November 10, 2020

First Supplement to Memorandum 2020-15

Parole Release and Penal Code Section 1170(d)(1) Resentencings
Panelist Materials

Memorandum 2020-15 gave an overview of parole release and Penal Code Section 1170(d)(1) resentencing, the topics of the November 12–13, 2020, meeting.

This supplement presents and summarizes written submissions from the panelists scheduled to appear before the Committee at its November meeting.

Exhibit

Discussion Panel 1
Parole Release

Keith Wattley, Executive Director, UnCommon Law

Keith Wattley is the Founder and Executive Director of UnCommon Law, which represents people at parole hearings. He notes that though California law provides that parole "normally" be granted, the grant rate for eligible parole applicants is less than 20%. One reason for this is the mismatch between programs

that parole boards look for and what is actually available to people in prison. Additionally, many people in prison are survivors of untreated childhood trauma, which often prevents them from achieving the type of "insight" that the parole board wants to see. Similarly, each parole commissioner has a subjective understanding of what constitutes a sufficient expression of remorse — a concept that has "no substantial empirical data" linking it to dangerousness.

Mr. Wattley concludes with a few specific policy suggestions: (1) strengthen the presumption in favor of parole, (2) forbid subjective assessments of insight or remorse in parole decisions, (3) provide the programs that the parole board expects people to complete, and (4) give courts more power to reverse improper parole denials. Mr. Wattley also suggests that California hold a series of hearings on each of these topics and that a pilot program to administer trauma testing in prison be created. He also includes an appendix of anonymized cases where courts rejected the Board's conclusions about lack of insight.

Heidi Rummel, Director, Post-Conviction Justice Project, USC Gould School of Law

Heidi Rummel is the Director of the Post-Conviction Justice Project at the USC Gould School of Law. Ms. Rummel's submission is an amicus brief that argues that the Board of Parole Hearing's regulations and practices violate constitutional requirements because they divorce the length of someone's confinement from their culpability for the crime. BPH engages in a post-conviction "suitability" analysis that can result in two people who committed the same offense under identical circumstances and who received the same indeterminate sentence ultimately serving vastly different terms of confinement based on subjective administrative judgments. This vagueness in sentencing invites arbitrary enforcement and denies fair notice to defendants, violating due process. The brief argues that BPH's procedures were not always this way, but regulatory shifts (unsupported by any legislation) since the creation of the Determinate Sentencing Law in the late 1970s have resulted in an unconstitutional system.

Jennifer Shaffer, Executive Officer, Board of Parole Hearings

Jennifer Shaffer is the Executive Officer for the California Board of Parole Hearings. Her extensive submission details how parole hearings operate and how parole commissioners are trained, and includes statistical information about parole grant rates. In particular, Ms. Shaffer explains that in the last 10 years, BPH approved release for more than 16,000 people (page 1). She also notes that 2017

marked the first time in 34 years that more people serving life sentences were released from prison than were admitted (page 12). She describes the three forensic tools that BPH psychologists use to assess parole candidates (page 7, note 20) and that the average length of a parole hearing is two and a half hours (page 8). She also notes that BPH has a robust process for advancing parole hearing and that this contributed to an increase in the number of people granted parole every year — a number that has almost doubled in the last seven years (pages 15-16).

On the issue of what BPH's parole grant rate is, she suggests that the grant rate should be calculated as a percentage of the hearings actually held, which significantly increases the grant rate because around 40% of all scheduled parole hearings do not occur every year (page 18). Finally, Ms. Shaffer describes the extensive training that parole commissioners receive (pages 23-25, and Appendix C). and new training recently implemented for appointed counsel (pages 26-27).

Discussion Panel 2
Resentencing Under Penal Code § 1170(d)(1)

Hillary Blout, Executive Director, For the People

Hillary Blout is the Founder and Executive Director of For the People, an organization that provides resentencing support to prosecutors and incarcerated people. Ms. Blout's submissions provides some statistical background on the racial disparities in California's prisons and the expense associated with incarcerating people in prison. She then describes her organization's work with eleven prosecutor's offices to complete sentencing review that may result in a referral for resentencing under Penal Code § 1170(d)(1). She notes that this work has eight phases — including gathering extensive records — and that the work for a single case can range from 30 to 50 hours and cost from $2,500 to $5,000. She makes three recommendations for the Committee's consideration: (1) providing guidance in § 1170(d)(1) about how gang enhancements should be considered during a resentencing, (2) clarifying whether a resentencing under § 1170(d)(1) can result in striking special circumstances findings that led to death or life without parole sentences, and (3) clarifying whether a § 1170(d)(1) resentencing can reduce or otherwise address a 25-to-life sentence.

Hon. J. Richard Couzens (Ret.), Superior Court, Placer County

Judge Couzens is a retired Superior Court judge from Placer County, and the author of treatises and other widely used references on California criminal law.

His submission is a memorandum he prepared offering guidance to trial courts that receive referrals for resentencing under Penal Code § 1170(d)(1). Judge Couzens suggests that if a judge concludes after an initial review that resentencing is inappropriate, the judge can reply via letter to CDCR that they are declining to conduct a resentencing under § 1170(d)(1). But if an attorney for the person to be resentenced objects to that conclusion, the court should then set and initial status conference, most likely without the defendant being present. The goal of the status conference is to reach a resolution agreeable to all the parties. If that is not possible, the court should conduct a contested hearing and then make a final determination. This structure includes appointing counsel if the initial status conference is held, but does not contemplate doing so before a judge makes an initial determination about the request for resentencing. His memo also does not specifically address requests for resentencing made by local prosecutors.

Discussion Panel 3
Perspectives on Life Sentences

Sam Lewis, Executive Director, Anti-Recidivism Coalition

Sam Lewis is the Executive Director of the Anti-Recidivism Coalition, which provides a support network, comprehensive reentry services, and opportunities to advocate for policy change to incarcerated and formerly incarcerated people. Mr. Lewis's submission focuses on programming at CDCR. He briefly describes the different types of programming available to people in prison and suggests that more extensive programming be made available at reception centers, where people are first placed when they arrive at prison.

Adnan Khan, Executive Director, Re:Store Justice

Adnan Khan is the Executive Director and co-founder of Re:Store Justice, an advocacy group he co-founded while incarcerated. His submission details his experience in being prosecuted and convicted for first-degree murder under the felony-murder rule. He describes the events that led to his conviction and the disparity in outcomes for those involved. Namely, Mr. Khan, who did not actually commit the killing, was convicted and sentenced to 25-life, while the actual killer was convicted of second-degree murder and sentenced to a shorter term.

Before he was sentenced, a probation report concluded that Mr. Khan was remorseful, had no propensity for violence, and did not pose a threat to society. Despite these and other findings, Mr. Khan was classified as "high-risk" by CDCR

and sent to a maximum-security prison. His placement there prevented him from accessing education and rehabilitative services for over a decade. After the passage of SB 1437, Mr. Khan was resentenced and released. He now calls for current sentencing practices to be upended and replaced with a more restorative model.

Shanae Polk, Director of Operations, 2nd Call

Shanae Polk is the Director of Operations at 2nd Call, a non-profit that teaches re-entry life skills and other classes for people leaving prison. Ms. Polk served 17 years of a 15-to-life prison sentence and describes the circumstances that led up to the offense. She also describes the difficulty in preparing for her appearances before the parole board, including being told by the parole board to complete a grief and loss class when no class existed and experiencing long waiting lists for other programming that the Board wanted to see. Despite these issues, Ms. Polk was granted parole release at her second appearance before the parole board.

Discussion Panel 4
Perspectives on the Penal Code

Anne Irwin, Director, Smart Justice California

Anne Irwin is the Director of Smart Justice California, which advocates for criminal justice reform through the electoral process, stakeholder engagement, and voter education. Her submission focuses on examining Norway's retooled approach to criminal justice, and specifically, incarceration. Ms. Irwin explains that in the 1990s, Norway's correctional system was struggling with many of the same issues that have plagued California: increasing incarceration rates, a high rate of recidivism, and violence within its prisons. But as California addressed these problems by implementing harsher punishments, Norway chose instead to rebuild its entire system around a set of guiding principles rooted in empirical data.

Ms. Irwin describes that Norway's approach to sentencing is fundamentally focused on preparing a person for release. With this approach, Norway was able to achieve an incarceration rate in 2018 of .53 per 100,000 people, compared to 4.4 per 100,000 in California. Ms. Irwin concludes by suggesting reforms to California's sentencing laws, including rethinking the disproportionality and overbreadth of strike eligible offenses, and incentivizing non-prison resolutions.

Jay Jordan, Executive Director, Californians for Safety and Justice

Jay Jordan is the Executive Director for Californians for Safety and Justice, an advocacy organization working to replace over-incarceration with victim-centered strategies for public safety. Mr. Jordan's submission details the results of survey data collected by his organization which indicate strong support from crime victims for public safety reforms that emphasize prevention, treatment, and rehabilitation over incarceration. He recalls the numerous criminal justice reforms implemented in California over the last several years and explains the continuing need for increased investment in local safety and victim support programs.

Mr. Jordan concludes that long prison sentences are ineffective and expensive public safety strategies. Public safety would be better achieved if California reoriented its spending away from prisons and into community-based programs. In addition to other recommendations, Mr. Jordan specifically endorses reducing the number of people sent to CDCR on short sentences, eliminating mandatory minimum sentences and probation prohibitions, and revising or eliminating sentence enhancements.

Taina Vargas-Edmond, Executive Director, Initiate Justice

Taina Vargas-Edmond is the Executive Director of Initiate Justice, a criminal justice reform organization that prioritizes organizing people directly impacted by incarceration. She did not complete a formal written submission, but her presentation will address increasing credit-earning opportunities for incarcerated people as a way to reduce prison and jail populations and recidivism. She recommends four proposals to do this: (1) standardize good-time credit earning to 50% for everyone, (2) apply all credits to earliest-possible release dates, (3) make all credits irrevocable, and (4) expand criteria for extraordinary conduct credits.

Respectfully submitted,

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Senior Staff Counsel

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Exhibit A

Keith Wattley, Executive Director, UnCommon Law

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October 30, 2020

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Sent via email to tnosewicz@clrc.ca.gov

RE: California Parole is Not the Norm

Dear Mr. Romano and Committee Members:

I am the founder and executive director of UnCommon Law, a nonprofit law firm in Oakland that delivers trauma-informed counseling and legal assistance to people serving lengthy prison terms in California. We represent people in their parole hearings and habeas petitions, and we engage in litigation and policy advocacy to address the ways in which the Board of Parole Hearings (the "Board") has fallen short of its statutory mandate to "normally" grant parole to eligible applicants.[1]

Thank you for the Committee's focus on this often overlooked but vitally important aspect of our criminal legal system. Put quite simply, California cannot eliminate mass incarceration unless we ensure safe and reliable pathways home for people incarcerated for serious and violent crimes, including those serving life sentences. The 35,000 people currently serving life sentences constitute 38 percent of California's prison population.[2] This letter addresses some of the ways in which the current system is failing.

Despite landmark criminal justice reforms in California, pathways out of prison for those serving life sentences (or lengthy determinate sentences) are illusory. California must do more to address the fact that less than 20 percent of eligible parole applicants are being found suitable for parole. Unfortunately, the overwhelming number of people subject to the Board's discretionary parole process each year are not being granted parole. Many are found "unsuitable" for parole at their hearings, others stipulate to unsuitability or waive their hearings, and still others have their hearings postponed or cancelled for some reason.[3]

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[1] *In re Lawrence* (2008) 44 Cal.4th 1181; CA Penal Code, § 3041: Parole "shall normally" be granted.

[2] As of October 29, 2020, CDCR reported at https://www.cdcr.ca.gov/covid19/ that there were "92,497 incarcerated persons in California's prisons."

[3] Some people prefer to think of the effective parole grant rate as a percentage of full hearings completed, but this ignores the critically important fact that our *prison system* is failing

California's parole grant rate has reached 20 percent only once in the last four decades. (See figure below, *Parole Grant Rate in California, 1981-2020*.)[4] When the Three Strikes Initiative passed in 1994, California's incarceration rate had already increased by over 400 percent since the 1976 passage of the determinate sentencing law.[5] In the year after Three Strikes passed, the parole grant rate dropped to below 0.5 percent. Although the rate slowly rose in subsequent years, Governor Davis reversed more than 95 percent of the parole decisions in murder cases that reached his desk and Governor Schwarzenegger followed by blocking 70 percent of the murder cases that reached him.[6] And while Proposition 57 was expected to be a breakthrough for those convicted of nonviolent crimes, only 20 percent of all eligible people with determinate sentences have been granted parole in the last two and a half years.[7]

Even before Prop 57, the Board had made clear its intention to stand firm even as political momentum was swinging away from draconian criminal justice policies. Data following implementation of several recent reforms reveals the Board's intransigence:

- Senate Bill 260 took effect at the beginning of 2014, creating Youthful Offender Parole Hearings, intended to provide a meaningful opportunity for release for those who were sentenced to lengthy terms for crimes committed before age 18.
- Later that same year, California's Elderly Parole Program was implemented as part of the *Plata/Coleman* class action litigation. Its purpose was to help relieve overcrowding by releasing people who were age 60 and older and had served at least 25 years in prison. Despite these efforts, only 19.2 percent of eligible parole applicants in 2014 were granted parole.
- The legislature tried harder in 2015, passing Senate Bill 261, which extended the eligibility age for Youthful Parole Hearings to 22. The extension took effect in 2016, but the parole grant rate that year was even lower at 16.1 percent.
- The only year the parole grant rate has ever reached 20 percent was in 2018, when Assembly Bill 1308 took effect, extending the Youth Parole eligibility to age 25. That

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to normally release people – whether due to the Board's overly subjective decision-making practices, prison conditions, limited programmatic offerings or other factors.

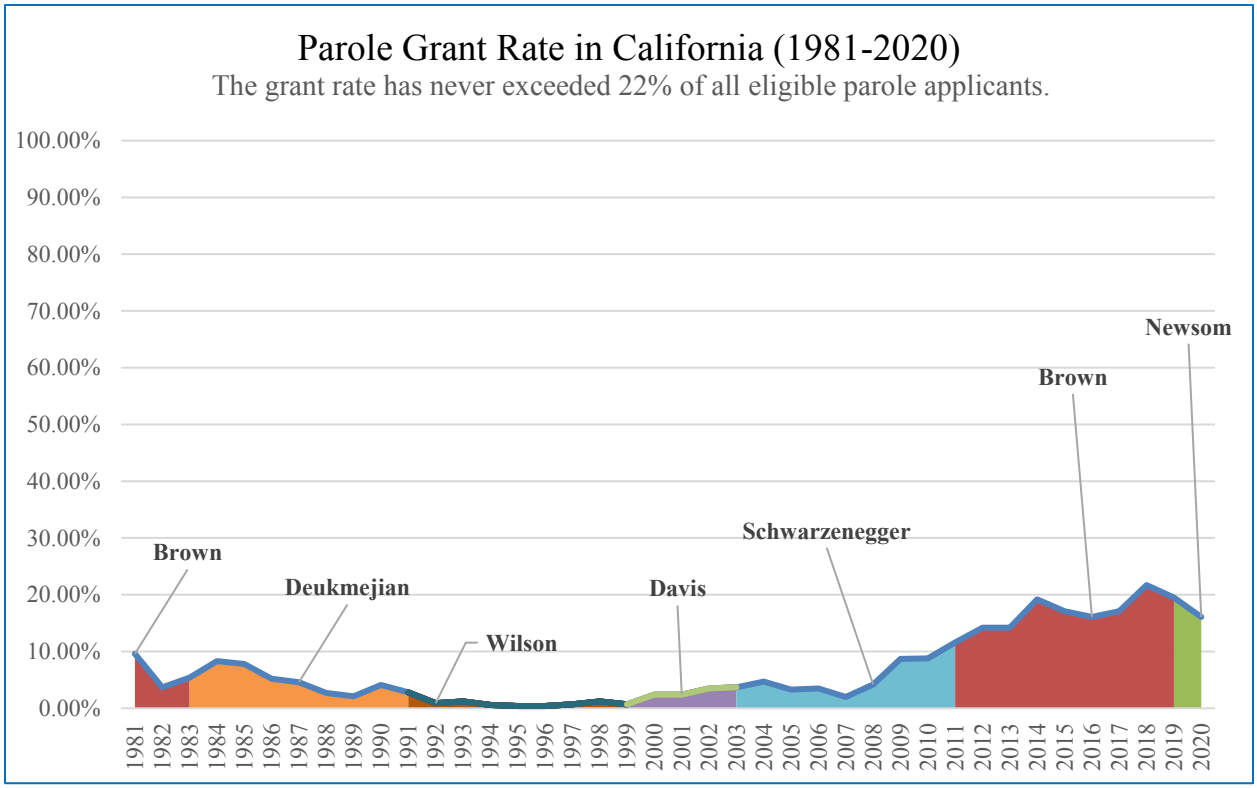
[4] "Statistical Data Results," *California Department of Corrections and Rehabilitation.* https://www.cdcr.ca.gov/bph/category/statistical-data/.

