

September 14, 2020

Memorandum 2020-13

**Alternatives to Incarceration and Short Sentences:
Updates on Possible Recommendations**

This memorandum provides summary updates on areas that the Committee directed staff to research, gives brief updates on legislative progress related to the Committee's work, and then presents in greater depth three suggested staff proposals.¹

SUMMARY UPDATES ON STAFF RESEARCH

The Committee has explored a number of areas where changes to the Penal Code may be appropriate and has directed staff to continue research into these areas.² Staff also anticipates that the subject matter of the September 2020 meeting — sentencing enhancements — and the November 2020 meeting, which is tentatively set to cover parole and reentry issues, may add significantly to this list.

Reducing Common “Wobblette” Misdemeanors to Infractions

At the April Committee meeting, Judge Daniel Lowenthal of Los Angeles County Superior Court testified about how a pilot diversion program there had helped reduce the volume of misdemeanor cases. The highest volume of criminal proceedings is in traffic court, including traffic misdemeanors that result in incarceration. Two of the most common traffic misdemeanors, driving without a license and driving on a license suspended for failure to pay a court fine or appear in court, could be reduced to infractions, which may lead to less incarceration and ease court congestion. These offenses are already classified as “wobblettes,” which means a prosecutor can charge them as misdemeanors or infractions. This idea is explored further below.

1. All Committee memoranda can be downloaded from the Committee's website: <www.clrc.ca.gov/CRPC.html>.

2. The Committee also discussed collaborative courts, restorative justice, and other diversion programs at its April and July meetings. Staff is continuing research into those areas, but at lower priority than the areas presented here.

Probation Eligibility

At the April Committee meeting, San Mateo Chief Probation Officer John Keene spoke about expanding opportunities for probation. One way to expand probation would be to revise the Penal Code so that probation is the presumptive sentence for certain offenses. Another expansion would be removing restrictions on probation for other offenses. These ideas are presented more fully below.

Financial Incentives to Reduce Local Incarceration and Recidivism

At the July Committee meeting, Director of Finance Keely Bosler testified about the positive impacts that financial incentive programs to counties had on improving criminal justice outcomes. State government could develop additional financial incentives — similar to funding tied to the performance of probation departments under SB 678 (Leno) and 2011's Public Safety Realignment — that encourage counties to reduce incarceration and recidivism while improving public safety. Staff is continuing research into this area.

Policy to Address Short Stays in CDCR Custody

At the July Committee meeting, Charles Callahan of CDCR informed the Committee that 37% of people with determinate sentences who arrive at CDCR have a length of stay less than a year. In addition to the cost of housing these people, CDCR spends additional money putting them through intake at Reception Centers. The last available data is that this intake process for all new CDCR arrivals costs about \$20 million a year.³ Staff is continuing to research recommendations for potential solutions to this difficult problem, which will be greatly informed by further data about the types of offenses and other factors that lead to these short CDCR stays.

Equalize Credits Between Jail and Prison

At the July Committee meeting, Aaron Fischer of Disability Rights California, spoke about expanding credit-earning opportunities. Credit-earning opportunities at jails and prisons differ in ways that appear more random than advancing any particular policy goal. The Committee could recommend uniform credit-earning rules that treat similarly-situated people the same regardless of where they are confined, as well as expanding the amount of credit available. This idea is explored further below.

3. California Department of Corrections and Rehabilitation, 2020–21 State Budget, CR 19 <<http://www.ebudget.ca.gov/2020-21/pdf/Enacted/GovernorsBudget/5210/5225.pdf>>.

LEGISLATIVE UPDATES

Misdemeanor Diversion

At its April and July meetings, the Committee explored recommending judge-controlled diversion for misdemeanor offenses. Since then, the Legislature passed AB 3234 (Ting), which adds judge-controlled misdemeanor diversion to the Penal Code. Under this law, the diversion period may not last more than 2 years and is not allowed for some child abuse, domestic violence, and stalking offenses. This bill is currently awaiting action by the Governor.

Probation Length

At its April and July meetings, the Committee considered recommending limits on the length of probation sentences. Since then, the Legislature passed AB 1950, sponsored by Asm. Kamlager, which limits felony probation terms to two years — except for violent offenses⁴ — and misdemeanor terms to one year.⁵ It is currently awaiting action by the Governor.

Record Sealing

At the July meeting, the Committee directed staff to provide updates on recent Legislative action around record sealing. The most significant action was in AB 1076 (Ting) (2019), which provided for automatic conviction and arrest record relief for some arrests and convictions that will occur after January 1, 2021. People who successfully complete a probation sentence are covered by the law.⁶ This bill's effective date was recently delayed from January 2021 to July 2022 and is "subject to an appropriation in the annual Budget Act."⁷

4. The two-year limit also does not apply to "an offense that includes specific probation lengths within its provisions" and some theft-related offenses where value exceeds \$25,000. AB 1950 (Section 1 creating Penal Code § 1203.1(m)).

5. The one-year misdemeanor limit does not apply "to any offense that includes specific probation lengths within its provisions." AB 1950 (Section 1 creating Penal Code § 1203a(b)).

