other non-execution related reasons.<sup>248</sup>

While Proposition 66 promised to speed up cases through the habeas process, the average time it takes for a capital case to proceed from a sentence of death to final resolution of habeas proceedings has continued to increase. In 2020, the average time from sentencing to resolution of the state habeas proceedings had increased to 20 years,<sup>249</sup> up from 17 years in 2015,<sup>250</sup> and 12 years in 2008.<sup>251</sup> The timeframe to complete the federal habeas review process adds additional time. The Commission on the Fair Administration of Justice found in 2008 that it took 10.4 years on average for a capital case to move through and conclude the federal review process and there is no indication that the pace has increased in recent years.<sup>252</sup>

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<sup>244</sup> *Costs of Capital Punishment, supra*, at S4 n.3 (2012) (discussing a 2012 study by Trisha McMahon and Tim Gage--the former director of the California Department of Finance--which found that it costs \$40,000 more per year to house a person on death row versus someone sentenced to LWOP); *see also* Death Penalty Information Center, *Costs*.

<sup>245</sup> Those facilities are California Medical Facility (4 people), and California State Prison, Corcoran (18 people).

<sup>246</sup> Data provided by CDCR Office of Research.

<sup>247</sup> Data compiled by the Office of the State Public Defender.

<sup>248</sup> *Condemned Inmates Who Have Died Since 1978*, California Department of Corrections and Rehabilitation (Mar. 10, 2021).

<sup>249</sup> HCRC Report, *supra*, at 11.

<sup>250</sup> *Jones v. Davis* (9th Cir. 2015) 806 F.3d 538, 543 (“By the time the inmate’s state habeas petition is decided, he will likely have spent a combined 17 years or more litigating his direct appeal and petition for state habeas review before the California Supreme Court.”).

<sup>251</sup> CCFAJ Report, *supra*, at 123.

<sup>252</sup> HCRC Report, *supra*, at 12-13.

To date, just 118 out of more than 1,000 Californians sentenced to death since 1978 have concluded the process of postconviction review in state and federal court.<sup>253</sup> Thirty one of the 118 people who have exhausted all appeals are eligible for execution, an additional 11 were executed, and six died of natural causes after their appeals were complete.<sup>254</sup> The other 70 obtained relief from their death sentences.<sup>255</sup> The 31 people who have exhausted all appeals have spent an average of roughly 34 years awaiting execution on death row.<sup>256</sup>

According to the Habeas Corpus Resource Center (“HCRC”), the principal reason for the extraordinary long timetable is the “acute shortage of qualified, competent attorneys willing and able to accept appointments in habeas corpus proceedings.”<sup>257</sup> On average, it takes eight to ten years after being sentenced to death for habeas counsel to be appointed.<sup>258</sup> Currently, there are 363 death-sentenced people awaiting appointment of counsel, more than half of all people sentenced to death in California.<sup>259</sup>

To address this problem, the Commission on the Fair Administration of Justice recommended in 2008 that California fund an expansion of the HCRC from 34 to 150 lawyers and increase the budget by 500 percent.<sup>260</sup> This recommendation has never been adopted, and HCRC continues to employ the same number of attorneys 13 years later.<sup>261</sup>

Despite arguments by proponents of Proposition 66 that the measure would “speed up” death penalty appeals,<sup>262</sup> the new law has made post-conviction proceedings slower.

Under Proposition 66, superior courts are now in charge of appointing capital habeas counsel, but so far only three additional attorneys have been included in the pool of prospective capital habeas counsel under the new system, and no new

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<sup>253</sup> *Id.* at 12-13 (stating that 116 people sentenced to death since 1978 had concluded the habeas appeals process by December 2020). Since December 2020, two additional people have exhausted their appeals. *Dean P. Carter v. Broomfield*, Case No. 20-6310 (cert. denied Feb. 22, 2021); *Deondre Arthur Staten v. Ronald Davis*, Case No. 20-6210 (cert. denied Mar. 1, 2021).

<sup>254</sup> This data was compiled by the Office of the State Public Defender.

<sup>255</sup> HCRC Report, *supra*, at 13.