[5] Campbell, Michael C. "The Emergence of Penal Extremism in California: A Dynamic View of Institutional Structures and Political Processes," *Law and Society Review*, vol. 28, no. 2, 2014, pg. 378. https://quote.ucsd.edu/jskrentny/files/2014/08/Campbell.CaliforniaIncarceration.pdf.

[6] Levin, Matt. "Timeline: History of California Lifers Up for Parole," *KQED,* 15 May 2014, https://www.kqed.org/news/136126/timeline-history-of-california-lifers-up-for-parole.

[7] Moran, Greg. "Prop 57 was meant to give nonviolent inmates a chance at early parole, but that's not how it has worked out," *San Diego Union Tribute,* 2 March 2020, https://www.sandiegouniontribune.com/news/courts/story/2020-03-02/prop-57-was-meant-to-give-nonviolent-inmates-a-chance-at-early-parole-but-thats-not-how-it-has-worked-out.

year, the parole grant rate reached 21.7 percent before returning to below 20 percent in 2019. So far in 2020, the parole grant rate is just 16.1 percent.[8] Not even a global pandemic placing elderly and sick people living in congregate settings at greatest risk of serious injury or death is enough to produce a higher grant rate.



While the Board has implemented several new policies and practices as the parole grant rate has risen in recent years,[9] the *courts* have ultimately been responsible for the modest breakthroughs of the modern era. In 2008, the California Supreme Court handed down decisions in *In re Lawrence* and *In re Shaputis*.[10] These cases held that a parole applicant could not be denied parole based solely on the seriousness of the crime they

[8] The Board will likely say that 2020's parole grant rates have been impacted by postponements caused by Covid-19, which is true. However, the rate was already averaging only 18.5 percent in January and February of this year – i.e., before Covid's impact – so that's no explanation.

[9] Young, Kathryne and Mukamal, Debbie. "Predicting Parole Grants: An Analysis of Suitability Hearings for California Lifer Inmates," *Federal Sentencing Reporter,* vol. 28, no. 4, April 2016, pg. 270, https://law.stanford.edu/publications/predicting-parole-grants-an-analysis-of-suitability-hearings-for-californias-lifer-inmates/.

[10] *In re Lawrence* (2008) 44 Cal.4th 1181, *In re Shaputis* (2008) 44 Cal.4th 1241.

committed.[11] Instead, *current* evidence of dangerousness must be present.[12] The Board and the Governor have responded to this increased judicial oversight by increasingly citing a "lack of insight" as the primary *current* evidence that justifies decisions to deny parole. In fact, in the year after *Lawrence* and *Shaputis* were decided in 2008, a claimed "lack of insight" was cited in twice as many appellate opinions as had been the case in the entire 31-year history of the Determinate Sentence Law prior to that.[13] Similarly, the Governor cited a lack of insight in only 12 percent of his decisions to block parole in the year preceding *Lawrence*/*Shaputis*, but he did so in a whopping 78 percent of his decisions in the year after.[14]

In recent years, courts have issued dozens of decisions rejecting the Board's reliance on a claimed lack of insight. Occasionally, even *the Board* has acknowledged that its commissioners improperly made this claim in their decisions. A selection of these interventions is highlighted in the Appendix below; however, these problems are much more widespread than these few interventions can reasonably account for.

There is a glaring mismatch between the types of programs the Board says parole applicants need and what is available within CDCR prisons. If parole applicants are to develop "insight" that meets commissioners' expectations, their only opportunity to do so is while they are in CDCR custody.[15] Yet, despite a 2019-2020 CDCR budget of approximately $13 billion (over $60 million of which was set aside for the Board's operations)[16], there is a fundamental gap between the Board's back-end expectations and the front-end programming and environment that CDCR provides. While the Board is asking questions about insight and remorse (and then denying parole when applicants are unable to answer those questions), CDCR is not helping prepare people to answer them satisfactorily.

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[11] Prior to this, the Board had a practice of finding 100 percent of crimes to be "especially heinous, atrocious, or cruel" under its regulations to deny parole in virtually all cases. (*In re Criscione*, Santa Clara County Superior Court, Case Number 71614, Order dated August 30, 2007.

[12] Young, Kathryne and Mukamal, Debbie. "Predicting Parole Grants: An Analysis of Suitability Hearings for California Lifer Inmates," *Federal Sentencing Reporter,* vol. 28, no. 4. April 2016, pg. 269-270, https://law.stanford.edu/publications/predicting-parole-grants-an-analysis-of-suitability-hearings-for-californias-lifer-inmates/.

[13] *In re Calderon* (2010) 109 Cal.Rptr.3d 229, 243, fn. 6, as modified on denial of reh'g.

[14] *Id*.

[15] To be clear, we do not accept the Board's position that a lack of insight correlates to an increased risk of violence for someone whose crime occurred decades in the past. Nor is there substantial evidence to support the Board's position. Indeed, in a criminal justice field that touts "evidence-based" practices, we should statutorily reject the use of "insight" in discretionary parole decisions, given the lack of evidence of its predictive value in this population, particularly when more objective factors indicate a person's changed lifestyle and activities over many years.

[16] "The 2019-20 Budget: Analysis of the Governor's Criminal Justice Proposals," *Legislative Analyst's Office,* 19 February 2019, https://lao.ca.gov/Publications/Report/3940.

According to a 2019 State Audit of California's rehabilitative programming[17], CDCR failed to meet programming needs in the following ways:

- CDCR had not validated the accuracy of the tools that were used to assess rehabilitative needs,
- A poor assessment process led to a mismatch between placements and needs,
- CDCR failed to meet any rehabilitative needs for 62 percent of those deemed "at risk to recidivate" who were released in the fiscal year 2017-18,
- CDCR had not ensured that its CBT (Cognitive Behavioral Therapy) curricula are evidence based, and
- CDCR had failed to establish performance measures for its rehabilitation programs and had not adequately assessed cost-effectiveness or impact on recidivism.

While the low historical grant rate has definite implications for the availability and effectiveness of regular programming, it also highlights some underlying structural issues that prevent parole applicants from understanding the factors that led to their life crimes and meaningfully healing and transforming their lives. In other words, not only is the Board failing to sufficiently change its operations in order comply with the legal requirement to normally grant parole, but CDCR's programmatic offerings have similarly failed to meet this obligation.

There is a widespread lack of understanding on how experiencing trauma manifests in acts of violence. A 2014 study found that between 62 and 87 percent of incarcerated adult males have experienced traumatic events at some point in their lifetime.[18] The rate is even higher for women and those who identify as transgender and nonbinary. Research on the trauma histories of incarcerated women have found that between 40 and 93 percent experienced intimate partner violence prior to their incarceration and 68 to 86 percent reported surviving sexual violence in their lifetime.[19] In 2013, researchers in San Diego found that people with violent convictions experienced childhood adversity, on average, at four times the rate of the general population.[20]

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[17] "California Department of Corrections and Rehabilitation – Several Poor Administrative Practices Have Hindered Reductions in Recidivism and Denied Inmates Access to In-Prison Rehabilitation Programs," *California State Auditor,* January 2019, https://www.auditor.ca.gov/pdfs/reports/2018-113.pdf.

[18] Wolff, Nancy and Huening, Jessica. "Trauma Exposure and Posttraumatic Stress Disorder among Incarcerated Men," *New York Academy of Medicine,* vol. 94, no. 4, 2014, pg. 707, http://europepmc.org/backend/ptpmcrender.fcgi?accid=PMC4134447&blobtype=pdf.

[19] "Research Across the Walls: A Guide to Participatory Research Projects & Partnerships to Free Criminalized Survivors," *Survived and Punished,* January 2019, pg. 4, https://survivedandpunished.org/wp-content/uploads/2019/02/SP_ResearchAcrossWalls_FINAL-compressedfordigital.pdf

[20] Reavis, James A. et al. "Adverse childhood experiences and adult criminality: how long must we live before we possess our own lives?." *The Permanente Journal*, vol. 17, no. 2, 2013, pp. 44-48, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3662280/.

Traumatic events overwhelm the human stress response. When someone experiences a threat, a host of psychological and physiological responses are triggered: the person's heart rate and blood pressure increase, their digestive system shuts down, their senses become more alert, and their muscles become tense. Research, including brain scan data, shows that survivors are easily triggered into or even stuck in the body's stress response even years after the traumatic events occurred.[21] It is not unusual for trauma survivors to be unconsciously scanning their environments for a threat or interpreting all events and interactions as potentially unsafe and threatening.

Despite meeting many of the markers for parole suitability, many trauma survivors in California prisons are unable to meet the Board's standard for "insight" and remorse because these standards are not consistently defined, applied or achievable. The majority of parole applicants have no opportunity to understand their childhood trauma, let alone heal from it.

Although the perception that remorse correlates with decreased recidivism is widespread among actors in the criminal justice system, no substantial empirical data supports this. There is no legal consensus as to the definition or markers of remorse, which has led decision-makers to determine whether gestures and actions align with their own conceptions of a complex and varied emotion.[22] Regardless of how remorse might naturally manifest in a particular individual, each commissioner expects to see parole applicants who are ready for release to act in a manner that aligns with their particular understanding of remorse. In his 2019 study, Shammas noted, "Eloquence, […] while important for facilitating the appropriate level of 'insight,' could also be negatively construed as a mark of evasion and falsity: the Board had the power to decide whether expressions of remorse were authentic indicators of self-knowledge and regret, or whether they were the duplicitous marks of a hardened criminal."[23]

The prison system is failing both the people who live and work inside it. Prison endangers everyone's health and welfare. Idle time, combined with the sense that one's personal development has no impact on whether one will be released, leads to high levels of violence, drug abuse, rule violations, depression, anxiety, PTSD, and other mental health conditions among incarcerated people. California's suicide rate among incarcerated people is

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[21] Benedict, Alyssa. "Using Trauma-Informed Practices to Enhance Safety and Security in Women's Correctional Facilities," *National Resource Center on Justice Involved Women,* https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/NRCJIW-UsingTraumaInformedPractices.pdf

[22] Bronnimann, Nicole. "Remorse in Parole Hearings: An Elusive Concept with Concrete Consequences," *Missouri Law Review,* vol. 85, no. 2, Spring 2020, pg. 326, https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=4441&context=mlr.

[23] Shammas, Victor, "The Perils of Parole Hearings: California Lifers, Performative Disadvantage, and the Ideology of Insight," *Political and Legal Anthropology Review,* vol. 42, no. 1, 2019, page 144.

higher than any other state.[24] Furthermore, the violence and cruelty inside our prisons also negatively impacts those who work there. According to one study, corrections officers suffer from post-traumatic stress disorder at more than double the rate of military veterans in the U.S.[25] Their suicide rate was also found to be twice as high as that of both police officers and the general public.

California must take specific steps and reckon with its failure to even come close to normally granting parole when people become eligible. We need to understand the obstacles that incarcerated people face when seeking to transform their lives and find a pathway out of prison, and we need to reexamine the validity and predictive value of the factors the Board uses in finding "current dangerousness." Specifically, this Committee should consider:

1. Strengthening the presumption in favor of parole,
2. Banning subjective assessments of insight or remorse in parole decisions,
3. Closing the gap between the Board's expectations (and parole applicants' trauma-informed needs) and CDCR's programmatic offerings, and
4. Strengthening the courts' authority to vacate improper parole denials.

Given the size and scope of these issues, it is strongly advisable to hold legislative hearings on these topics and invite currently and formerly incarcerated people to speak about their experiences with the Board. The legislature may also wish to authorize a pilot program to begin administering trauma testing (such as the Adverse Childhood Experiences Assessment) to better inform programmatic offerings in the prisons.

These problems are all connected. An unsafe, unhealthy hypermasculine environment that exacerbates previously existing mental conditions, combined with racist, gendered, religious and other power dynamics is a predictable recipe for a failed system. I appreciate the fact that this Committee is exploring ways to revise the Penal Code in order to make our system fairer and more equitable.

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[24] Hayes, Lindsay M. "Prison Suicide: An Overview and Guide to Prevention," *U.S. Department of Justice National Institute of Corrections*, June 1995, pp. 28, https://www.ncjrs.gov/pdffiles1/Digitization/157204NCJRS.pdf; Fagone, Jason and Cassidy, Megan. "Suicides in California prisons rise despite decades of demands for reform." *San Francisco Chronicle*, 29 September 2019, https://www.sfchronicle.com/bayarea/article/Suicides-in-California-prisons-rise-despite-14476023.php.

[25] Lisitsina, Dasha. "'Prison guards can never be weak': the hidden PTSD crisis in America's jails," *The Guardian,* 20 May 2015, https://www.theguardian.com/us-news/2015/may/20/corrections-officers-ptsd-american-prisons.

If you have any questions, please do not hesitate to contact me at (510) 271-0310. I am looking forward to meeting with you soon.

Sincerely,

Keith Wattley
UnCommon Law

APPENDIX

Selection of BPH decisions with groundless insight claims that were later vacated[26]

Case #1
The Board and Governor claimed Mr. C lacked insight and credibility because he denied allegations for which he had either been acquitted or never charged decades earlier. His release from prison was delayed by fifteen years based on the false claims, including those in his confidential file before a court ordered his release.

Case #2
During his parole hearing in January 2018, the commissioners cited an unreliable and previously undisclosed allegation to deny parole to Mr. S, claiming that he lacked insight and credibility because he correctly stated that the allegation was false. After the hearing, a quick review of the report's internal inconsistencies showed that it was completely unreliable. Governor Brown intervened and urged the Board to vacate the unlawful decision (after the Board initially refused to revisit its decision). Mr. S was granted parole at the re-hearing eight months later.

Case #3
The Board denied Mr. A parole in 2009, finding that he lacked insight into his offense because he referred to the crime as an "accident." The Board concluded that calling the crime anything but a double murder "was to minimize it" and demonstrated he did not have insight into the causative factors of his conduct. A reviewing court found that, even if his statements showed a lack of insight, it was not "rationally indicative" that Mr. A unreasonably endangered public safety.

Case #4
The Board denied Mr. V parole in part because he had "not completely come to grips [with] the life crime." The reviewing court held that such a conclusion is inconsistent with the psychological evaluation and not otherwise supported by the record.

Case #5
The Board denied Mr. M parole in 2010 in part because he lacked insight into his drug use and addiction. However, the court found "nothing in the record...indicates that [M] fails to appreciate the causes of his substance abuse and its relationship to his crime, and his own criminal responsibility." Even if there had been a lack of insight, the court observed, that was beside the point because "the record is manifestly bereft of evidence connecting any such deficit to the conclusion he would present a risk to public safety if released on parole."

Case #6
In 2009, the Board denied Mr. K parole, in part, because he "had not taken full responsibility for his actions and that he needed to develop insight into what caused him to commit the

[26] We can provide the Committee with identifying information if desired.

crime." The court found that the record did not support the conclusion: Mr. K's "failure or inability to fill in a couple of blanks regarding the commitment offense does not show he is a current threat to public safety. This is particularly true in light of the strong evidence of rehabilitation in the record."

Case #7
In 2008, Mr. D was denied parole in part because the Board did not get a sense that he "really looked into [the crime] as deeply or you have the grasp of what you did as thoroughly as we'd like to see." However, the court found that "Board members merely intoned the conclusory phrase 'lack of insight,' without offering any explanation of what was lacking, or referencing anything in [D's] record supporting the conclusion."