6. AB 1076 (Section 8, creating Penal Code § 1203.425(a)(2)(E)(i)).

7. SB 118 (Committee on Budget) (2020) (Section 12 amending Penal Code § 851.93(g); Section 16 amending Penal Code § 1203.425(a)).

STAFF PROPOSALS

Reclassify Common “Wobblette” Misdemeanors to Infractions

Summary Staff Proposal

Reclassify two of the most common misdemeanors offenses as infractions. One of these offenses, driving on a license suspended for failure to pay a fine or appear in court, may affect more than 500,000 people.

Current Law

Two common traffic offenses — driving without a license and driving on a license suspended for failure to appear in court — are “wobblettes,” which means they can be charged as either infractions or misdemeanors entirely at a prosecutor’s discretion.

Background

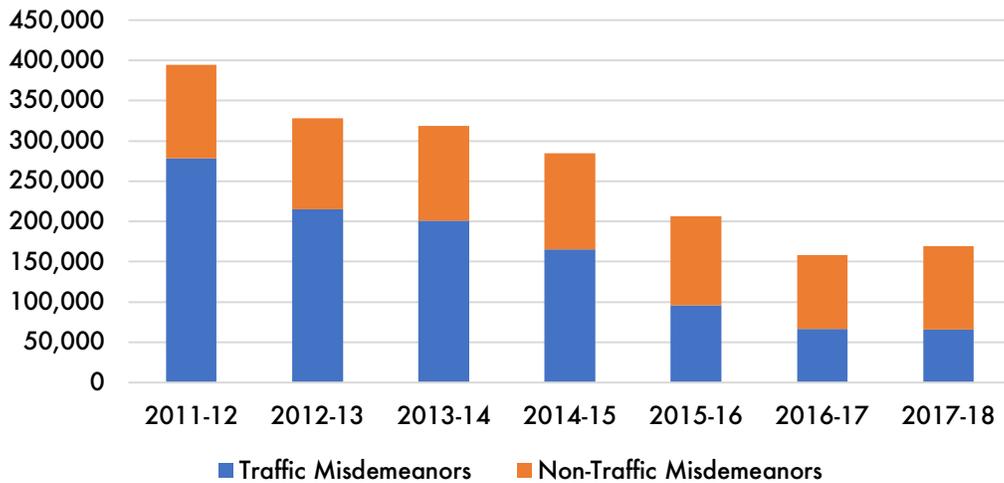
While discussing misdemeanor diversion at the July 2020 meeting, the Committee noted that overall misdemeanor filings in Los Angeles County had declined by 57% since 2011–12.⁸ The Committee expressed interest in learning more about this drop in filings.

Further analysis of the filings data showed that most of the drop was caused by misdemeanor filings in traffic cases. These filings fell by 76% from 2011-12 to 2017-18 (from 278,133 to 65,597 filings) — almost double the overall 41% decrease in all filings during this time.⁹ Non-traffic misdemeanors filings also fell during this time, but only by 11%. This chart summarizes the drop in misdemeanor filings:

8. All information about criminal filings in this memo is from the Judicial Council’s annual Statewide Caseload Trends. See, e.g., Judicial Council of California, 2019 Court Statistics Report, Statewide Caseload Trends, 2008–09 through 2017–18, 134 (Table 7a).

9. “All filings” include all traffic and non-traffic infractions and misdemeanors, as well as felony filings.

Los Angeles County Misdemeanor Filings



Staff learned of two reasons that may have contributed to this drop in filings. First, one common misdemeanor offense — driving without a license — may have occurred less often because of the passage of AB 60 (Alejo) (2013), which, beginning in 2015, gave people with undocumented immigration status the ability to obtain drivers licenses. This expansion in the availability of drivers licenses may have reduced the number of driving without a license cases.

Next, part of this drop in misdemeanor traffic filings may also be due to a policy instituted by the Los Angeles City Attorney, who handles misdemeanor cases in the incorporated parts of Los Angeles County. This policy directed that some of the most common traffic offenses — including driving without a license¹⁰ and driving on a license suspended for failure to appear in court¹¹ — be filed as infractions, not misdemeanors.¹² The City Attorney had the flexibility to implement this policy because these type of charges are “wobblettes” — meaning they can be filed as either misdemeanors or infractions.¹³ (California also has

10. Vehicle Code § 12500.

11. Vehicle Code § 14601.1. Under Vehicle Code § 13365, the DMV may suspend a license once it receives court notification that someone has failed to appear. See Vehicle Code §§ 40509 & 40509.5 (authority for courts to notify DMV). The failure to appear may also separately be charged as a misdemeanor. Vehicle Code § 40508(a).