<sup>256</sup> *Id.*

<sup>257</sup> As of December 2020, the average time on death row for the 29 people who have exhausted their appeals was 33.8 years. (*Id.* at 14.) Since that time, two additional people, Dean Carter and Deondre Staten, have exhausted their federal and state appeals and have spent over 31 years and 29 years on death row respectively.

<sup>258</sup> CCFAJ Report, *supra*, at 145.

<sup>259</sup> See HCRC Report, *supra*, at 10.

<sup>260</sup> CCFAJ Report, *supra*, at 135.

<sup>261</sup> HCRC Report, *supra*, at 15.

<sup>262</sup> See *Voter Information Guide: Argument in Favor of Proposition 66*, Cal. Secretary of State, Elections Division, 108 (Nov. 8, 2016).

appointments of habeas counsel have been made.<sup>263</sup> In addition, by requiring that superior courts process habeas cases, Proposition 66 created an additional level of review. Now either side may appeal the habeas decision of the superior court, and entirely new counsel must then be appointed in the California Court of Appeals. Because no method of paying the new counsel was contemplated by Proposition 66, the cases of 19 petitioners are currently stayed in the California Court of Appeal, waiting to have habeas counsel appointed.<sup>264</sup>

In total, at the close of 2020, the same number of individuals on death row (363 people), were waiting for habeas counsel to be appointed in their case as in 2016.<sup>265</sup>

### C. Poor quality defense at trial leads to death sentences

When he initiated a death penalty moratorium in 2019, Governor Newsom highlighted that capital sentences in California are “unjustly and unfairly applied to people who cannot afford legal representation.”<sup>266</sup> Professor Mitchell and Judge Alarcon agreed that “[i]t is universally acknowledged that ineffective counsel is the primary reason so many defendants are sentenced to death.”<sup>267</sup>

Indeed, over half (37) of the 70 California death sentences overturned by federal courts occurred on grounds that trial counsel provided prejudicially ineffective assistance.<sup>268</sup> In most of those 37 cases, the death judgment was reversed because defense counsel failed to investigate or present potential mitigating evidence during the penalty phase of the trial.<sup>269</sup> This is also one of the leading reasons why most death verdicts have been overturned in California overall, in both state and federal court.<sup>270</sup> It is likely that the death sentences of many more individuals will eventually be overturned due to ineffective trial counsel once post-conviction counsel has been appointed in the cases awaiting appointment.<sup>271</sup>

Nearly all people on death row were appointed defense counsel funded by the county or state because they did not have the financial resources to retain private counsel.<sup>272</sup> Attorneys with histories of ineptitude have repeatedly been appointed to

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<sup>263</sup> HCRC Report, *supra*, at 10 n. 3, 25.

<sup>264</sup> *Id.* at 10-11.

<sup>265</sup> *Id.* at 9.

<sup>266</sup> Governor’s Executive Order N-09-19 (Mar. 13, 2019).

<sup>267</sup> Mitchell, et al., Alarcón Advocacy Ctr., *California Votes 2016: An Analysis of the Competing Death Penalty Ballot Initiatives* 1 Loyola Law School Special Report, 27 (2016).

<sup>268</sup> This data, compiled by the Office of the State Public Defender, is on file with Committee staff.

<sup>269</sup> *Id.* In total, ineffective assistance of counsel is the reason federal courts have overturned 31 death judgments and reversed 6 capital murder convictions.

<sup>270</sup> CCFAJ Report, *supra*, at 129; updated data compiled by the Office of the State Public Defender.

<sup>271</sup> See HCRC Report, *supra*, at 10 (noting that 363 people on death row do not yet have habeas counsel).