Case #8
In 2010, the Board denied Mo parole in part because he "failed to accept full responsibility for the murder and he lacked insight into his criminality because he never apologized for his actions and had only moderate insight into his antisocial thinking and criminality." The court found no evidence "that defendant lacks or has insufficient insight in any area."

Case #9
The Board denied Mr. Y parole primarily for his lack of insight because he "recalled nothing about the crime and did not have any insight into why he committed it." However, the court found that "the Board ignored all evidence of petitioner's insights" and "relied on guesswork."

Case #10
Mr. W was denied parole primarily because the Board believed he "lacked insight into the life offense because he minimized his actions." However, the court found that Mr. W admitted he was solely responsible for the murder, expressed remorse, underwent "severe introspection" and changed how he responded to anger. The court found there was "little more [W] could have done" to demonstrate he had sufficient insight into the life crime.

Exhibit B

Heidi Rummel, Director of Post-Conviction Justice Project,
USC Gould School of Law

Case No. S237014

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE ROY BUTLER (D-94869), On Habeas Corpus.	Court of Appeal Case No.: A139411 Superior Court Case No.: 91694B

California Court of Appeal, First Appellate District, Division Two
California Superior Court for Alameda County, Hon. Larry J. Goodman

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In support of Roy Butler

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INTRODUCTION

It is unconstitutional for the California Board of Parole Hearings (Board) to continue to hold an individual in prison indefinitely because the Board has determined, in its very broad discretion, that the individual poses a risk to public safety. The current system completely divorces the length of an individual's confinement from his culpability for his crime, and thus violates the prohibitions on cruel/unusual punishment under both the U.S. and California Constitutions. The Board's power to imprison indeterminately sentenced inmates beyond their minimum terms, until the Board subjectively deems the inmates "suitable" for release, must be "subject to the overriding constitutionally compelled qualification that the maximum [term an inmate is required to serve] may not be disproportionate to the individual prisoner's offense." *In re Rodriguez*, 14 Cal. 3d 639, 652 (1975).

The Board's implementation of the parole system for indeterminately sentenced inmates has not always been unconstitutional. As described below, this Court has dictated clear constitutional obligations, which were recognized by the California Legislature and implemented by the Board in its regulations. However, as will be discussed, through the Board's gradual, systematic shifts in its regulations and practices – shifts that were improper and unprompted by statute – the parole process for indeterminately sentenced inmates has morphed over time. The Board's

unauthorized chipping away at clear constitutional limitations on its power has led to the current system that defies this Court's constitutional mandates and that enacts precisely the system that the Legislature intended to do away with for all inmates in passing the Determinate Sentencing Law (DSL).

In short, through regulatory opportunism, the Board abandoned its constitutional responsibility (as articulated by this Court) to set constitutional *maximum* terms (primary terms) for all indeterminately sentenced inmates. It then blurred the critical distinction between its "term-setting" and "parole-granting" powers, and warped its practices such that setting any "term" set for indeterminately sentenced inmates was delayed unless and until an inmate was found to be suitable for relase on parole, and such that this "term" served as a *minimum* instead of a *maximum* length of confinement. Now, after rendering meaningless the concept of "setting a term," the Board argues that it need not set any terms at all, and misleadingly attempts to use this Court's inapposite ruling in *Dannenberg* as an excuse for failing to fulfill its constitutional obligations and for resurrecting the parole regime that the DSL sought to eliminate.

Although there has been widespread confusion (and obfuscation) regarding the constitutional flaws in the parole regime – confusion in which this Court has been unwittingly caught up – now is the time to right the ship. The goal of this brief is to shed light on the constitutional infirmities

of our current parole system by offering a thorough historical and constitutional context. The brief seeks to illuminate the legislative and legal history that is glossed over in the Board's attempt to wave away any concerns about what it is doing behind the curtain, and to ensure that this Court can make a decision based on an accurate understanding of how the system reached its current state.[2]

This Court should order the Board's full compliance with *Rodriguez*, including the setting of constitutional maximum primary terms early in indeterminately sentenced inmates' confinement.

ARGUMENT

I. The Board's Current Parole Regime Violates Clear Constitutional Limits on Sentencing.

This Court held in *In re Rodriguez* that, under both the U.S. and California Constitutions, an individual who receives an indeterminate sentence may not be imprisoned past a maximum term that is constitutionally proportionate to his "culpability for the crime," as measured by the "circumstances existing at the time of the offense."

[2] This brief uses "Board" as a generic term to refer to the parole authority in California, which has had various names over the years. Prior to passage of the DSL, the parole authority for male inmates was called the "Adult Authority," and the parole authority for female inmates was called the "Women's Board of Terms and Paroles." The DSL combined these entities and renamed them the "Community Release Board," which was subsequently renamed the "Board of Prison Terms," and later, the "Board of Parole Hearings."

Rodriguez, 14 Cal. 3d at 652-53. This maximum term, which the Court called the "primary term," is not the maximum penalty allowed by law. Instead, it is a term of imprisonment determined to be proportionate to the "culpability of the individual offender" for his particular participation in the particular crime. *Id.* *Rodriguez* explicitly recognized that the "measure of the constitutionality of punishment for crime is individual culpability." *Id.* at 653. The U.S. Supreme Court, too, has placed culpability at the heart of the inquiry into the appropriateness of a punishment under the Eighth Amendment to the U.S. Constitution. *See Atkins v. Virginia*, 536 U.S. 304, 319 (2002).

The *Rodriguez* Court recognized that, once an inmate's appropriate sentence has been set, the Board had power to consider "occurrences subsequent to the commission of the offense" – such as conduct in prison, rehabilitative programming, and parole plans – in deciding whether to release an inmate on parole *prior* to the expiration of his constitutional maximum "primary term," such that the remainder of that term would be served in the community. *Rodriguez*, 14 Cal. 3d at 652. Critical to the Court's reasoning, however, was its insistence that this "power to grant parole" is "independent" of the "basic term-fixing responsibility" to set a constitutional maximum primary term. *Id.*

The clear principles established by *Rodriguez* dictate fundamental constitutional parameters on sentencing and parole – parameters that the

Board has hustled to the sidelines or sought to do away with completely. First, under *Rodriguez*, prison terms are only constitutionally acceptable to the extent they are proportional to an individual's culpability for his crime. Second, this culpability must be determined based on the circumstances at the time of the offense. Determining a maximum sentence by any other measure – including by post-conviction conduct or a subjective evaluation of "suitability" – undermines the legislative intent of retribution and uniformity in sentencing, and works at cross purposes with the constitutional requirements of proportionality and notice.

The U.S. Supreme Court has held that prison terms are subject to proportionality analysis, which was also the linchpin of the *Rodriguez* Court's analysis. *See Solem v. Helm*, 463 U.S. 277, 288-89 (1983). While there are different types of proportionality, the one that is relevant here involves assurance of similar punishment for similar crimes and similar levels of individual culpability. "If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive." *Id.* at 291. To the extent that federal constitutional cases reflect a reluctance to impose strict proportionality limits on prison terms, the Court has made clear that its primary concern has been to ensure that judgments "be informed by objective factors to the maximum possible extent." *Rummel v. Estelle*, 445 U.S. 263, 274 (1980) (quoting *Cohen v. Georgia*, 433 U.S. 584, 592

(1977)). This goal necessarily places importance on the "legislative prerogative" of determining appropriate sentences. *Estelle*, 445 U.S. at 274. As explained below, in California, the legislative judgments so critical to constitutional legitimacy, as well as any semblance of objective factors, have receded into obscurity.

Since the constitutional guideposts were established by this Court in *Rodriguez*, the Board has gradually dismantled the parole system established to meet those guideposts. In its place, the Board has created a system in which the maximum sentence for every single indeterminately sentenced inmate – regardless of the severity or circumstances of, or the inmate's level of participation in, the crime – is life in prison, because there is never a time when an inmate is entitled to an assessment of a constitutional maximum primary term within the available statutory range based on his culpability for his individual offense. Because a term is never specified, there is no opportunity for an administrator or court to consider whether the sentence imposed is proportionate to the offender's culpability, as both the U.S and California Constitutions require. (Indeed, prior to 2016, the only time the Board assessed the individual's culpability was to set a *minimum*, rather than a maximum, term, and since 2016 it argues that it can throw out that ritual altogether.)

Further, the life-in-prison maximum is reduced only if the Board subjectively determines that the inmate is "suitable," largely based on

various post-conviction factors that have no constitutional basis. 15 Cal. Code Regs. § 2281(d) (listing factors tending to show suitability). Thus, two individuals, who committed the same offense under identical circumstances and received the identical statutory sentence of years-to-life, could serve vastly disparate terms of confinement based solely on subjective administrative judgments based on post-conviction circumstances. If a prisoner is repeatedly denied a finding of suitability for parole – as most are – he will frequently exceed his constitutionally appropriate primary term before he even receives it. This makes the judicial protection against disproportionate sentencing impossible, as *Rodriguez* held. *See Rodriguez*, 14 Cal. 3d at 650 (holding that indeterminate sentencing was being implemented in an unconstitutional manner because terms were not "fixed with sufficient promptness to permit any requested review of their proportionality to be accomplished before the affected individuals have been imprisoned beyond the constitutionally permitted term").

The parameters from *Rodriguez* – that maximum prison terms must be based on culpability at the time of the crime – are critically important because they are the only way to hold true to the hierarchy of sentences established by the Legislature and carried out by sentencing courts. For crimes where the offender's significant culpability renders life in prison constitutionally appropriate, the Legislature has created a separate available

sentence (life without parole), which is distinct from indeterminate sentences. *See, e.g.*, Cal. Penal Code § 190.2. By contrast, sentencing a defendant to an indeterminate sentence (*e.g.*, 15-to-life, 25-to-life) necessarily involves a finding that the crime does *not* render life imprisonment constitutionally appropriate – either because life without parole is not an available sentence for that crime, or because it is not merited by the facts of the case. The existing parole process collapses this distinction – a distinction enacted in state law and imposed by sentencing courts – by creating a de facto maximum sentence, for all indeterminately sentenced inmates, no different from the sentence statutorily reserved for those whose crimes merited life without parole.

Similarly, by making all indeterminately sentenced inmates subject to the same maximum term – life in prison – the Board's practice collapses the statutory distinctions between different indeterminately sentenced crimes enacted by the Legislature and implemented by sentencing courts. For example, the Penal Code distinguishes between second-degree murder (15-to-life) and first-degree murder (25-to-life), reflecting a judgment that these two crimes are not the same in terms of severity and that they deserve different punishments. *See* Cal. Penal Code §§ 189, 190(a). Yet, under the Board's current parole regime, inmates serving these sentences are subject to an identical maximum term (life in prison) that will only be reduced based on a variety of factors, most of which have nothing to do with

individual culpability or the commitment offense, and many of which involve subjective assessments of occurrences subsequent to the crime. *See* 15 Cal. Code Regs. § 2281(c)-(d).

Significantly, as recognized by the Legislature, life in prison is simply not the appropriate maximum term for every person who receives an indeterminate sentence. If culpability does not play its constitutional role in dictating the appropriate maximum term, a third-striker who is convicted of purse-snatching has the same maximum sentence as the individual convicted of a multiple murder, *see* Cal. Penal Code §§ 667(e)(2)(A) (Three Strikes Law), 1192.7(c)(19) (defining robbery as a "serious" felony), 211 (defining "robbery"), 190(a) (setting penalty for first-degree murder), and the only thing that will reduce this maximum is the Board's determination that the inmate has become particularly insightful, or has done a sufficient number of rehabilitative programs, and whether the Board and the Governor have made a subjective evaluation of "suitability."

In addition to the constitutional concern about proportionality, the Board's practices raise serious concerns about due process. The federal Due Process Clause is violated when vagueness in sentencing limits invites "a wide-ranging inquiry" that "both denies fair notice to defendants and invites arbitrary enforcement." *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015) (striking down vague enhancement provision in federal law). The Board's current system cruelly denies fair notice by leaving inmates

with no idea of whether, even after decades in prison, there is any end in sight or they will continue on a perpetual cycle of periodic parole hearings in which they are told they are not yet entitled to know when their sentence will have been fully served. The Legislature, as detailed below, was concerned about this issue and its effect on prison morale and violence. *See infra* at pp. 27-31. Moreover, the problem of arbitrariness in enforcement is substantial. As the system stands now, periodic parole hearings hold the key not just to *early* release to serve the remainder of a term in community, but to ever being released *at all*, as an end-point need never be supplied.

This reality cannot stand in the face of *Rodriguez*. *Rodriguez* made clear that the "oft-stated" maxim that "life is life," is as erroneous as it is callous. *Rodriguez*, 14 Cal. 3d at 652; *see also id.* at 650 (rejecting the Board's assertion that it "has no obligation, either statutory or constitutional, to ever fix [an indeterminately sentenced inmate's] term at less than life imprisonment"). That opinion resoundingly qualified the general rule that a prisoner has no right to a term fixed at less than the statutory maximum because of the "overriding constitutionally compelled qualification that the maximum may not be disproportionate to the individual prisoner's offense." *Id.* at 652. *Rodriguez* made clear that maximum terms must be dictated by individual culpability at the time of the crime.

The Board argues that *In re Dannenberg*, 34 Cal. 4th 1061 (2005), supports the unconstitutional parole regime it created, but *Dannenberg* need not preclude this Court from acting. First, as described below, the *Dannenberg* Court was presented with, and relied on, incomplete information, leading to a misunderstanding of the legislative history behind the DSL and the evolution of the parole system over time. Second, the Board's reliance on *Dannenberg* as a proxy for its assertion that the Board has no constitutional term-fixing responsibility is misplaced. *Dannenberg* did not actually consider the Board's term-fixing obligation – something the Board had long before abandoned; instead, it only addressed the Board's "independent" and distinct parole-granting power. The Board's use of *Dannenberg* to justify its position is yet another instance of avoiding its constitutional obligation.

II. The Board Systematically Dismantled A Parole Process That Complied With Its Constitutional Obligation To Set A Proportionate Maximum Term.

In 1976, the Board implemented regulations to bring the parole system into compliance with the constitutional mandate of *Rodriguez* – that indeterminately sentenced inmates receive a constitutional maximum "primary term" based on culpability, within which the Board can set an earlier parole release date based on suitability for release. The California Legislature relied on the Board's term-setting practices under these regulations when it enacted the DSL in order to address the abuses of

indeterminate sentencing. Rather than indicating a belief that the previously existing parole system was only problematic for those whose sentences became determinate, the legislative history of the DSL reveals that the Legislature was equally concerned about those who remained indeterminately sentenced after the DSL's passage. As for those inmates, legislators explicitly relied on the Board's then-existing practice of setting constitutional maximum "primary terms," and it sought to further curb the abuses of the prior parole system by revising the statutes governing the Board's parole-granting power.

However, over the years, the Board systematically dismantled the parole system that met the constitutional requirements mandated by this Court and intended by the Legislature. Through piecemeal changes not authorized by statute, the Board ceased setting constitutional maximum primary terms for indeterminately sentenced inmates. It eroded the limitations on its parole-granting power, and ultimately, it began setting only one "term" for indeterminately sentenced inmates – a term that served as a *minimum* sentence. Under this system, each indeterminately sentenced inmate's maximum term was the same – life in prison – and that maximum could only be reduced by the Board's subjective evaluation of "suitability," based on a variety of factors, most of which had nothing to do with culpability or the circumstances of the crime. This system – in which punishment is not dictated by culpability, and there is no certainty about

length of terms and no notice to the inmate of the penalty imposed for various crimes – is not only unconstitutional, but is precisely the system the Legislature intended the DSL to eliminate.

After reducing "term-setting" to a meaningless formality that serves no constitutional purpose and does not even attempt to fulfill the Board's constitutional obligation, the Board has argued various things – including that "terms" need not be set until an inmate is found suitable, and that terms need not be set, by the Board, at all. The Board also relies heavily on *In re Dannenberg*, in which the Attorney General wrongly argued – and this Court accepted – that the Legislature passed the DSL *intending* to retain the problematic previously existing parole system for inmates who remained indeterminately sentenced. But none of these arguments has any basis in fact, and none is a substitute for the Board's constitutional duty to set constitutional maximum primary terms.