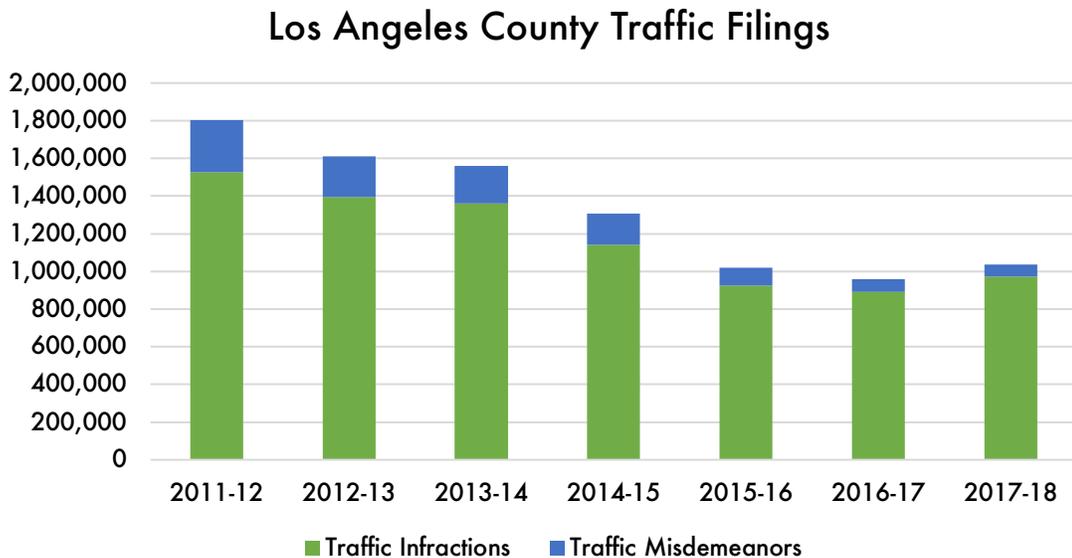
12. Memorandum from M.C. Molidor, Jose Egurbide, and Robert Cha, Re: Update to the Los Angeles City Attorney Filing Guidelines for Direct Citations — Changes Re Vehicle Code Section 14601.1(a), February 22, 2020. The offenses will be filed as misdemeanors if a police officer writes a full report, which is most likely to occur if there has been an accident.

13. 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 a misdemeanor wobblette to an infraction with the defendant’s consent. Penal Code § 17(d)(2).

“wobblers,” which are offenses that can be charged as misdemeanors or felonies.)¹⁴ An infraction, unlike a misdemeanor, is “not punishable by imprisonment.”¹⁵

Neither of these offenses are associated with unsafe driving. Other provisions of the Vehicle Code cover suspensions for unsafe driving.¹⁶ The potential impact of change here is large: as of March 2017, 612,000 Californians had a license suspension for failure to appear in court or pay a fine.¹⁷ The latter situation is no longer a permissible basis for suspending a license,¹⁸ but many people likely still have a license suspended for that reason.

Traffic filings are down significantly in Los Angeles County, as is the percentage of traffic filings that are brought as misdemeanor cases. Since 2011–12, the number of traffic filings has dropped by 42% and currently stands at about a million a year. And in the last two years, about 6% of traffic offenses are filed as misdemeanors. This percentage has steadily decreased: in 2011–12, traffic filings were 15% misdemeanors. This graph shows the division between misdemeanor and infraction traffic filings over time:



14. Penal Code § 17(b).

15. Penal Code § 19.6. In addition, “A person charged with an infraction shall not be entitled to a trial by jury. A person charged with an infraction shall not be entitled to have the public defender or other counsel appointed at public expense to represent him or her unless he or she is arrested and not released on his or her written promise to appear, his or her own recognizance, or a deposit of bail.”

16. Vehicle Code §§ 14601 (driving while license is suspended for “reckless driving”); 14601.2 (driving while license suspended because of driving while under the influence); 14601.5 (similar).

17. Sen. Com. On Public Safety, Analysis of Sen. Bill No. 185 (2017–2018 Reg. Sess.) March 20, 2017, p. 5.

18. AB 103 (Committee on Budget) (2017) (amending Vehicle Code § 13365).

But even with these decreases, data from the Los Angeles County Public Defender shows that in 2018 and 2019, there were more than 14,000 charges for driving without a license and more than 24,000 for driving on a license suspended for failure to pay a fine or to appear in court. The data does not indicate which of these were filed as infractions or as misdemeanors.

Another prosecutor has recently pledged to take steps similar to the Los Angeles City Attorney. The Santa Clara County District Attorney recently announced that “thousands” of driving on suspended license for failure to pay fines or failing to appear in court would be filed as infractions, not misdemeanors. As that office explained, “All of our cases in criminal court have a disproportionately high percentage of Latino and African-American defendants. By removing a large number of these cases from criminal court, and moving them instead to traffic court as infractions (like speeding tickets), we reduce the overall number of cases within the criminal justice system, and by so doing have a disproportionately positive impact on communities of color.”¹⁹ (For comparison, Santa Clara County most recently had 140,610 traffic filings, of which 10% were misdemeanors. Los Angeles County had 1,037,072, of which 6% were misdemeanors.)

In addition to the disparate racial impact that these cases may have, there have been serious problems with how the DMV is suspending people’s licenses. A recent appellate decision ruled that the DMV had been suspending licenses for failure to pay a fine or appear in court without receiving the appropriate court paperwork.²⁰ It’s unknown how many people may have had their licenses improperly suspended, but as noted, as of March 2017, 612,000 Californians had a license suspension for failure to pay a fine or appear in court.²¹

Finally, there are likely many people who have a suspended license for failure to pay a court fine. As noted, until recently, the DMV could suspend someone’s license for this reason. This law changed in 2017 and the DMV no longer has the authority to suspend a license for failure to pay a fine.²² But this change in the law was not retroactive, which means many people may have a suspended licenses for failing to pay a fine, a suspension that would not be permissible today.