<sup>272</sup> Data compiled by the California Appellate Project.

represent indigent people facing death.<sup>273</sup> For example, one lawyer who has represented four men sentenced to death in San Bernardino County told the jury in one case that “execution would help his client,” and failed to speak with another client – an individual ultimately executed despite the failures of his counsel – outside of trial.<sup>274</sup> In LA County, attorneys with “prior or subsequent misconduct charges” represented over one-third of the 22 cases where individuals received death sentences sought by District Attorney Jackie Lacey’s office.<sup>275</sup>

Many counties also do not provide adequate pay or resources to indigent capital counsel. For example, the funding provided for capital counsel by many counties fails to meet the requirements of the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases – well-recognized as establishing the required norms for competent death penalty counsel.<sup>276</sup>

Additionally, many counties employ a flat-fee contract structure for indigent (non-public defender) capital defense counsel, which can provide incentives contrary to the best interests of the accused.<sup>277</sup> For example, in Riverside County, the compensation structure discourages trial counsel from attempting to negotiate a less severe sentence or conduct early investigation into penalty phase mitigation (known as the best tool to negotiate a more favorable non-death plea).<sup>278</sup> Instead, trial counsel are financially incentivized to take every death eligible case to trial.<sup>279</sup> Unsurprisingly, in most death sentenced cases arising out of Riverside, trial counsel elected to present only one day of mitigation evidence, and some presented no mitigation evidence whatsoever.<sup>280</sup> In comparison, seven days of mitigation evidence was presented on behalf of the single death row defendant represented by the Los Angeles County Public Defender’s Office in 2020.<sup>281</sup>

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<sup>273</sup> FPP II, *supra*, at 17-18, 42; FPP I, *supra*, at 34, 38-39.

<sup>274</sup> FPP II, *supra*, at 17-18.

<sup>275</sup> American Civil Liberties Union, *The California Death Penalty is Discriminatory, Unfair and Officially Suspended. So Why Does Jackie Lacey Continue to Use it?*, 2 (2019) (hereinafter ACLU LA Report).

<sup>276</sup> CCFAJ Report, *supra*, at 130; see *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (finding that the ABA Guidelines establish “standards to which we long have referred as ‘guides to determining what is reasonable.’”); *In re Lucas*, 33 Cal.4th at 725 (same).

<sup>277</sup> See CCFAJ Report, *supra*, at 125-26.

<sup>278</sup> FPP I, *supra*, at 33.

<sup>279</sup> *Id.* (explaining that trial counsel’s fees are reduced by half if the prosecution decides not to seek the death penalty before trial and reduced by 70-75% of the client agrees to take a plea).

<sup>280</sup> *Id.* at 33-34.

<sup>281</sup> FPP, Part II, *supra*, at 30.

## D. Most judgments do not survive review

At bottom, most sentences of death ultimately are reversed in California<sup>282</sup> and throughout the United States.<sup>283</sup> In California, a total of 83 percent of capital cases have been reversed in state or federal court.<sup>284</sup> Although the California Supreme Court has one of the highest rates of affirming death penalty cases in the nation,<sup>285</sup> California death sentences are frequently reversed in federal court after decades of litigation expenditures in the state courts.<sup>286</sup> Federal courts have granted relief in 70 of the 118 California capital cases that have final federal judgments – a reversal rate of 60.3 percent.<sup>287</sup> In total, most of the people who obtained relief in state or federal court were resentenced to LWOP or less.<sup>288</sup>

## VII. Other Jurisdictions

At its height, the death penalty was law in the United States in all but 12 states.<sup>289</sup> Since 2004, the death penalty has been eliminated in law – either through legislative repeal or through decisions of the state’s highest court – in ten additional states.<sup>290</sup> Virginia is now poised to become the 23<sup>rd</sup> state without the death penalty and the first southern state to repeal the death penalty since the founding of the nation.<sup>291</sup> In addition, beyond California, the Governors of Oregon and Pennsylvania have placed a

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<sup>282</sup> Data compiled by the Office of the State Public Defender (data includes cases with final federal judgments, since the death judgments that are affirmed in the state system move on to the federal court habeas process).

<sup>283</sup> Baumgartner, et al., *Deadly Justice: A Statistical Portrait of the Death Penalty*, 139 (2018) (hereinafter “Deadly Justice”) (noting that between 1973 and 2013, reversal of the sentence on appeal was the most frequent outcome in death penalty cases nationally).

<sup>284</sup> Data compiled by the Office of the State Public Defender (a total of 230 out of 278 final judgments have been reversed).