A. The Parole System Under the Indeterminate Sentencing Law (ISL)

Prior to passage of the DSL, under California's Indeterminate Sentencing Law (ISL), most defendants convicted of a felony were sentenced to an indeterminate prison term. Parnas & Salerno, *The Influence Behind, Substance and Impact fo the new Determinate Sentencing Law in California*, 11 U.C.D. L. Rev. 29, 29-30 (1978). Under the ISL, courts were prohibited from fixing the actual term a defendant would serve

in prison, and the length of a prison term for a given crime was not set by the legislature. Appendix of Sources In Support of Amicus Brief (Amicus App'x) Ex. P (Cal. Penal Code §§ 1168, 1168a (1971)); Cassou & Taugher, *Determinate Sentencing in California: The New Numbers Game*, 9 Pac. L.J. 5, 8 (1978). Instead, courts imposed sentences as a range – such as 1 year to life or 5 years to life – and the Board was tasked with determining how many years the defendant ultimately served until release. *Id.* The Board had the power to fix the inmate's prison term at less than the maximum (life), and also to allow the inmate to leave prison prior to that maximum and serve the rest of his or her term on parole. *See* Amicus App'x Ex. O (Cal. Penal Code §§ 3020, 3040 (1970)); *Rodriguez*, 14 Cal. 3d at 645-46.

This system garnered tremendous criticism for being arbitrary and unfair. Although the Board was authorized to make decisions early on about how long an individual inmate would likely have to serve, it rarely did so. Cassou & Taugher, at 9. Instead, it regularly withheld the setting of an ultimate release date until it decided the inmate was ready for release – a calculation that focused, not on the inmate's culpability for the commitment offense, but on the authority's subjective assessment of the inmate's level of rehabilitation and its prediction of the inmate's likely future behavior. *Rodriguez*, 14 Cal. 3d at 646. This resulted in endless "ambiguity," as inmates had no idea when their confinement would end (until it actually did), creating "tension" and "cynicism" among inmates. Parnas & Salerno,

at 30. It also gave rise to significant disparities in length of confinement between individuals who committed the same crimes, and raised serious proportionality concerns given the disparity between the severity of a crime and the length of time an individual was imprisoned for it. Cassou & Taugher, at 11.

B. The Board's Response to *Rodriguez*

In June 1975, this Court held that the parole authority's practice of deferring the setting of a prison terms was unconstitutional. *Rodriguez*, 14 Cal. 3d at 650. In that case, although the petitioner had served 22 years on a one-year-to-life sentence, the Board had never determined what the appropriate prison term would be, and had refused to grant parole, keeping the petitioner imprisoned indefinitely. *Id.* at 643-44. Deeming this practice unconstitutional, the *Rodriguez* Court held that "the [Board] must fix terms within the statutory range that are not disproportionate to the culpability of the individual offender." *Id.* at 652. As noted above, this Court explained that the prohibition against cruel/unusual punishment (in both the U.S. and California Constitutions) entitles each inmate to have a "primary term" set based on "individual culpability" and the "circumstances existing at the time of the offense." Significantly, it must be set with sufficient promptness to enable effective review of a proportionality challenge. *Id.* at 650. The *Rodriguez* Court emphasized that "[t]his basic term-fixing responsibility . . . is independent of the [Board's] power to grant parole"

prior to the expiration of the primary term – a power whose exercise can be based on occurrences "subsequent to the commission of the offense." *Id.* at 652.

The Board promptly changed its practices in response to the Court's decision in *Rodriguez*. On September 2, 1975, the Chairman of the Board (then called the Adult Authority) issued Directive No. 75/30 entitled "Implementation of *In re Rodriguez*," detailing new operating procedures. *See* 3/20/17 Butler Mot. for Judicial Notice, Ex. A (Directive No. 75/30). The stated goal of the procedures was to "bring Adult Authority term setting practices into compliance with recent changes in the law." *Id.* at 1. Directive No. 75/30 interpreted the ISL to comply with *Rodriguez*, and explained that a "primary term" would be fixed for "each offense" in conformance with guidelines designed to "assur[e] equal treatment in sentencing practices." *Id.* In setting the primary term, the Adult Authority relied on information specific to an inmate's personal culpability for the crime and criminal history, and could not rely on conduct subsequent to the offense. *Id.* at 2-6. "Once fixed, the primary term for that offense cannot be refixed upward," and in general, "no primary term will be fixed above 25 years." *Id.* at 1, 6. The Directive clarified that its procedures were specific to "term fixing," and were "distinct" and "should not be confused with the procedures governing parole granting." *Id.* at 1. The Directive

also anticipated that, "[i]n the vast majority of cases, an inmate will serve a portion of his primary term inside prison and a portion of it on parole." *Id.*

By 1976, the Adult Authority had promulgated regulations implementing *Rodriguez*'s requirement that ISL inmates receive a constitutional maximum primary term, separate from discretionary earlier parole release. As amended, Division 2 of Title 15 included Chapter 2 (Term Fixing) and Chapter 4 (Parole Release). Amicus App'x Ex. K (Reg. 76, No. 21, p. 151 (May 22, 1976)). In Chapter 2, the 1976 regulations provided that a "primary term" must be fixed for all indeterminately sentenced felons, and that it should be set at the initial parole hearing (§ 2100(a), (c)). *Id.* at 179. The regulations were clear in establishing that the primary term is "the maximum period of time which is constitutionally proportionate to the individual's culpability for the crime," and "should not be confused with the parole release date" (§ 2100(a)). *Id.* Under the regulations, setting a primary term was solely rooted in an assessment of culpability. The primary term was calculated by setting a base term – using "typical" and "aggravated" ranges of years established by the regulations for various crimes – which could be adjusted upward based on prior convictions or prison terms (§§ 2150-2156). *Id.* at 183-85.

Separately, the 1976 regulations specifically provided for the setting of a "parole release date" within the period of the constitutional maximum primary term (§ 2250). *Id.* at 207. Early release through parole was

reserved for those inmates found "suitable" (§ 2300). *Id.* at 209. Suitability, in turn, involved a judgment about whether the inmate would pose an "unreasonable risk of danger to society" if released early, based on specific factors relating to criminal history (not post-conviction conduct) that tend to show unsuitability (§§ 2300-2301). *Id.* If the inmate was found suitable, a "parole release date" was set by determining a "total period of confinement" (§ 2350). *Id.* at 210. Notably, the "total period of confinement" was calculated by using the same base term used in primary term fixing (focusing on culpability for the offense), which could then be adjusted up and/or down based on various pre-conviction, commitment, and post-conviction factors (§§ 2250, 2350-2356). *Id.* at 207, 210-13.

C. Senate Bill 42 – The DSL

At the end of 1974 – prior to the decision in *Rodriguez* – the California Legislature introduced Senate Bill 42 (SB 42), the Determinate Sentencing Law (DSL), to reform some of the objectionable elements of the indeterminate sentencing regime. In 1976, after *Rodriguez*, legislators revived SB 42, which ultimately passed and became effective July 1, 1977, fundamentally altering the sentencing scheme in California.[3] Stats. 1976, ch. 1139, pp. 5061-5178.

[3] SB 42 was originally introduced in late 1974, but it hit roadblocks and ultimately failed to pass out of the Assembly Criminal Justice Committee in August 1975. Cassou & Taugher, at 11-16. It lay dormant for several months before being revived in 1976. *Id.* at 16-17.

There is no question that the DSL was intended to target the widely acknowledged and criticized abuses of the indeterminate sentencing regime. It had several specified goals. For one, the bill sought to take down the prevailing "medical model," under which length of confinement was dictated by the parole authority's evaluation of an inmate's rehabilitation rather than the inmate's culpability for the crime. As explained by SB 42's primary sponsor, Senator John A. Nejedly, the bill was intended to "[e]nd subjective evaluation of rehabilitation as a factor in determining release," and address the problem that "the eventual length of [inmates'] prison stays will really depend not on what the offense was," or on their behavior, but rather on "subjective evaluation by psychologists and laymen on whether a convict is rehabilitated." Amucis App'x Ex. A (6/12/75 Nejedly Letter to Governor, at 1, 3). The Senate record includes testimony that the fundamental principle underlying the "medical model" – the predictability of future violence – was "untenable," and that numerous studies had shown that most offenders predicted to be violent when released were not. Amicus App'x Ex. B (Summary of 4/15/75 Testimony of Professor John Monahan, UC Irvine before the Senate Select Committee on Penal Institutions (in Senate Judiciary file)); *see also, e.g.*, Parnas & Salerno, at 30 (noting that the medical model had been "totally invalidated"). Following this testimony, Senator Nejedly expressed to the Governor that the "medical model" should be "cast off," as it has "not produced law-

abiding offenders either inside the prison or ex-offenders outside and seem[s] unlikely to do so in the future." Amicus App'x Ex. A (Memo attached to 6/12/75 Nejedly Letter to Governor, at 2); *see also, e.g.*, *id.* Ex. C (9/20/76 Enrolled Bill Report on SB 42 prepared for Governor by Department of Corrections, at 3 (noting the problems that proponents of the bill claim are created by the "medical model")).

Moreover, the bill sought to address the disparities in, and lack of uniformity of, sentencing that resulted from the ISL, which Senator Nejedly described as "manifestly unjust." Amicus App'x Ex. A (Memo attached to 6/12/75 Nejedly Letter to Governor, at 2); *see also, e.g.*, *id.* Ex. D (8/17/76 Nejedly Letter to Superior Court Judge John E. Longinotti, at 4 (stating indeterminacy "has resulted in unfairness and injustice")); *id.* Ex. E ("Benefits of SB 42, As Amended April 22, 1976 in Comparison with Current Law" (in Governor's file) (listing as benefits of SB 42 that it "[r]emoves disparity in prison sentences for same crimes currently due to use of invalid behavior science predictors" and "[a]voids disparity in prison sentences for same crimes currently due to conscious or unconscious influences of personal biases of parole board members under a system which provides unparalleled discretion")).

In addition, the bill sought to reduce violence in prison. As Senator Nejedly explained, "The lack of uniformity in sentencing breeds resentment and greater tensions within the prisons, which contribute to an atmosphere

of violence." Amicus App'x Ex. A (6/12/75 Nejedly Letter to Governor, at 3); *see also, e.g.*, *id.* (Memo attached to 6/12/75 Nejedly Letter to Governor, at 2 (same)). He continued, the "clouded picture" of what is required to earn parole release "contributes significantly to prison unrest." *Id.* (6/12/75 Nejedly Letter to Governor, at 3); *see also, e.g.*, *id.* Ex. C (9/20/76 Enrolled Bill Report on SB 42 prepared for Governor by Department of Corrections, at 12 (recommending that the Governor sign SB 42 because the application of the ISL presents "paralyzing uncertainties, anxieties and frustrations that sometime tend to precipitate violence")).

Finally, Senator Nejedly tied the reforms of SB 42 directly to due process concerns. In a letter to a superior court judge, he wrote:

> [N]otice of the penalty to be incurred for violation of the law [i]s a basic tenet of due process. That fundamental precept is heightened rather than reduced by SB 42 because the only real notice which existed under the [ISL] was either the meaningless statutory ranges or the statistics for actual time served in past years; the latter always with the unknown quantity of the extent of political or economic expediency changing those statistics by the 'whim and caprice' of the unbridled discretion of the Adult Authority.

Amicus App'x Ex. D (8/17/76 Nejedly Letter to Superior Court Judge John E. Longinotti, at 3-4). He further stated: "A person should not be made to guess what his actual punishment will be." Amicus App'x Ex. A (Memo attached to 6/12/75 Nejedly Letter to Governor, at 2).

When the DSL was passed in September 1976, it expressly emphasized its purpose of proportionality and uniformity and codified the

Legislature's constitutional concerns regarding notice, uniformity, proportionality, and meting out punishment according to culpability for an offense rather than according to subjective evaluations of future behavior. *See, e.g.*, Amicus App'x Ex. R (Stats. 1976, ch. 1139, pp. 5140, 5151-52).

D. Indeterminate Sentencing Under the DSL

Although six crimes would still carry indeterminate sentences following passage of the DSL – first-degree murder, kidnapping for ransom, trainwrecking, assault by a life prisoner, sabotage, and injury by explosives, *see* Cassou & Taugher, at 29 – the legislative history suggests that the Legislature was concerned that the basic problems with the ISL *also* applied to those crimes. The legislative history of SB 42 shows that the Legislature believed it was addressing those concerns for those who remained indeterminately sentenced, despite the fact that their actual sentences remained indeterminate.

First, the legislative history shows an explicit belief by the Legislature that those who remained indeterminately sentenced under the DSL would still have constitutional maximum primary terms set as required by *Rodriguez*. For example, in a letter, Senator Nejedly confirmed that the Board would be required to "set a parole date for those left indeterminate[ly sentenced]," but explained that "[t]his is nothing new but rather is simply in keeping with the import of recent court decisions and Adult Authority policy." Amicus App'x Ex. D (8/17/76 Nejedly Letter to Superior Court

Judge John E. Longinotti, at 7). Indeed, the Legislature was well aware of *Rodriguez* and the requirements it imposed on the parole authority. In letters about SB 42, Senator Nejedly repeatedly explained that *Rodriguez* "requires the Adult Authority, on the basis of the crime the individual has committed, to set a 'primary term' soon after the inmate enters prison, a sentence that can be reduced but cannot be increased," and he recognized that "the Adult Authority has been carrying out a policy of setting parole release dates for most all inmates." Amicus App'x Ex. F (9/2/76 Nejedly Memo to All Interested Persons, at 2); *see also id.* Ex. D (8/17/76 Nejedly Letter to Superior Court Judge John E. Longinotti, at 9); *id.* Ex. G (8/24/76 Nejedly Memo to All State Legislators, at 2). With *Rodriguez* and the parole authority's resulting practices in the background, the legislative history materials make clear the Legislature's understanding that constitutional maximum primary term setting *would continue* for those who remained indeterminately sentenced under the DSL.[4]

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[4] *See, e.g.*, Amicus App'x Ex. C (9/20/76 Enrolled Bill Report on SB 42 prepared for Governor by Department of Corrections, at 8 (explaining that, under the DSL, parole release dates for indeterminately sentenced inmates "will be determined by a board in a manner generally similar to that now used")); *id.* Ex. H (9/3/76 "Highlights of Senate Bill 42," at 3 (in Governor's file) (explaining that under the DSL, the parole board will "set[] terms for inmates remaining indeterminately sentenced")); *id.* Ex. I (Criminal Justice Newsletter, vol. 7, no. 18, at 2 (Sept. 13, 1976) (in Governor's file) (same)); *id.* Ex. J (Bill Analysis prepared by Assembly Committee on Criminal Justice, at 1 (in Senate Judiciary file) (noting that the parole authority's determinations of the actual prison term to be served, and how much of that time could be served on parole,

In addition, nothing in the legislative history suggests that the Legislature did not believe its primary concerns about parole practices under the ISL applied to those who remained indeterminately sentenced under the DSL. In elaborating on the problems with the ISL – *e.g.*, the lack of uniformity and proportionality of sentences, the lack of notice to criminal defendants of what their sentence would be, and the basing of actual prison terms on subjective predictions of future behavior instead of on culpability – the sponsors of the bill never suggested that these problems were only concerns for those convicted of less severe crimes. To the contrary, a document in the Governor's file on SB 42 specifically enumerates as a "benefit" of SB 42 that, for inmates who remain indeterminately sentenced under the DSL, their "crime . . . rather than 'prediction of behavior' [would be the] criteria for parole date setting." Amicus App'x Ex. E ("Benefits of SB 42, As Amended April 22, 1976 in Comparison with Current Law" (in Governor's file)). The Legislature intended to address the same fundamental problems that resulted from indeterminate sentencing, albeit in different ways, both for those whose

"[h]istorically . . . were not made until long into the prison sentence," but that "[c]urrently" the parole authority "attempt[s] to make these decisions early in the term")).

sentences would become determinate and those whose sentences would remain indeterminate.[5]

Further, the Legislature reformulated the statutory provision governing parole-granting power in a manner that addressed its concerns about indeterminacy. The DSL amended Penal Code § 3041 to provide that, at an inmate's initial parole hearing, a "parole release date" shall "normally" be set. Amicus App'x Ex. R (Stats. 1976, ch. 1139, pp. 5151-52). Notably, the term "parole release date" is the exact term used in the then-existing Board regulations relating to its parole-granting, as opposed to its term-setting, power, *see* Amicus App'x Ex. K (Reg. 76, No. 21, pp. 207, 210 (May 22, 1976) (§§ 2250, 2350)), indicating that § 3041 was *not* intended to govern term-setting. Also, consistent with the Legislature's intent to address sentencing disparities, the DSL provides that parole release dates must be set "in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public." Amicus App'x Ex. R (Stats. 1976, ch. 1139, p. 5151 (§ 3041(a))). The Legislature's overarching concern that culpability be the measure of punishment is also reflected in its designation of the one circumstance in which the Board can deviate from its duty to "normally" set a parole release

[5] An L.A. Times article reported that capital offenses retained indeterminate sentences under the DSL because "[s]upporters thought it would be impossible to secure legislative agreement on a more specific term." *Finally, Sentences with Periods*, L.A. Times, at 6 (Sept. 2, 1976).

date: where the inmate's crime and criminal history pose a particular cause for concern. *See id.* at 5152 (§ 3041(b) (stating that the board may decline to set a parole release date if it determines "that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting")).