19. Santa Clara County District Attorney, Bend the Arc Reforms, July 22, 2020, 9 <https://www.sccgov.org/sites/da/newsroom/newsreleases/Documents/2020NRDocs/Bend%20The%20Arc%20Reforms%20Handout_%20Final.pdf>

20. Hernandez v. Department of Motor Vehicles, 49 Cal. App. 5th 298 (2020).

21. Sen. Com. On Public Safety, Analysis of Sen. Bill No. 185 (2017–2018 Reg. Sess.) March 20, 2017, p. 5.

22. AB 103 (Committee on Budget) (2017) (amending Vehicle Code § 13365).

Staff Proposal

The Committee should decide whether to follow the lead of prosecutors in Santa Clara and Los Angeles and recommend that two traffic offenses — driving without a license and driving on a license suspended for failure to pay a fine or appear in court — be reclassified from wobblettes to infractions. Doing so would result in less incarceration because misdemeanor offenses that result in jail time²³ would be reclassified to infractions that could never lead to incarceration.

Reclassification of these offenses makes particular sense as these offenses are not connected to dangerous driving. Reducing these offenses to infractions would have significant impacts on court congestion statewide as thousands of cases would be removed from misdemeanor dockets. Finally, prosecutions for these offenses likely have a disparate impact on poor people and people of color as the license suspensions often arise from being unable to pay fines or failing to appear in court to explain why a fine could not be paid.

Create Presumption in Favor of Probation

Summary Staff Proposal

Create a general presumption in favor of probation for certain offenses.

Current Law

The Penal Code does not currently have any presumptions in favor of probation — only presumptions against probation and situations where probation is never allowed.

Background

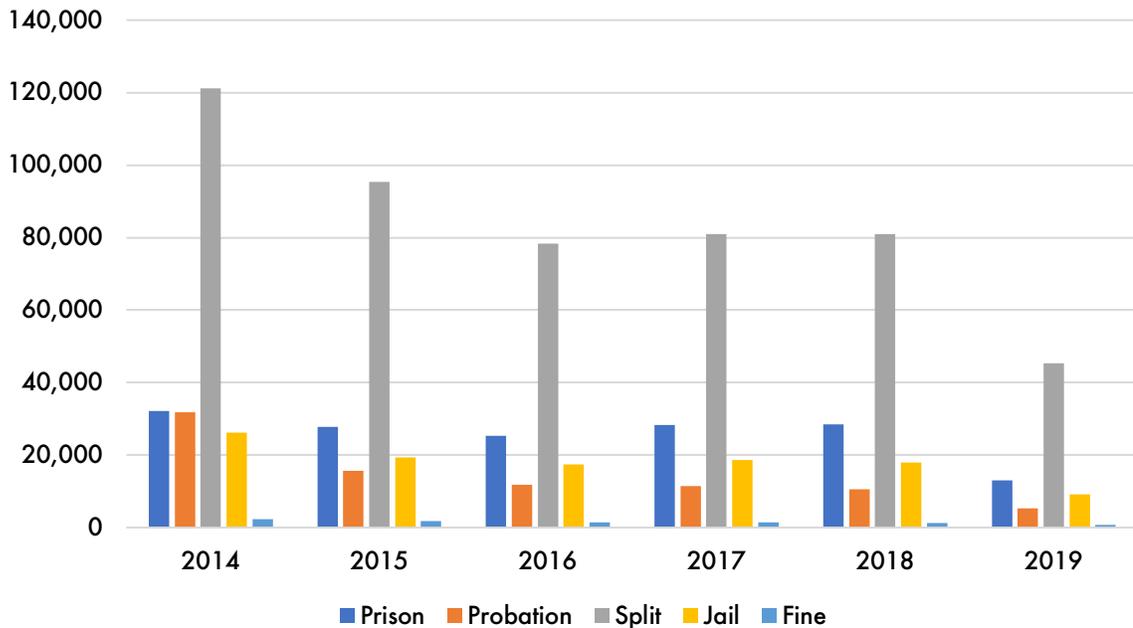
The Committee discussed probation eligibility at its April and July meetings. Straight probation sentences (which can include a period of incarceration as a condition of probation) are received in about 7% of all felony convictions.²⁴ Split sentences — a combination of jail and probation — are the most common type of sentence and account for about 60% of all felony sentences. This graph shows how the use of each sentence type has changed over recent history:²⁵

23. Vehicle Code § 14601.8 (allowing judge to permit “weekend jail” for people convicted under § 14601.1).

24. All disposition information is taken from California Department of Justice, *Crime in California* 2019, July 2020, Table 38A. Note “b” of this table states 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.”

25. The graph does not include death sentences and dispositions labeled as “other.”

California Felony Conviction Dispositions



California law currently addresses probation eligibility in three ways: ineligible, presumptively ineligible, and at the court’s discretion.²⁶ There are no offenses where probation is the presumptive sentence.