<sup>285</sup> CCFAJ Report, *supra*, at 120-121, n. 21; data compiled by the Office of the State Public Defender and the Habeas Corpus Resource Center.

<sup>286</sup> *Deadly Justice*, *supra*, at 151; CCFAJ Report, *supra*, at 120-121, n. 21 (citing Uelmen, *Review of Death Penalty Judgments By the Supreme Courts of California: A Tale of Two Courts*, 23 Loyola L.A. L.Rev. 237 (1989)). In 1986, three California Supreme Court justices were not reelected in a campaign “dominated by the death penalty.” Bright, et al., *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L.Rev. 759, 761 (1995). Since that time, the high court has affirmed almost 90% of death penalty cases. CCFAJ Report, *supra*, at 120-121, n. 21.

<sup>287</sup> Data compiled by the Office of the State Public Defender and the Habeas Corpus Resource Center.

<sup>288</sup> *Id.*

<sup>289</sup> Death Penalty Information Center, “State by State.” At: <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state>

<sup>290</sup> *Id.*

<sup>291</sup> Pilkington, *Virginia all but certain to become first southern state to abolish death penalty*, The Guardian (Feb. 5, 2021) At: <https://www.theguardian.com/us-news/2021/feb/05/virginia-first-southern-state-abolish-death-penalty>; Death Penalty Information Center, “Virginia Death Penalty Repeal Bill Gains Final Legislative Approval, Moves to Governor’s Desk.” (Feb. 4, 2021). At: <https://deathpenaltyinfo.org/news/virginia-repeal-bill-gains-final-legislative-approval-moves-to-governors-desk>.

moratorium on executions, bringing to 26 the total number of states that do not have the death penalty in law or effect.<sup>292</sup>

In total, 39 states have not carried out an execution for five years or do not have the death penalty in law.<sup>293</sup> The jurisdictions of Puerto Rico, the District of Columbia, and all other U.S. territories also do not have the death penalty.<sup>294</sup>

For 17 years, from 2003 until July 2020, the federal government did not carry out any executions.<sup>295</sup> However, in the final months of the Trump administration, the federal government carried out 13 executions between July 2020 and January 2021.<sup>296</sup> President Biden has halted federal executions<sup>297</sup> and stated that he is opposed to the death penalty.<sup>298</sup> There are currently 49 people on the federal death row.<sup>299</sup> In addition, five servicemembers are on the Military death row, which operates separately from the federal death penalty.<sup>300</sup>

Internationally, the death penalty is used in only a small minority of countries. The death penalty has been formally abolished or was never law in 106 nations.<sup>301</sup> The vast majority of executions are carried out by China, Iran, Saudi Arabia, Iraq, and Egypt.<sup>302</sup> Several international treaties and covenants either restrict or prohibit use of the death penalty, most notably the European Convention on Human Rights.<sup>303</sup>

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<sup>292</sup> *Supra* note 271.

<sup>293</sup> Death Penalty Information Center, *Executions Overview: States with No Recent Executions*. At: <https://deathpenaltyinfo.org/executions/executions-overview/states-with-no-recent-executions>

<sup>294</sup> Death Penalty Information Center, *State and Federal Info: Puerto Rico*. At: <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/puerto-rico>; Constitution of the Commonwealth of Puerto Rico, Art. II, Section 7 (1952) (“The right to life, liberty and the enjoyment of property is recognized as a fundamental right of man. The death penalty shall not exist.”).

<sup>295</sup> Pilkington, *Civil and human rights groups urge Biden to end federal death penalty*, *The Guardian* (Feb 9, 2021). At: <https://www.theguardian.com/us-news/2021/feb/09/joe-biden-death-penalty-coalition-civil-human-rights-groups>

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> Death Penalty Information Center, *Military: Facts and Figures*. At: <https://deathpenaltyinfo.org/state-and-federal-info/military/facts-and-figures>

<sup>301</sup> Amnesty International, *Death Penalty*. At: <https://www.amnesty.org/en/what-we-do/death-penalty/>

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*