Thus, although the DSL allowed for a consideration of public safety in conjunction with evaluating parole suitability of indeterminately sentenced inmates, it is clear that there was never an intention that this assessment would dictate an indeterminately sentenced inmate's maximum term. Given the Legislature's expressed understanding that the Board would continue to set constitutional maximum primary terms, in amending this section, and in lifting the term "parole release date" directly from the Board's 1976 regulations implementing *Rodriguez*, the Legislature clearly intended that parole release dates would be set *within* the primary term, allowing the inmate to leave custody early and serve the remainder of his term out in the community.

E. The Board's Policy Shifts Eroded The Constitutional Limits On The Parole System.

Following the passage of SB 42, and a subsequent clean-up bill AB 476, Stats. 1977, ch. 165, pp. 639-80, the new Community Release Board

promulgated updated regulations in 1977, which muddied the DSL's commitment to the two distinct Board functions of term-setting and parole-granting.

On the one hand, the Board renamed the Chapter entitled "Term Fixing," labeling it "Term Decisions," and altered the provisions so that they did not relate to the setting of primary terms. Amicus App'x Ex. L (Reg. 77, No. 28, p. 151 (July 9, 1977)); *id.* at 191-94.

On the other hand, the Board amended the separate "Parole Release" Chapter of the regulations in a manner relatively consistent with the DSL. The 1977 regulations continued to provide that the Board would "normally" set a "parole date" for inmates who were "suitable," and that suitability required considering whether the inmate posed an "unreasonable risk of danger to society" if released (§ 2280). *Id.* at 228-29. The updated regulations tracked the language of Penal Code § 3041. They maintained the importance of uniformity, proportionality, and culpability in determining *whether to set a parole date* (§§ 2280-2281), although post-conviction factors could be used *to calculate* that date when it was set. *See id.* at 228-29 (providing that a parole date "shall normally be set," that it must be set in a manner that provides for "uniform terms," and that "the timing and gravity of the current offense or past offenses" should be considered in determining whether to set a parole date). The regulations also remained consistent in that calculating a parole date for parole-suitable

inmates required determining a "total period of confinement" based on a base term, established by guidelines in the regulations, that is adjusted up and/or down based on pre-conviction, commitment, and post-conviction factors (§§ 2285-2291, 2296). *Id.* at 232-35, 237.

However, over the next few years, the Board made further changes – unauthorized and unprompted by legislation – that systematically whittled away parole process protections established by the DSL. First, in August 1978, the Board drastically expanded the list of factors tending to show unsuitability that could be used to defer setting a parole release date (§ 2281(c)). Amicus App'x Ex. M (Reg. 78, No. 31, p. 330 (Aug. 8, 1978)). Rather than tying the unsuitability factors to past criminal history – as provided in Penal Code § 3041(b) and prior versions of the regulations – the August 1978 revisions broaden the bases for finding unsuitability to include childhood abuse *suffered by the inmate* and post-conviction institutional behavior. *Id.*

Even more significantly, the August 1978 revisions emptied "parole dates" of their "total period of confinement" protection. Rather than a suitability finding requiring the calculation of a "total period of confinement" that could be reduced by good behavior in prison, a suitability finding required the Board to set a "base term" (§ 2282). *Id.* at 231. This base term must reflect the gravity of the commitment offense, as dictated by guidelines in the regulations, but there is no provision that it be

adjusted, reduced by positive post-conviction factors, and used as a *maximum* total period of confinement within the primary term. *Id.* Because the base term is not determined until an inmate is deemed suitable, and at that point it is combined with any enhancements and other crimes to establish the "total life term," it serves as a functional *minimum* that is often surpassed by the time the inmate is found suitable, as the Board recognized (§ 2289). *See id.* at 238 (specifically providing for situations in which "the time already served by the prisoner exceeds the [total life term]"). Thus, the Board, with no legislative authorization whatsoever, effectively transformed a "parole release date" required to be set by Penal Code § 3041(a) into a *minimum* term of incarceration of indefinite duration, while simultaneously abdicating its responsibility to set a *maximum* constitutionally proportionate term.[6] *See* Board Opening Br. at 5-6

[6] Long after this unauthorized shift in Board practice, Deputy Attorney General Michael Wellington issued a memo regarding a meeting by the "Morrissey 8" (Morrissey Memo), discussing several "legal conclusions" made by the Board. *See* Amicus App'x Ex. S. Notably, the Morrissey Memo acknowledges the Board's obligation (under *Rodriguez*) to set maximum primary terms for indeterminately sentenced inmates, but baselessly concluded that this obligation "ha[d] been rendered obsolete." *Id.* at 1, 2, 3. To justify this conclusion, the memo points to: (1) the repeal of Penal Code § 2940 *et seq.* by AB 476 (the SB 42 clean-up bill); and (2) the fact that Proposition 7 amended to Penal Code to increase the MEPDs for first-degree murder (25 years) and second-degree murder (15 years).

The Morrissey Memo's "legal conclusion" is utterly baseless. First, the repeal of Penal Code § 2940 *et seq.* (two full years earlier) is irrelevant to the Board's obligation to fix maximum primary terms, which stems from the U.S. and California Constitutions, not from statute, as explained by *Rodriguez*. Although the statutes referenced by the Board (Penal Code

(arguing that once an indeterminately sentenced inmate is found suitable, the regulations require the calculation of a "base term," which is a "minimum term of confinement").

Following this drastic, unauthorized shift in the regulations, the Board further dismantled the protections the Legislature intended to put in place in the DSL. Specifically, in 1979, the Board removed the requirement that a parole date "normally" be set – contrary to the express language of Penal Code § 3041(a). Amicus App'x Ex. N (Reg. 79, No. 24, p. 230.1 (June 16, 1979) (§ 2280(a))).

F. This Court Became Entangled In The Board's Deflection And Obfuscation.

This Court's decision in *In re Dannenberg*, 34 Cal. 4th 1061 (2005), relies on the grave misunderstanding that the Board's interpretation created. In addressing a challenge to a denial of parole based on public safety, the

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§ 2940 *et seq.*) did previously provide a few sparse statements about the parole authority's ability to fix terms, *see* Amicus App'x Ex. P (Cal. Penal Code § 2940 *et seq.* (1971)), the legislative history of the DSL establishes that their repeal by AB 476 was *not* an indication that the Legislature meant to revoke that ability.

Second, Proposition 7's adjustment of the *minimum* eligible parole date (MEPD) for first- and second-degree murder has no affect on the Board's obligation to set a *maximum* primary term.

Notably, and contrary to the Board's argument that the 2015 legislation Senate Bill 230 somehow newly created statutory minimum terms, *see* Board Opening Br. at 1, 9, 15, minimum terms are now, *and have always been*, established by statute. *See, e.g.*, Amicus App'x Ex. O (Cal. Penal Code §§ 3043-3049 (1970)); *id.* Ex. Q (Cal. Penal Code §§ 3046-3049 (1977)); Cal. Penal Code § 3046.

Dannenberg Court examined the statutory language of § 3041, with its reference to a "parole release date," and held that the Board was not unreasonable in refusing to set such a "parole release date" until after it had found a prisoner suitable for parole. *Dannenberg*, 34 Cal. 4th at 1071. Reading the statutory language in isolation, that interpretation appears sensible. But the Board is currently using this Court's determination about its parole-granting power as a proxy for a determination of its constitutional term-setting obligation. After the Board's regulatory opportunism obfuscated the critical distinction between these two powers, and rendered empty the concept of "setting a term," the Board relies on the *Dannenberg* Court's ruling to excuse its failure to set any type of term at all and return to the pre-*Rodriguez* ISL regime.

Notably, the *Dannenberg* Court was not presented with full information about the history behind the DSL and its requirement to set primary terms. Before the Court, the Attorney General wrongly argued that the Legislature *intended* for the ISL parole system to remain unchanged for inmates who remained indeterminately sentenced under the DSL. *See In re Dannenberg*, 2003 WL 1918571, Opening Br. at 18 (Feb. 14, 2003) ("[T]he Legislature plainly intended . . . to retain the old concept of the subjective, individualized consideration of parole-release decisions by an executive board" for indeterminately sentenced inmates). This Court accepted that assertion, and premised its decision on it. *Dannenberg*, 34 Cal. 4th at 1083

(relying on the assertion that, in passing the DSL, the Legislature intended to apply determinate sentencing principles to those whose crimes became determinately sentenced, "[b]ut" *not* to "certain serious criminals" for whom it "retained" indeterminate sentences) (citing *People v. Jefferson*, 21 Cal. 4th 86, 95-96 (1999)).[7] Although respondent's brief in *Dannenberg* discussed the history of the DSL and argued that the Board's practices created a system that is precisely what the DSL was designed to eliminate, it did not provide key information from original sources of legislative history. *In re Dannenberg*, 2003 WL 21396723, Answering Br. at 18-22, 28-31 (Apr. 16, 2003). As discussed above, the legislative history for SB 42 evidences the Legislature's clear intent both that constitutional maximum primary terms be set for inmates who remained indeterminately sentenced, and that the revisions to the parole-granting process remedy concerns that existed under the ISL for those inmates (*i.e.*, uniformity, proportionality, notice, and basing punishment on culpability rather than a subjective evaluation of likely future behavior).

[7] *Dannenberg*'s ruling also relied on dicta from *Jefferson* that stated, with absolutely no basis, that under the DSL, a parole date marks the end of a prison term for both determinately and indeterminately sentenced inmates (rather than, for indeterminately sentenced inmates, marking a point at which the inmate may be released to serve the rest of his term in community). *See Dannenberg*, 34 Cal. 4th at 1083 (citing *Jefferson*); *Jefferson*, 21 Cal. 4th at 95-96 (citing Cassou & Taugher, at 28, which does *not* support that proposition).

Although *Dannenberg*'s holding is not dispositive of the present case – because the Court considered the Board's parole-granting, and not its term-setting, obligations – its understanding of the system underlying its decision was clearly confused. The language of the opinion reveals a blending of the distinct concepts of constitutional maximum terms and parole release dates, and a blurring of the Board's two separate and independent functions. For example, the Court repeatedly used the term "fixed parole release date." *See Dannenberg*, 34 Cal. 4th at 1069, 1080. However, it is only constitutional maximum primary terms that have ever been "fixed" under the law, and parole release dates have always been subject to adjustment based on the inmate's institutional behavior.

Had the *Dannenberg* Court had more information about the legislative history behind SB 42 and the development of the parole regulations, and had its confusion about the Board's dual function been resolved, its holding would likely have been different. The Court's assertion, in dicta, that under the DSL, "the overriding statutory concern for public safety in the individual case trumps any expectancy the indeterminate life inmate may have in a term of comparative equality with those served by other offenders," *id.* at 1084, is directly contradicted, both by the evidenced intent of the Legislature in passing the DSL, and by the clear mandate of *Rodriguez*.

Further, the Board's assertion in this case – based on *Dannenberg* – that setting an inmate's maximum term can be delayed until after the inmate is found suitable is similarly baseless. If a prisoner is repeatedly denied a finding of suitability for parole – as most are – the inmate will frequently exceed his constitutional maximum primary term before even receiving it. This makes the constitutional protection against disproportionate sentencing impossible to enforce, as *Rodriguez* recognized. *See Rodriguez*, 14 Cal. 3d at 650 (maximum terms must be "fixed with sufficient promptness to permit any requested review of their proportionality to be accomplished before the affected individuals have been imprisoned beyond the constitutionally permitted term"). This is particularly so given that there are currently more than 25,000 indeterminately sentenced inmates – more than 19,000 of whom are either past their MEPD or assessed as a "low" risk by Board psychologists. *See* Butler Answering Br. at 15. The Board's assertion that it can delay setting a term also undermines every stated goal of the DSL – to make punishment more uniform according to culpability, to reduce the violence and stress attributable to the unpredictability and uncertainty of sentencing, and to further the aims of due process by providing clear notice.

Amici respectfully suggest that *Dannenberg* does not command precedential authority on either the meaning or validity of the statute at issue or the Board's obligations.

CONCLUSION

This Court should order the Board's full compliance with *Rodriguez*, including the setting of constitutional maximum primary terms early in indeterminately sentenced inmates' confinement.

DATED: May 10, 2017

Respectfully submitted,

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In support of Roy Butler

Exhibit C

Jennifer Shaffer, Executive Officer, Board of Parole Hearing

DISCRETIONARY PAROLE IN CALIFORNIA

Report for the Committee on Revision of the Penal Code

Jennifer P. Shaffer
Executive Officer

November 2020

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Contents

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DISCRETIONARY PAROLE IN CALIFORNIA

OVERVIEW

This document was prepared in response to a request from the Committee on Revision of the Penal Code for an overview of discretionary parole processes administered by the Board of Parole Hearings (Board). The Board is responsible for the following discretionary parole processes:

- **parole consideration hearings** for persons serving lengthy periods of incarceration;

- **parole reviews** for persons serving determinate sentences for nonviolent convictions; and,

- **medical parole hearings** for persons the California Department of Corrections and Rehabilitation (CDCR or Department) refers to the Board who suffer from a significant and permanent condition, disease, or syndrome resulting in the person being physically or cognitively debilitated or incapacitated.[1]

The Board's discretionary parole processes have expanded significantly since 2014, as has the number of persons approved for release through the Board's processes. For example, eligibility for parole consideration has expanded to include youth offenders, persons eligible for elderly parole, and to persons convicted of nonviolent offenses who are eligible for parole consideration under Proposition 57.

Over the past 10 years the Board has approved the discretionary release of over 16,000 persons, including more than 8,000 "long-term" inmates granted parole after a full parole hearing and another 8,000 determinately-

[1] The Board performs a variety of additional functions for the adult inmate population, including hearings for offenders with mental health disorders, screenings for sexually violent predators, international prisoner transfers, and investigations for gubernatorial pardons and commutations of sentence. In addition, the Board determines when long-term offenders are discharged from parole and initiates extradition proceedings for certain persons who escape or abscond from parole and are apprehended outside of California.

sentenced nonviolent offenders approved for release under the Board's administrative parole review processes.[2]

The Board conducts parole hearings for persons who are serving lengthier sentences for the most violent offenses, including murder. Despite the increase in the number of persons granted parole through the parole hearing process, the recidivism rate for persons released after a parole hearing remains very low. Only two to four percent of persons released after a parole hearing recidivate, with less than one percent being convicted of a new felony crime involving harm to another person.[3]

[2] There were 8,091 parole hearing grants 2010 through 2019; 3,680 approvals for release of determinately-sentenced nonviolent offenders under Proposition 57 (July 2017 through September 2020); 4,336 determinately-sentenced nonviolent second striker inmates approved for release under the parole consideration process ordered by the Three-Judge Panel in the *Plata/Coleman* class action litigation (January 2015 through June 2017).

[3] Recidivism is defined as any new misdemeanor or felony conviction for an offense committed during the three years following release. Recidivism rates are discussed in more detail later in this report.

PAROLE ELIGIBILITY

There are two general classes of inmates in the California prison system: inmates sentenced to determinate terms, and inmates sentenced to indeterminate terms. Many inmates sentenced to determinate terms serve a fixed period of time and are released. Some who are serving determinate sentences, however, are eligible for parole consideration by the Board once they have served a specified portion of their sentence. Indeterminately-sentenced persons are serving "life" sentences, with or without the possibility of parole, such as 25 years-to-life or life without the possibility of parole, respectively.