Exhibit A to this memo catalogs where probation is presumptively unavailable and where it is forbidden. For example, probation is presumptively unavailable for these offenses:

- burglary of an inhabited dwelling²⁷
- failure to register as a sex offender²⁸
- any felony if defendant has two prior felony convictions²⁹
- some sex offenses³⁰
- some drug offenses³¹

26. See, e.g., Penal Code § 667(c)(2) (probation not available if defendant has prior strike conviction); Penal Code § 1203(e) (partial catalog of where probation is presumptively unavailable); Penal Code §§ 1203(b)(3) (felony probation eligibility), § 1203a (misdemeanors). See also Cal Rules of Ct 4.413 & 4.144 (guidance for imposing probation). There is also one category of offense — non-violent drug possession — where probation is mandatory. Penal Code § 1210.1(a).

27. Penal Code § 462(a).

28. Penal Code § 290.018(e).

29. Penal Code § 1203(e)(4).

30. Penal Code § 1203.065(b); Penal Code § 1203.066(d).

31. Penal Code § 1203.07(a).

In these circumstances, probation should only be granted in “unusual cases where the interests of justice would best be served.”³²

Similarly, some offenses and circumstances are totally ineligible for probation and a mandatory term of incarceration must be imposed. These restrictions are similar to the presumptively-ineligible categories, but the offenses tend to be more serious:

- robbery where great bodily injury has been inflicted³³ or a firearm was used³⁴
- any serious or violent offense committed while the defendant is on probation³⁵ or parole³⁶
- any felony offense committed by someone who has a prior strike conviction³⁷
- other drug offenses — even though these offenses would require a county jail not state prison sentence³⁸

Staff Proposal

The current probation-eligibility structure could be modified by creating a presumption that — unless probation eligibility is otherwise addressed by the Penal Code — probation is the appropriate sentence for most offenses.

Some parts of the Penal Code are already structured in this way. For example, the mental health diversion law applies to all offenses — except for those it specifically excludes.³⁹ A presumption for probation could take a similar inclusive approach.

Other states have similar structures, though many limit the presumption of probation to certain offenses or classes of offenses.⁴⁰ If the Committee concludes that a general presumption for probation is not appropriate, the Committee could recommend an approach similar to those of other states and place the cut-off

32. Penal Code § 1203(e).

33. Penal Code § 1203.06(a)(1)(B).

34. Penal Code § 1203.075(a)(2)

35. Penal Code § 1203(k).

36. Penal Code § 1203.085(b).

37. Penal Code § 667(c)(2).

38. For example, compare Health & Safety Code § 11351 (possession for sale offense; allowing jail sentence in all circumstances) with Penal Code § 1203.07(a)(1) (forbidding probation sentence for same offense if involving heroin in excess of 14.25 grams). Once the weight is above 1 kilogram, drug-weight enhancements apply, beginning at 3 years. Health & Safety Code § 11370.4(a)(1).

39. Penal Code § 1001.36(a), (b)(2).

40. See Pew Charitable Trusts, *35 States Reform Criminal Justice Policies Through Justice Reinvestment*, July 2018 (since 2011, 9 states have created some form of presumptive probation); Alison Lawrence, *Making Sense of Sentencing: State Systems and Policies*, National Conference of State Legislatures, June 2015, 7 (describing presumptive probation systems in four states).

somewhere on the below catalog of California offenses, which is ordered from least to most serious:

- Misdemeanor offenses
- Wobbler offenses — offenses that can be charged as either a felony or misdemeanor.⁴¹ This category includes criminal threats⁴² and theft over \$950.⁴³
- Penal Code 1170(h) offenses — non-serious, non-violent, non-sex felony offenses that allow incarceration in county jail. This would include drug sales⁴⁴ and commercial burglary.⁴⁵
- Non-strike offenses — this would include the 1170(h) offenses and other offenses that are not serious or violent, such as possession of drugs and a gun.⁴⁶
- Non-violent offenses — this would include serious offenses, such as any felony that has a gang enhancement.⁴⁷
- All offenses, including violent offenses, such as robbery.

Implementing such a structure would encode directly in California law that incarceration should be the last resort. Incarceration would always be an option for a sentencing court if the presumption is overcome. This presumption would shift the burden from the defendant to show why probation was appropriate to the prosecutor, who would need to show why incarceration was appropriate.

What standard should be used to overcome the presumption? A possible model exists in South Dakota. That state allows a presumption in favor of probation to be overcome if “aggravating circumstances exist that pose a significant risk to the public and require a departure from presumptive probation under this section.”⁴⁸

If the law were changed to create a presumption of probation in some cases, the law should probably not permit incarceration to be included as a condition of probation. The point would be to identify situations where probation alone would be sufficient to protect public safety.

41. Penal Code § 17(b).

42. Penal Code § 422. Note that criminal threats, if charged as a felony, becomes a serious offense — and therefore a strike. Penal Code § 11927(c)(38).