Persons sentenced to state prison may be eligible for parole consideration or release based on one or more of the following parole eligible dates:

- **Earliest Possible Release Date (EPRD)** – the date determinately-sentenced offenders will be released based on the sentence imposed by the court, less any applicable credits;
- **Minimum Eligible Parole Date (MEPD)** – the date indeterminately-sentenced offenders (i.e., persons sentenced to life with the possibility of parole, or "lifers") are eligible for parole consideration by the Board based on the sentence imposed by the court, less any applicable credits;
- **Nonviolent Parole Eligible Date (NPED)** – the date determinately or indeterminately-sentenced nonviolent offenders are eligible for parole consideration (administrative review for determinately-sentenced persons or parole hearing for indeterminately-sentenced persons) under Proposition 57, once they have served the full term of their primary offense; sex offenders are excluded;
- **Youth Parole Eligible Date (YPED)** – the date determinately or indeterminately-sentenced offenders who committed their controlling offense while under the age of 26 are eligible for a parole hearing, once they have served 15, 20, or 25 years, depending on the sentence imposed by the courts; persons sentenced under the Three Strikes Law are excluded; this is also the date persons sentenced to life without the possibility of parole for offenses they committed while under the age of 18 are eligible for a parole consideration hearing, once they have served 25 years; beginning January 2022, credits for educational milestones, such as high school diplomas and college degrees will be applied to YPEDs; and,

- **Elderly Parole Eligible Date (EPED)** – the date determinately and indeterminately-sentenced offenders are eligible for a parole hearing once they have served 25 years of incarceration and have reached the age of 60, based on the Three-Judge Panel's 2014 court order; offenders sentenced to life without the possibility of parole or condemned are excluded; effective January 1, 2021, determinately and indeterminately-sentenced offenders will be eligible for a parole hearing once they have served 20 years of incarceration and have reached the age of 50 under Chapter 334 of the Statutes of 2020; persons sentenced under the Three Strikes law, persons convicted of first degree murder of a peace officer, and persons sentenced to life without the possibility of parole or condemned will be excluded.

If more than one of the above parole eligible dates applies to an inmate, the inmate's "controlling parole eligible date" is the date that gives the person the earliest opportunity for parole consideration or release. Each inmate's controlling parole eligible date is provided to the inmate and publically available on CDCR's website via the Department's "Inmate Locator" search engine.

THE PAROLE HEARING PROCESS

Overview

The parole hearing process begins five years prior to an inmate's first scheduled parole hearing when a commissioner or deputy commissioner consults one-on-one with the person to explain the parole hearing process, legal factors relevant to the person's parole suitability, and to provide recommendations regarding work assignments, rehabilitative programs, and institutional behavior.[4] In 2019, the Board conducted 3,877 consultations.

The next step occurs when an inmate is scheduled for a parole hearing. In 2019, the Board scheduled more than 6,000 parole hearings. Parole hearings are conducted by a panel of one or two Board commissioners and a deputy commissioner. The Board is comprised of 17 commissioners appointed by the Governor to three-year terms.[5] Deputy commissioners are administrative law judges employed by the Board.

Inmates are entitled to legal counsel at parole hearings. The District Attorney from the prosecuting county may attend and ask clarifying questions and render an opinion regarding suitability.[6] Victims of the crime and their family members, as well as their representatives, may also attend and give a statement. Victims are also entitled to have support persons present.[7] Victims and their family members are notified of a hearing at least 90 days prior to the hearing if they request to be notified. Victims can request to be notified through CDCR's Office of Victim and Survivor Rights and Services.

At a parole hearing, the panel will determine whether the inmate is suitable for release. If an inmate is found to not be suitable for parole, statutory law requires that the inmate's next hearing be set 15, 10, 7, 5, or 3 years in the future.[8] An inmate who is denied parole may submit to the Board a petition to advance his or her next hearing date, based on a change of circumstances or new information that establishes a reasonable likelihood that public safety does not require the additional period of incarceration

[4] Pen. Code, § 3041, subd. (a).
[5] Pen. Code, §§ 3041, subd. (c), 5075, subd. (b).
[6] Pen. Code, § 3041.7
[7] Pen. Code, §§ 3043 – 3043.3.
[8] Pen. Code, § 3041.5, subd. (a)(3).

imposed by the denial length previously issued.[9] The Board may also advance an inmate's next parole hearing date based on new information or a change in the inmate's circumstances through its administrative review process.[10]

Parole hearings are held to determine if an inmate currently poses an unreasonable risk of danger to society if released from prison.[11] The panel will consider "all relevant, reliable information available to the panel" in determining the inmate's suitability for parole.[12]

California Code of Regulations, title 15, section 2281 provides general guidelines the Board considers in determining suitability for parole. Factors tending to show an inmate's suitability include: (1) lack of a juvenile record, (2) stable social history, (3) signs of remorse, (4) motivation for the crime, (5) lack of criminal history, (6) age, (7) understanding and plans for the future, and (8) institutional behavior.[13] The panel will also consider whether the inmate suffered from Intimate Partner Battering, formerly referred to as Battered Woman Syndrome, at the time of the crime and whether the crime resulted from the inmate's victimization.[14]

The panel also considers evidence suggesting unsuitability. The factors tending to show unsuitability include the inmate's (1) commitment offense, (2) previous record of violence, (3) unstable social history, (4) prior sadistic sexual offenses, (5) psychological factors, including the prisoner's history of mental problems related to the crime, and (6) institutional misconduct in prison or jail.[15] Additionally, the California Supreme Court has held that an inmate's lack of insight into the causative factors of the inmate's crime is an

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[9] Pen. Code, § 3041.5, subd. (d).
[10] Pen. Code, § 3041.5, subd. (b)(4).
[11] Penal Code section 3041, subdivision (a) states the Board "shall normally grant parole." However, subdivision (b) of the same section states the Board "shall grant parole to an inmate unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual." This language has been the subject of numerous published decisions, including *In re Lawrence* (2008) 44 Cal.4th 1181 and *In re Shaputis (2008)* 44 Cal.4th 1241 in which the Supreme Court clarified in 2008 that the central question for the Board when determining parole is whether the inmate poses a current unreasonable risk of danger to the public.
[12] 15 CCR § 2281, subd. (b).
[13] 15 CCR § 2281, subd. (d).
[14] Pen. Code, § 4801.
[15] 15 CCR § 2281, subd. (c).

appropriate factor to consider in determining whether the inmate is currently unsuitable.[16]

If an inmate is a qualified youth offender, the hearing panel must also give great weight to the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the inmate.[17] The Board will find a youth offender suitable for parole unless it determines, even after giving great weight to the youth offender factors, that the youth offender remains a current, unreasonable risk to public safety.[18]

If an inmate qualifies for elderly parole, the panel must give special consideration to the inmate's advanced age, long-term confinement, and diminished physical capacity, if any, when determining the inmate's suitability for parole.[19]

At all hearings the panel is aided in its decision-making by a comprehensive risk assessment prepared by a forensic psychologist with the Board's Forensic Assessment Division. The Board's forensic psychologists use the Historical Clinical Risk Management-20 (HCR-20), version 3, the Psychopathy Checklist - revised (PCL-R), and the Static 99-R (for sex offenders) to assess each inmate's potential risk for future violence.[20]

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[16] *In re Shaputis (2011)* 53 Cal.4th 192, 219.
[17] Pen. Code, § 4801(c).
[18] 15 CCR § 2445(d).
[19] Pen. Code, § 3055.
[20] The HCR-20 was developed to help structure decisions about violence risk (based on static and dynamic risk factors) and it has become the most widely used and best validated violence risk assessment instrument in the world. It has been translated into 20 languages and adopted or evaluated in more than 35 countries. The PCL-R, although not a risk assessment instrument per se, is the most researched and most widely administered assessment of dissocial or psychopathic personality characteristics associated with violent and sexual offending. The Static-99R is the State Approved Risk Assessment Tool for Sex Offenders (SARATSO) in California. The Static-99R is administered to provide a baseline estimate of risk for violent and sexual reconviction among offenders who have committed sex crimes. It is the most researched and most widely administered assessment of sexual offending risk. All three instruments were developed to have widespread applicability in correctional and forensic settings, have been cross-validated across many types of offender samples, and have been in use for more than 25 years.

If the panel finds the inmate unsuitable for parole, the panel must articulate their decision with evidence supporting their findings. In finding an inmate unsuitable for parole the panel must support their decision by articulating facts that support the conclusion that the inmate continues to pose an unreasonable risk to public safety.

Following a parole hearing, the decision is considered a proposed decision and is subject to review by the Board's chief counsel. The panel's decision becomes final "unless the Board finds that the panel made an error of law, or that the panel's decision was based on an error of fact, or that new information should be presented to the Board, any of which when corrected or considered by the Board has a substantial likelihood of resulting in a substantially different decision upon a rehearing."[21] The Board has up to 120 days following the suitability hearing to conduct a review of the decision.[22]

California is one of only a handful of states where the Governor has the absolute right to review grants of parole to inmates sentenced to indeterminate sentences. Under Article V, section 8, subdivision (b) of the state constitution, the Governor has executive authority to affirm, reverse, or modify any Board decision to grant or deny parole to a convicted murderer. In all other life with the possibility of parole cases, the Governor is limited to referring the case for review by the Board's commissioners sitting en banc[23] to consider modifying the decision or referring the decision to a hearing panel to determine if the inmate's grant of parole should be rescinded. When a decision is referred to the Board's commissioners sitting en banc, it is placed on the Board's public meeting agenda and any member of the public has the opportunity to give a brief statement on whether the decision should be upheld.

Administrative Procedures

The average length of a parole hearing is two and one-half hours, hearings are scheduled approximately six months in advance to allow for a variety of pre-hearing procedures established to ensure the hearing is complete, fair, and that the rights of everyone who participates are protected. A summary of pre-hearing procedures is included in Appendix A.

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[21] Pen. Code, § 3041, subd. (b)(2).
[22] Pen. Code § 3041, subd. (b)(2).
[23] En banc review is a review conducted by a majority of the commissioners holding office on the date the matter is heard by the Board. (Pen. Code § 3041, subd. (e)).

CHANGES IN THE LAW EXPANDING PAROLE ELIGIBILITY FOR LONG-TERM OFFENDERS

Prior to 2014, only persons sentenced to "life with the possibility of parole" were eligible for a parole hearing and they were required to serve the minimum sentence imposed by the court before they were eligible for a hearing (less any applicable credits).[24] There are 33,676 of these persons in prison today.[25]

However, despite being sentenced to life "with the possibility of parole," many of these persons received sentences where their minimum eligible parole date exceeds their natural life. For example, there are 6,166 persons in prison today sentenced to life with the possibility of parole who, based on the sentence imposed by the court, would need to serve an additional 40 years before they would be eligible for a parole hearing. Approximately 1,528 of these persons would need to serve 100 to 600 years before they would be eligible for a parole hearing and 265 would need to serve more than 600 years before they would be eligible for a parole hearing.

There are also some determinately-sentenced persons in prison who are sentenced to lengthy terms of imprisonment. For example, there are 295 persons in prison today who, based on the sentence imposed by the court, would need to serve more than 40 years before reaching their release date. Forty of these inmates would need to serve an additional 100 to 600 years, and one would need to serve more than 600 years.

With the exception of persons sentenced to life without the possibility of parole or condemned, all inmates now have an opportunity for parole during their natural life under youth offender parole, elderly parole, or Proposition 57.

Youth Offender Parole, Elderly Parole, and Proposition 57 Parole Hearings

As previously noted, prior to 2014, only persons sentenced to life with the possibility of parole were eligible for parole consideration by the Board and only after they served the minimum sentence imposed by the court. Since 2014, however, a series of legislative measures, ballot initiatives, and court

[24] A sentence of 25 years-to-life is an example of an indeterminate sentence of "life with the possibility of parole" and the person would have to serve a minimum of 25 years, less any applicable credits, before the person was eligible for a parole hearing.

[25] As of October 12, 2020.

cases have both expanded the number of persons eligible for a parole hearing and made many persons eligible for a parole hearing earlier in their incarceration period.

For example, indeterminately and determinately-sentenced persons who committed their controlling offense[26] while under the age of 26 are now eligible for a **youth offender parole hearing** after serving 15, 20, or 25 years (depending on the length of the sentence imposed by the court).[27] Exclusions apply.[28] Persons who were under the age of 18 and who were sentenced to life without the possibility of parole are eligible for a youth offender parole hearing after serving 25 years.[29]

In addition, effective January 1, 2021, inmates who are both age 50 and who have served at least 20 years will be eligible for an **elderly parole hearing** under Penal Code section 3055.[30] Exclusions apply.[31] Inmates who are age 60 and who have served at least 25 years are also eligible for an elderly parole hearing under a court order issued by the Three Judge Panel

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[26] "Controlling offense" is defined as an offense or enhancement for which any sentencing court imposed the longest term of imprisonment. (Pen. Code, § 3051, subd. (a)(2)(B)).

[27] Pen. Code, § 3051, subd. (b); 15 CCR §§ 3492-3497. In 2014, persons who were under the age of 18 when they committed their controlling offense were eligible for a youth offender parole hearing. (Ch. 312, Statutes of 2014). In 2016, eligibility was extended to persons who were under the age of 23 when they committed their controlling offense. (Ch. 471, Statutes of 2016). In 2018 eligibility was extended to persons who were under the age of 26 at the time of their controlling offense. (Ch. 675, Statutes of 2018).

[28] The following persons are excluded: persons sentenced under the Three Strikes Law (with the exception of one-strike offenders due to *People v. Edwards* (2019) 34 Cal.App.5th 183), persons sentenced to life without the possibility of parole for crimes they committed while over the age of 18, and persons who, after turning age 26, commit an additional crime for which malice aforethought is a necessary element of the crime or for which the individual is sentenced to life in prison. (Pen. Code, § 3051, subd. (h)).

[29] Ch. 684, Statutes of 2018; Pen. Code, § 3051, subd. (b)(4).

[30] Currently, Penal Code section 3055 applies to inmates who are age 60 and who have served 25 years. Effective January 1, 2021, Penal Code section 3055 will be amended and persons age 50 and who have served 20 years of incarceration will be eligible for parole hearing by December 31, 2022. (Ch. 334, Statutes of 2020).

[31] The following persons are excluded: persons sentenced under the Three Strikes Law, persons convicted of first degree murder of a peace officer, and persons sentenced to life without the possibility of parole or condemned. (Pen. Code § 3055(g), (h).)

in the *Plata/Coleman* class action litigation.[32] Under the court order, only persons sentenced to life without the possibility of parole or condemned are excluded.

Lastly, indeterminately-sentenced nonviolent offenders (i.e., "nonviolent third strikers") are eligible for a parole hearing under Proposition 57 once they have served the full term of their primary offense.[33]

As shown in Figure1 below, the result of these changes is that there are now 41,464 determinately and indeterminately-sentenced persons who are eligible for a parole hearing, which means 7,788 long-term inmates are eligible for a parole hearing today who would not have been eligible for one in 2013.[34] In addition, 38,523 (93 %) of the 41,464 long-term inmates who are now eligible for a parole hearing have either already had a parole hearing or will have one in the next 20 years.

Figure 1

	Initial Parole Hearing this year or in 2021	Initial Parole Hearing in Next 20 Years (2022-2040)	Initial Parole Hearing in 20- 40 Years (2041-2060)	Initial Parole Hearing 40+ Years (2061+)	Total
Without Changes in the Law	**9,205**	**12,049**	**6,256**	**6,166**	**33,676**
With Changes in the Law**	**14,715**	**23,808**	**2,928**	**13**	**41,464**

As shown in Figure 2 below, changes in the law and increases in parole grants have shifted the balance between the number of life-term-inmates admitted to CDCR annually and the number of life-term inmates released

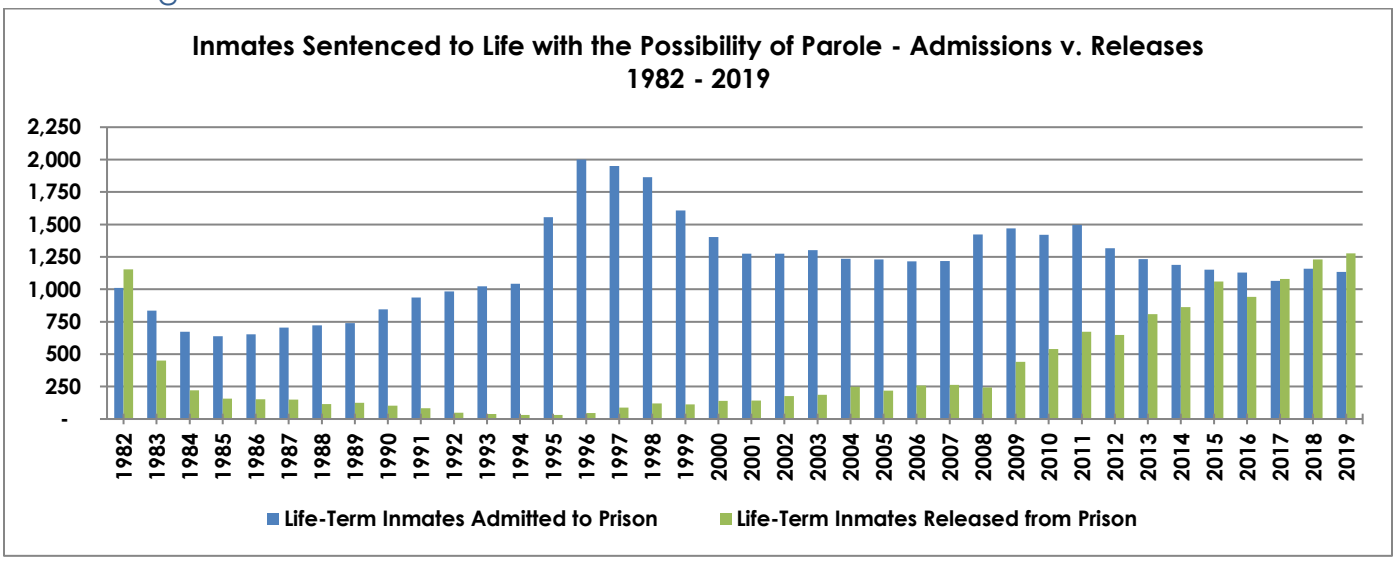
[32] Persons who are condemned, sentenced to life without the possibility of parole, sentenced under the Three Strikes Law, or convicted of first degree murder of a peace officer killed in the performance of their duties are not eligible for an elderly parole hearing under Penal Code section 3055. If the court order is dismissed, elderly parole will be governed by Penal Code section 3055 and elderly parole will no longer apply to inmates sentenced under the Three Strikes Law or who are convicted of murdering a peace officer. (*Plata v. Brown*, USDC ND Cal. No. 01-1351 TEH, Order Granting in Part and Denying in Part Defendant's Request for Extension of December 31, 2013 Deadline (ECF No. 2766); Ch. 676, Statutes of 2017; Ch. 334, Statutes of 2020.

[33] *In re Edwards*, (20190 26 Cal.App.5th 2081; holding nonviolent parole includes indeterminately-sentenced persons and their primary offense shall be calculated by taking the maximum term applicable by statute to the underlying nonviolent offense. (15 CCR § 3495, subd. (d); 15 CCR §§ 3492-3497, 2449.30-2449.34.)

[34] As of October 12, 2020.

from state prison. This culminated in 2017 being the first time in 34 years that more life-term inmates were released from state prison than were admitted to state prison in California. Please see Appendix B for a summary of select changes in the law governing sentencing and parole over the past 10 years.

Figure 2



California is one of only a few states in which persons have a liberty interest in parole, which means parole decisions are subject to judicial review. Changes in statutes and published case law along with improved training, expanded rehabilitative programming, and increased hope among inmates has significantly increased the number of long-term inmates granted parole and safely released annually by the Board.

For example, in 2008, the California Supreme Court published decisions in the cases of *In re Lawrence* and *In re Shaputis* (*Shaputis I*).[35] The *Lawrence* and *Shaputis* decisions clarified the judicial standard for reviewing the Board's decisions. The court held that a denial of parole must be supported by evidence that the person poses a current, unreasonable risk of dangerousness. Prior to these decisions, the Board could routinely deny a person's parole based solely on the severity of the commitment offense. As a result of the *Lawrence* and *Shaputis* decisions, only persons who are found to pose a current, unreasonable risk of dangerousness are denied parole today.

Also in 2008, the voters approved Proposition 9, known as Marsy's Law. Marsy's Law is a victims' rights initiative that expanded the rights of crime victims throughout the criminal justice system, including the parole hearing process. The following are examples of a few of the changes in the law governing parole hearings enacted by Marsy's Law:

- the definition of victim was expanded for purposes of determining who may attend a parole hearing and victims may have support persons and a representative at parole hearings; victims are entitled to notice of a parole hearings at least 90 days in advance of the hearing[36];
- victims have the right to express their views at a parole hearing concerning the inmate, the case, the inmate's suitability for parole, and to provide a recommendation concerning the granting of parole; the Board is required to consider the entire and uninterrupted statements of the victim when deciding whether to grant parole;[37]
- when denying parole, the Board must set the inmate's next hearing in15 years absent clear and convincing evidence that consideration of the public and victim's safety does not require that the inmate be

[35] *In re Lawrence* (2008) 44 Cal.4th 1181; *In re Shaputis (2008)* 44 Cal.4th 1241.
[36] Pen. Code, §§ 3043, 3043.1, 3043.3.
[37] Pen. Code, § 3043, subd. (d).

incarcerated for more than 10 years; the Board must defer the inmate's next hearing for 10 years absent clear and convincing evidence that consideration of the public and victim's safety does not require the inmate be incarcerated for an additional seven years; the Board must set the inmate's next hearing in three years, five years, or seven years if the Board finds that consideration of the public and victim's safety does not require that the inmate serve more than seven years of additional incarceration;[38]

- the Board may advance an inmate's next parole hearing to an earlier date if there is new information or a change in circumstances that establishes a reasonable likelihood that consideration of the public and victim's safety does not require the inmate to serve the period of incarceration imposed by the hearing panel at the inmate's last hearing;[39] and,
- an inmate may request that the Board advance the inmate's next parole hearing to an earlier date based on new information or a change in circumstances that establishes a reasonable likelihood that consideration of the public safety does not require the additional period of incarceration.[40]

The Board's consideration of the victim's views when determining an inmate's suitability for parole was addressed by the California Supreme Court in 2013. (*In re Vicks* (2013) 56 Cal.4th 274.) The court's decision in *In re Vicks* states "to the extent victims provide information or argument relevant to the express issue of safety and thus suitability for parole, their participation simply provides another source of information for the Board to consider."

The court went on to state that to the extent the Board may be required to consider statements that are not relevant to the express issue of the inmate's suitability for parole, the receipt of such statements serves an important purpose.

The court explained that one principle purpose of Marsy's Law is to provide victims "due process" by affording them an opportunity to be heard. The court likened a victim's "due process" to an individual's due process liberty

[38] Pen. Code, §§ 3043, 3043.1, 3043.3.
[39] The California Supreme Court has held that "the passage of time, during which the Board may expect positive changes in the prisoner's maturity, understanding, and mental state, is a changed circumstance." (In re Vicks (2013) 56 Cal.4th 274, 305.)
[40] Pen. Code, §§ 3041.5, subd. (d)(1); 3043.

interest in being free from arbitrary adjudicative procedures. Specifically, the court recognized:

> the important due process interest in recognizing the dignity and worth of the individual by treating him as an equal, fully participating and responsible member of society. For government to dispose of a person's significant interests without offering him a chance to be heard is to risk treating him as a nonperson, an object, rather than a respected, participating citizen. Thus, even in cases in which the decision-making procedure will not alter the outcome of governmental action, due process may nevertheless require that certain procedural protections be granted the individual in order to protect important dignitary values, or, in other words, to ensure that the method of interaction itself is fair in terms of what are perceived as minimum standards of political accountability — of modes of interaction which express a collective judgment that human beings are important in their own right, and that they must be treated with understanding, respect, and even compassion." (internal citations omitted).

(*In re Vicks, supra*, 56 Cal.4th at p. 310.) The court found the same sentiments evident in the provisions of Marsy's Law that seek to ensure that crime victims are treated with dignity. The court went on to state, "as in the context of adjudication of liberty interests, it is not critical that a victim's participation be relevant to the ultimate decision; rather, what is important is that the victim be acknowledged and respected. In doing so, the scheme does not authorize the Board to base its decisions on victims' opinions or public outcry." (*In re Vicks, supra*, 56 Cal.4th at p. 310.)

With respect to parole denial lengths, prior to Marsy's Law a non-murderer could be denied parole for one or two years and a murderer could be denied parole for one to five years. After Marsy's Law, all denials of parole are for a period of 15, 10, 7, 5, or 3 years; the minimum denial period was lengthened from one year to three years and the maximum denial period was lengthened to 15 years.

However, as noted above, Marsy's Law also created a process by which the Board can advance an inmate's next parole hearing date on its own or in response to an inmate's request. The Board's authority to advance an inmate's next parole hearing date was also addressed by the court in *Vicks*. (*In re Vicks, supra*, 56 Cal.4th at pp. 302-303.) Soon after the *Vicks* decision

was published, the Board implemented a robust process for inmates to submit a petition to the Board requesting that their next parole hearing be advanced to an earlier date. The Board also implemented a meaningful process to independently identify inmates whose next parole hearing date should be advanced based on new evidence or a change in circumstances.[41]

Today the Board advances parole hearing dates for over 1,000 inmates annually and hearings held after a hearing date has been advanced are more likely to result in a grant of parole. In 2019, the Board reviewed 479 petitions from inmates asking that their next parole hearing be advanced to an earlier date and 323 (67%) were approved. Thirty-seven percent of the hearings held after a petition was approved resulted in a grant of parole.

The Board's process for independently identifying inmates whose next parole hearing date should be advanced is based on the premise that the Board should focus its resources on those who are most likely to be found suitable for parole.[42] As a result, the Board reviews all persons who receive a three-year denial, have a low or moderate risk rating, and who have not incurred a serious rules violation or new conviction since their last hearing. The Board reviews persons 11 months after their hearing and if approved, the person's next parole hearing occurs approximately 18 months after the person's prior hearing.[43] This process is commonly referred to as the Board's **Administrative Review Process** for advancing parole hearing dates.[44]

In 2019, the Board reviewed 925 inmates to determine if their next parole hearing date should be advanced. The Board approved 694 (75%). Fifty-one percent of hearings held after the Board advanced the inmate's hearing date under Administrative Review Process resulted in a grant of parole.

As show in Figure 3 below, the Board's processes for advancing parole hearing dates appear to have contributed to the overall increase in the number of grants issued annually by the Board since 2013. The total annual number of grants has nearly doubled from 592 in 2013 to 1,184 in 2019.

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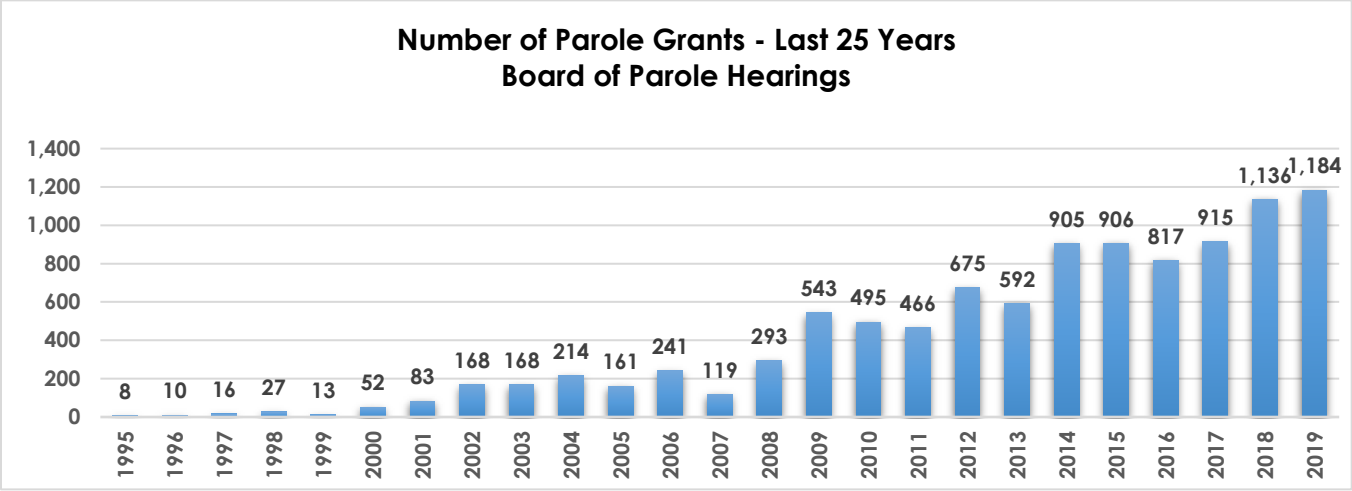
[41] 15 CCR §§ 2150-2157.
[42] *Garner v. Jones* (2000) 529 U.S. 244, p. 254.
[43] State and federal courts have held that Marsy's Law does not impose an ex post facto punishment on inmates, on its face or as applied. (*In re Vicks, supra* 56 Cal.4th 274, 317; *Gilman v. Brown* (2016) 814 F.3d 1007.)
[44] 15 CCR §§ 2150-2157.

Figure 3


Number of Parole Grants - Last 25 Years
Board of Parole Hearings
1,400
1,200
1,000
800
600
400
200
0
8
10
16
27
13
52
83
168
168
214
161
241
119
293
543
495
466
675
592
905
906
817
915
1,136
1,184
1995
1996
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012
2013
2014
2015
2016
2017
2018
2019

Parole Grant Rates

Historically, the Board's official parole hearing grant rates were calculated as the percentage of *scheduled* parole hearings that result in a grant of parole. However, this number is often misunderstood because a scheduled parole hearing can result in a grant, denial, stipulation, voluntary waiver, postponement, cancellation, or continuance.

For example, in 2019 the Board scheduled 6,061 hearings resulting in the following outcomes:

Figure 4

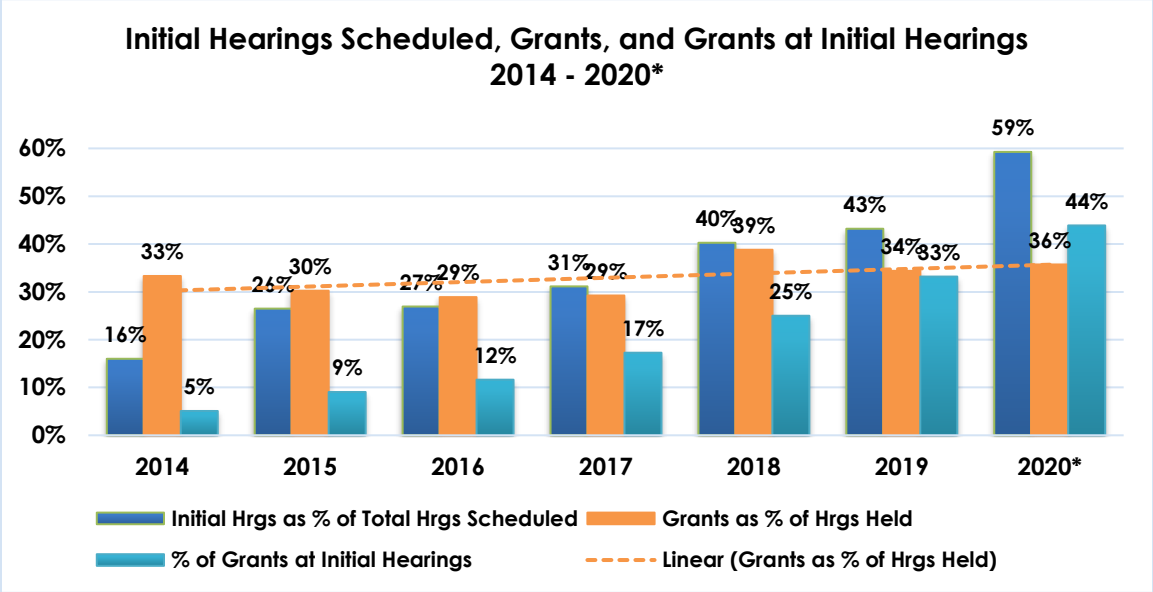
2019 Scheduled Hearing Outcomes

Outcome	Number	Percentage
Grant	**1,184**	**20%**
Denial	2,257	37%
Stipulation	660	11%
Voluntary waiver	517	9%
Postponement	1,222	20%
Cancelled/Continued	221	4%
Total	**6,061**	**100%**

One might assume that if 20% of scheduled hearings resulted in a grant in 2019, it stands to reason that the remaining 80% resulted in a denial of parole. As you can see from the Figure 4 above, that is not true. There was no decision rendered concerning the person's parole suitability in 1,960 scheduled hearings because the person voluntarily waived his or her hearing or the hearing was postponed, continued, or cancelled.