43. Penal Code § 489(c)(1).

44. Health & Safety Code §§ 11351, 11352.

45. Penal Code §§ 459, 460(b), 461(2).

46. Health & Safety Code § 11370.1

47. Penal Code § 11927(c) (serious offenses).

48. SDCL 22-6-11.

In addition to continuing research into a general presumption, staff will continue exploring whether adjusting the offenses that are presumptively or totally ineligible for probation may be appropriate. For example, the drug offenses that are presumptively or totally ineligible for probation are county jail offenses. But there are other more serious offenses that are eligible for probation and require a state prison term if probation is not imposed. These disparities may be fruitful starting places for adjusting these lists, as are the inclusion of common offenses that can be committed in a wide variety of circumstances, such as burglary of an inhabited dwelling.

Finally, the Committee also expressed interest in learning more about the conditions of probation, including how they are imposed and monitored in practice. Staff will continue to research this topic.⁴⁹

Equalize Credit Schemes Between Jail and Prison

Summary Staff Proposal

Equalize credits between jail and prison. The current system treats similarly-situated people differently based on where they are confined.

Current law

Current law provides for “good conduct credits,” which allow someone to reduce the length of their incarceration if they follow the rules in jail or prison. Current law also creates “earned credit” opportunities where completion of specific programming, such as obtaining a GED, results in an additional reduction in incarceration. Both of these types of credit differ based on whether someone is confined in jail or prison.

Background

Issues around credits — which can reduce the amount of actual time someone is incarcerated — arose when the Committee discussed short sentences at its July 2020 meeting. The credit rules in jail and prison differ in key respects, and people who are otherwise the same are treated differently solely because of where they are incarcerated. Some people may prefer to be in prison while others prefer to be in jail purely because of the type of credits they may earn in each setting. It does

49. See generally Fiona Doherty, “Obey All Laws and Be Good”: Probation and the Meaning of Recidivism, 104 Georgetown Law Review 291 (2016) (surveying and analyzing probation conditions).

not make sense to create such incentives, which could have problematic effects on the administration of jails and prisons.

Minimizing differences in credit-earning schemes between jail and prison would seem to have a number of benefits:

- Create equity between similarly-situated people.
- Reduce incarceration for people serving short sentences.
- Eliminate irrational incentives to prolong or shorten the time spent in jail, which could have problematic side effects.

To understand this issue, consider three common scenarios:⁵⁰

1. Non-violent jail offense with a prior strike.

- Current conviction: drug sale
- Past conviction: robbery. Because of this prior strike, the sentence must be served in prison.
- Credit-earning details
 - Jail: 2 days credit for every day served.⁵¹
 - Prison: 1.5 days credit for every day served.⁵²
- Result: This person has a strong incentive to stay in county jail as long as possible by delaying their case.

2. Non-violent prison offense with no prior strikes.

- Current conviction: possession of drugs and gun. This sentence, even though not for a violent or serious offense, must be served in state prison because it has not been specifically realigned to county jail.
- Past conviction: no strikes
- Credit-earning details
 - Jail: 2 days credit for every day served.⁵³
 - Prison: up to 3 days credit for every day served.⁵⁴
- Result: This person is incentivized to get to CDCR as quickly as possible — where they may also be eligible for earned-credits like Milestones and Education Merit Credits, which are more limited in county jail.⁵⁵

50. These scenarios do not consider the effect of parole release under Proposition 57, which may further reduce the amount of incarceration someone may serve in prison. See Cal. Const., art. I, § 32(a)(1).

51. Penal Code § 4019.

52. 15 CCR § 3043.2(b)(3).

53. Penal Code § 4019.

54. 15 CCR § 3043.2(b)(5)(A) (credit available for people with no prior strikes, serving sentence for non-violent offense, and “assigned to Minimum A Custody or Minimum B Custody”).

55. CDCR provides for a variety of earned credit opportunities which can authorize more than three months off a sentence in a year. See 15 CCR § 3043.3–3043.6. Similar earned-credit opportunities in jail are limited to a reduction of six weeks in a year and seem to be little used in practice. Penal Code § 4019.4(a)(2).

3. Non-violent jail offense with no prior strikes.

- Current conviction: drug sale. This sentence must be served in jail.
- Past conviction: no strikes
- Credit-earning details
 - Jail: 2 days credit for every day served.⁵⁶
 - Prison: Unavailable. But if they were at CDCR, they could earn up to 3 days credit for every day served.⁵⁷
- Result: This person is stuck with the jail credit-earning rules. But they would earn more credit if the prison credit-earning rules, including more generous earned credit opportunities, applied.

Staff Proposal

The Committee could recommend that the credit-earning scheme be equalized in jail and prison, with the faster credit-earning rules controlling.

Jail credit-earning is currently set by the Penal Code, but CDCR sets prison credit-earning via regulation under the constitutional authority granted to them by Proposition 57.⁵⁸ However, there have been recent legislative efforts to direct how CDCR exercises its authority over credit-earning.⁵⁹ If the Committee pursues this recommendation, staff will conduct further research and consultation on how this recommendation could best be presented.

In addition to equalizing credit-earning in these two contexts, the Committee could recommend that credit-earning in both settings be expanded. This may be part of a solution to addressing the volume of short CDCR sentences.

CONCLUSION

The topics and staff proposals in this memo run the gamut from traffic infractions to credits for people serving prison time. They all share the goal of increasing public safety while reducing incarceration and improving equitable outcomes for large swathes of California's criminal legal system.

Respectfully submitted,

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Senior Staff Counsel

56. Penal Code § 4019.

57. 15 CCR § 3043.2(b)(5)(A).

58. Cal. Const., art. I, §32(a)(2) & (b).

59. AB 965 (Stone) (2019) (creating Penal Code § 3051(j) ("The Secretary of the Department of Corrections and Rehabilitation may authorize persons described in [this law] to obtain an earlier youth parole eligible date by adopting regulations pursuant to subdivision (b) of Section 32 of Article 1 of the California Constitution.")).

Exhibit A
Probation Eligibility Catalog

Probation Eligibility Catalog

This material is excerpted from CJER Felony Sentencing Handbook (2020).

Note: All citations are to the Penal Code, unless otherwise noted.

I. Eligible Only in Unusual Case

A. Serious Nature of Present Offense

1. Sex Offenses

- | | |
|-------------|---|
| 1203.065(b) | Pen C § 220 violation of assault with intent to commit one of specified sex offenses, violation of Pen C § 261(a)(7), § 286(k), § 287(k), or § 289(g) |
| 1203.066(d) | Certain Pen C § 288 (lewd or lascivious act w/a child) or § 288.5 (continuous sexual abuse of child) violations when specified mitigating circumstances are present |

2. Drug Offenses

- | | |
|----------------|--|
| 1203(e)(8) | Knowingly furnishing or giving away PCP |
| 1203.073(b)(1) | Possession for sale or sale of specified amounts of cocaine or cocaine base in violation of Health & S C § 11351, § 11351.5, or § 11352 |
| 1203.073(b)(2) | Possession for sale or sale of specified amounts of methamphetamine in violation of Health & S C § 11378, or § 11379 |
| 1203.073(b)(3) | Manufacturing controlled substance (except PCP) in violation of Health & S C § 11379.6 |
| 1203.073(b)(4) | Employing minor to manufacture or sell heroin, cocaine, cocaine base, or methamphetamine in violation of Health & S C § 11353 or § 11380 |
| 1203.074 | Violation of Health & S C § 11366.6 (use of location specifically designed to suppress police entry in order to manufacture, sell, or possess for sale heroin, cocaine, cocaine base, PCP, amphetamine, methamphetamine, or LSD) |

3. Burglary Offenses

- | | |
|----------|--|
| 462(a) | Burglary of an inhabited dwelling, building, trailer coach, or floating home (first degree burglary) |
| 462.5(a) | Felony custodial institution burglary |

4. Arson Offenses

- 454(c) Unlawful burning within area of insurrection or emergency
- 1203(e)(9) Violation of Pen C § 451(a) (arson that causes great bodily injury), or § 451(b) (arson of inhabited structure or property)

5. Escape Offenses

- 4532(c) Specified felony escape from secure main jail facility

6. Offenses by Public Officials

- 1203(e)(7) Bribery, embezzlement, or extortion by public official or peace officer in discharge of duties

7. Weapon Offenses

- 1203(e)(11) Possession of a short-barreled rifle or shotgun under Pen C § 33215, a machinegun under Pen C § 32625, or a silencer under Pen C § 33410

8. Solicitation of a Minor

- 1203.046(a) Solicitation of a minor to commit certain felonies in violation of Pen C § 653j

9. Failure To Register as Sex Offender

- 290.018(e) Felony violation of registration provisions under Pen C § 290.018(b) and (d)

10. Unlawful Transfer of Firearm or Deadly Weapon

- 1203(e)(12) Knowing gift or sale of deadly weapon or firearm to mental patient in violation of Welf & I C § 8101
- 1203(e)(13) Unlawful firearm transaction specified in Pen C § 27590(b) or (c)

B. Aggravated Nature of Present Offense

1. Armed With Deadly Weapon

- 1203(e)(1) Armed w/a deadly weapon, other than a firearm, at the time of commission or arrest, when convicted of specified felonies

2. Deadly Weapon Use

1203(e)(2) Used or attempted to use deadly weapon on a person in any offense

3. Great Bodily Injury

1203(e)(3) Willfully inflicted great bodily injury or torture in any offense

1203(e)(10) Inflicted great bodily injury or death by discharging a firearm from or at a vehicle

4. Excessive Theft

115(c)(2) Conviction in one proceeding of more than one violation of Pen C § 115, attempt to record false or forged instrument, with intent to defraud, when violations resulted in cumulative financial loss exceeding \$100,000

1203.045(a) Theft exceeding \$100,000

1203.048(a) Computer-related crimes (Pen C § § 502, 502.1(b)) w/ taking or damage exceeding \$100,000

1203.049(a) Fraudulent appropriation or unauthorized use, transfer, sale, or purchase of CalFresh benefits committed by means of electronic transfer in violation of Welf & I C § 10980(f) or (g) and amount exceeds \$100,000

5. Elderly Victim

1203.09(f) Assault w/ a deadly weapon, battery that results in physical injury requiring professional medical treatment, robbery, carjacking, or mayhem committed against a victim 60 years of age or older

C. Prior Convictions

115(c)(1) Prior conviction of Pen C § 115, attempt to record false or forged instrument, w/ present conviction of that section in a separate proceeding

1203(e)(4) Two prior felony convictions

1203(e)(5) One prior felony conviction and present conviction of one of specified felonies

1203(e)(6) One prior felony conviction involving deadly weapon use or arming or infliction of great bodily injury

1203.073(b)(5) Prior and present conviction of certain offenses involving methamphetamine

II. Mandatory Jail Term as Condition of Probation Except in Unusual Case

186.22(c)	Participation in criminal street gang activity
186.22(d)	Wobbler committed at direction of or in association w/a criminal street gang
208(c)	Kidnapping
209(c)	Kidnapping for ransom or extortion or to commit robbery or sex crime
209.5(c)	Kidnapping during commission of carjacking
463	Looting
626.9(g)	Possession of firearm on or within 1,000 feet of school grounds with prior conviction of any felony, any crime made punishable by any provision listed in Pen C § 16580, or of any misdemeanor offense specified in Pen C § 23515
626.9(g)	Discharging or attempted discharge of firearm w/reckless disregard of safety of others on or within 1,000 feet of school grounds with prior conviction of any felony, any crime made punishable by any provision listed in Pen C § 16580, or of any misdemeanor offense specified in Pen C § 23515
1203.055(a)	Specified crimes against public transit vehicle or occupant
1203.095	Specified firearm offenses
25400(d)	Possession of a concealed firearm with prior conviction of any felony, any crime made punishable by any provision listed in Pen C § 16580, or any misdemeanor offense specified in Pen C § 23515
25850(d)	Carrying loaded firearm with prior conviction of any offense specified in Pen C § 23515 or any crime made punishable by any provision listed in Pen C § 16580
29900(a)	Possession of a firearm with prior conviction of one of specified felonies

III. Not Eligible

A. Serious Nature of Present Offense

1. Arson Offenses

1203.06(a)(3) Conviction of Pen C § 451.5 (aggravated arson)

2. Sex Offenses

667.61(h) Conviction of specified serious sex offenses committed under designated aggravated circumstances

1203.065(a) Conviction of specified serious sex offenses

1203.066(a)(1) Violation of Pen C § 288 (lewd act w/ child) or § 288.5 (continuous sexual abuse of child) by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury

1203.066(a)(6) Violation of Pen C § 207, § 209, or § 209.5 (kidnapping) for the purpose of committing a violation of Pen C § 288 or § 288.5

3. Drug Offenses

1203.07(a) Specified Health and Safety Code violations involving heroin, PCP, or other specified

4. Destructive Device Offenses

12311 Any violation of Pen C §§ 12303-12312

B. Aggravated Nature of Present Offense

1. Firearm Use

1203.06(a)(1) Personal use of a firearm in committing or attempting one of specified felonies

12022.53(g) Personal use or discharge of firearm in committing or attempting one of specified felonies

2. Great Bodily Injury

1203.075(a) Personal infliction of great bodily injury in committing or attempting one of specified felonies

3. Minor Victim

- 1203.066(a)(2)-(4) Violation of Pen C § 288 or § 288.5 when bodily injury caused, weapon used, or stranger befriended child victim for purposes of committing the offense
- 1203.066(a)(7)-(9) Violation of Pen C § 288 or § 288.5 involving more than one victim, a victim under 14 years of age, or the use of obscene matter or matter depicting sexual conduct, and specified mitigating circumstances are not present
- Health & S C § 11370(b) Violations involving specified controlled substance or narcotics when an adult involves a minor

4. Elderly or Disabled Victim

- 1203.09(a) Infliction of great bodily injury on elderly or disabled victim while committing or attempting one of specified felonies

5. Offense Committed While on Parole

- 1203.085(a) Conviction of any non-wobbler felony committed while on parole for a Pen C § 667.5(c) violent felony or a Pen C § 1192.7(c) serious felony
- 1203.085(b) Conviction of a Pen C § 667.5(c) violent felony or a Pen C § 1192.7(c) serious felony committed while on parole for any felony

6. Offense Committed While on Probation

- 1203(k) Conviction of Pen C § 667.5(c) violent felony or Pen C § 1192.7(c) serious felony while on probation for a felony offense

C. Prior Convictions

- 550(d) Two or more prior felony convictions of preparing/presenting false/fraudulent insurance claim and present felony conviction of same
- 667(c), 1170.12(a) Prior conviction of felony offense ("strike") defined in Pen C § 667(d) or § 1170.12(b) and present conviction of any felony
- 1203.055(c) Prior and present conviction of one of specified felonies committed against public transit vehicles or occupants
- 1203.06(a)(2) Prior conviction of one of specified felonies and personally armed w/a firearm at the time of commission or arrest, in any subsequent felony
- 1203.066(a)(5) Prior conviction of one of specified sex offenses and present conviction of Pen C § 288 or § 288.5

1203.07(a)(3)	Prior conviction of violating Health & S C § 11351 or § 11352 and present conviction of violating Health & S C § 11351 or § 11352 involving heroin
1203.08	Present conviction of one of "designated" felonies with prior conviction under charges separately brought and tried two or more times of any "designated" felony
Health & S C § 11370(a)	Prior conviction of one of specified Health and Safety Code provisions involving controlled substance and present conviction of an offense involving one of specified controlled substances