For this reason, it is often more illuminating to review grants as a percentage of hearings *held*. As shown in Figure 5 below, the percentage of hearings held resulting in a grant has generally increased over the past seven years, ranging from 29 to 39 percent of all hearings held. This has occurred despite the dramatic increase in the percentage of hearings scheduled each year for persons who have never before had a parole hearing (from 16% of scheduled hearings in 2014 to 59% in 2020). This means more persons are being found suitable for parole at their first hearing (5% of grants were at initial hearings in 2014 versus 44% in 2020).

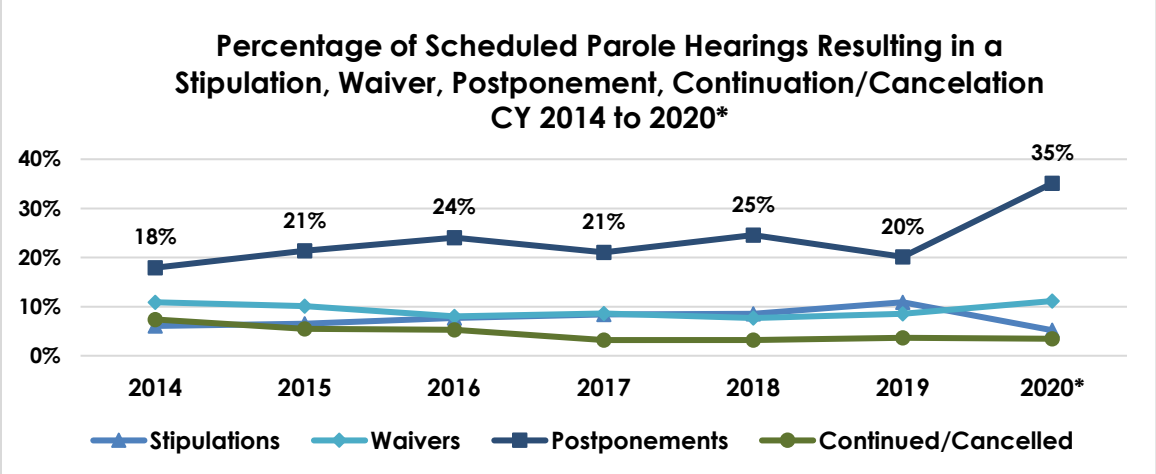
Figure 5



*2020 represents a partial year (January through September)

While the grant rate for hearings held has generally increased, the percentage of scheduled hearings resulting in a waiver, stipulation, postponement, continuation or cancelation have remained relatively unchanged, as shown below in Figure 6. One anomaly is the rate of postponements in 2020, which increased as a result of the COVID-19 pandemic. The Board postponed 650 hearings in March and April 2020 as it transitioned from conducting hearings in person to conducting hearings by videoconference.

Figure 6

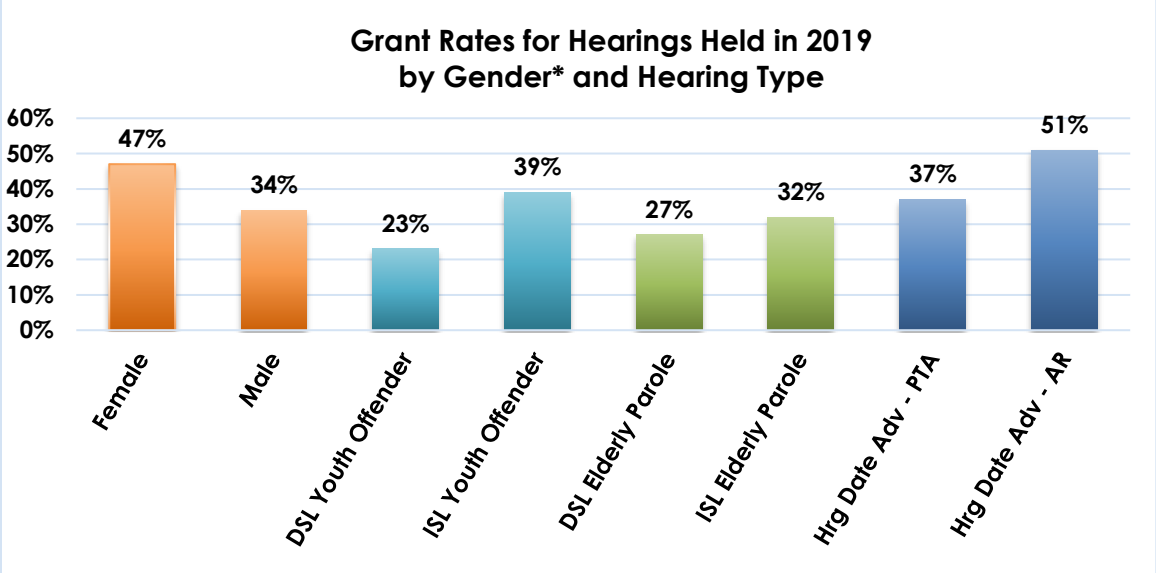


*2020 represents a partial year (January through September)

In addition, as shown in Figure 7 below, grant rates vary considerably depending on a variety factors. For example, although the overall grant rate for hearings held in 2019 was 34 percent (as shown above in Figure 5),

grant rates varied from 23 percent for determinately-sentenced youth offenders to 51 percent for hearings held as a result of the Board advancing the inmate's parole hearing date.

Figure 7

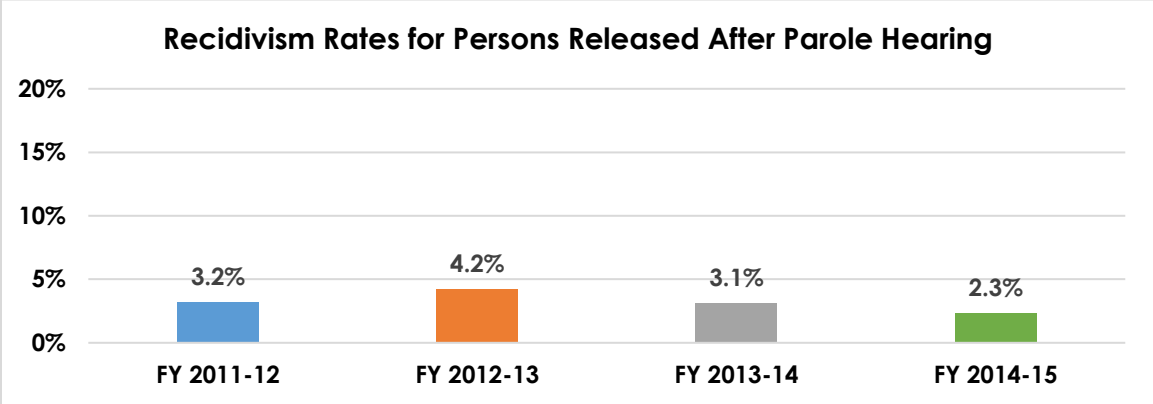


*Available CDCR data currently classifies persons according to gender assigned at birth; beginning in 2021, CDCR will classify persons by their gender identity.

Recidivism

Despite the significant increase in the number of parole grants to inmates serving long sentences (8,000 parole grants in the last 10 years) the recidivism rates for these formerly incarcerated persons remains very low, at two to four percent for general recidivism and less than one percent for recidivism involving felony crimes against persons.[45] See Figure 9 below.

Figure 9



Specifically, the *Recidivism Report for Offenders Released from the California Department of Corrections and Rehabilitation in Fiscal Year 2014-15* found that of the 682 life-term inmates released in fiscal year 2014-15 as a result of a grant of parole by the Board, 16 offenders (2.3%) were convicted of a new misdemeanor or felony crime during a three-year follow-up period. Less than one percent (0.4%) or three persons were convicted of felony crimes against persons.

The CDCR's *2018 Recidivism Report* found that of the 510 life-term inmates released in fiscal year 2013-14 as a result of a grant of parole by the Board, 16 offenders (3.1%) were convicted of a new misdemeanor or felony crime during a three-year follow-up period. Less than one percent (0.6%) or three persons were convicted of felony crimes against persons.

The CDCR's *2017 Outcome Evaluation Report* found that of the 478 life-term inmates released in fiscal year 2012-13, 20 offenders (4.2%) were convicted of a new misdemeanor or felony crime during a three-year follow-up period. Less than one percent (0.4%) or two persons were convicted of felony crimes against persons.

[45] CDCR classifies felony as property crimes, drug/alcohol crimes, crimes against persons, and "other" felony crimes.

The CDCR's *2016 Outcome Evaluation Report* found that of the 349 life-term inmates released by the Board in fiscal year 2011-12, 11 offenders (3.2%) were convicted of a new misdemeanor or felony crime during a three-year follow-up period. Less than one percent (0.3%) or one person was convicted of felony crimes against persons.

Although persons released from prison after a grant of parole present a low risk of recidivism, the same cannot be said for all persons serving long sentences in prison. In 2019, the Board administered 3,386 Comprehensive Risk Assessments and found that 47 percent presented a moderate risk for future violence and 28 percent presented a high risk.[46]

[46] Persons who present as a moderate risk pose an elevated risk relative to long-term parolees and non-elevated or below average to average risk relative to shorter-term parolees released without discretion; persons who present as a high risk pose an elevated risk relative to long-term parolees and average to above average risk relative to shorter-term parolees released without discretion.

As mentioned above, some of the increase in parole grants can be attributed to the Board's training program, as well as its increased transparency, which has improved the general understanding of the Board's decision-making processes.

Training

Prior to 2011, new commissioners received 40 hours of training, followed by an additional 40 hours of training annually, as required by Penal Code section 5075.6, subdivision (b). Since 2011, new commissioners receive six weeks of initial training followed by two weeks of annual training, in addition to training provided at the Board's monthly executive board meetings. New commissioners also attend a two-week judicial training course on *Fair Administrative Hearings* at the National Judicial College after which they are certified administrative law judges. In addition, for the past few years, commissioners have attended the Association of Paroling Authorities International's Annual Training Conference. Please see Appendix C for an example of annual training provided to commissioners.

Transparency

Policies at the Board and CDCR have also increased the Board's transparency. For example, the majority of the Board's training sessions are routinely conducted in public session, hearing transcripts can be requested by the public through the Board's website, and the public is routinely approved to observe a parole hearing for educational and informational purposes.

In addition, the Board's hearing schedule and hearing outcomes are posted on the Board's website, as is information concerning the parole hearing process. The Board also collaborated with CDCR to post parole eligibility dates, hearing dates, and parole hearing outcomes for each inmate on CDCR's "Inmate Locator" web-based search engine. In addition, since 2013 the Board has produced an annual report entitled "Report of Significant Events," providing an overview of statistics, training, litigation, and policy initiatives. The reports are available on the Board's website. In 2017, the Board also worked with CDCR to create a dedicated unit of experienced correctional counselors to review and provide a comprehensive summary of confidential information contained in an inmate's central file for purposes of disclosing that information to the inmate in advance of their parole hearing.

The Board also implemented use of a structured decision-making framework (SDMF) in 2019, which provides the Board with a structured and evidence-based approach to guide parole decisions. The SDMF was a collaborative effort with the National Institute of Corrections (NIC) and Dr. Ralph Serin, Ph.D., Professor, Department of Psychology, and Director of the Criminal Justice Decision Making Laboratory at Carleton University in Ottawa, Canada. With their assistance, the model SDMF was successfully adapted to reflect California's unique parole hearing process for persons serving longer sentences.

The SDMF is a structured professional judgement model; it is a systematic compilation of key factors reflecting best practice in risk assessment and parole release decision-making. It combines both research-supported factors and relevant legal considerations, providing an analytical framework for hearing panel members to follow that is consistent with the law governing parole decisions in California. The SDMF is intended to produce parole decisions that are structured, transparent, and focused on an offender's current risk. Additionally, it is intended to increase consistency among hearing panels and to result in more efficient parole hearings and decisions.

The SDMF was initially developed for the National Parole Board of Canada over a period of several years and has since been implemented in seven states in the United States. In 2018, the NIC chose California as one of three states to receive technical assistance in evaluating the prospects of successfully implementing the SDMF. The NIC sent teams of experts to California multiple times to evaluate its existing parole processes, including governing law, information technology systems, access to offender information, risk assessment tools, and available support systems for implementing the SDMF. In addition, members of the Board's executive team travelled to Connecticut to observe parole hearings and to gather information about implementing the SDMF.

Each paroling authority that implements the SDMF modifies the tool as necessary to account for variations in governing law and policy. The Board worked with Dr. Serin, the NIC, and the Board's litigation counsel to modify the SDMF to account for inmates who have served long sentences and to reflect relevant legal considerations in California, such as those applicable to youth offender hearings and elderly parole hearings.

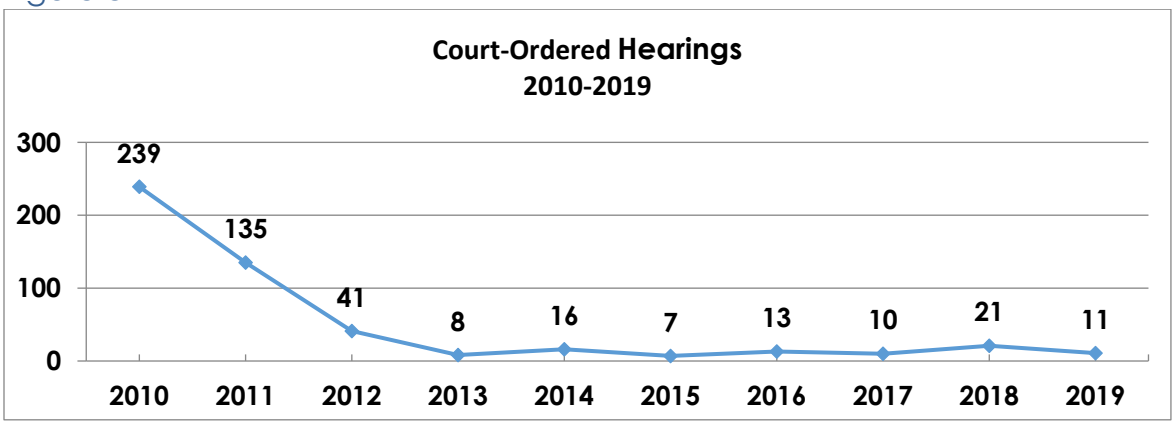
In April 2019, experts from NIC, Dr. Serin, the Board's litigation counsel, the Board's Senior Forensic Psychologists, commissioners, deputy commissioners, and attorneys met for three days of SDMF training and practical application of the framework to California cases. The SDMF was

subsequently implemented in California's parole hearing process over a period of several months.

Since the Board implemented the SDMF, the average length of a parole hearing has decreased by more than 30 minutes and the overall grant rate for hearings held has increased slightly from 34% in 2019 to 36% thus far in 2020. Please see Appendix D for a copy of the Board's SDMF.

The Board's increased focus on training and the law governing parole hearings has resulted in a significant decrease in the number of court-ordered hearings. Historically, the judicial remedy for a successful challenge to a parole denial is a court order requiring the Board to vacate its decision and conduct a new hearing. As shown below in Figure 8, the number of "court-ordered hearings" has decreased significantly in the last 10 years.

Figure 8



Improving the Quality of Attorney Representation at Parole Hearings

In 2019 the Board began implementing a new program for recruiting, training, and compensating attorneys who represent indigent inmates through the parole hearing process. The program was loosely modeled after the California Appellate Project, which provides counsel for indigent persons during the criminal appeal process. The intent of the Board's new program is to improve the quality of attorney representation and to allow inmate counsel to focus more time on preparing an inmate for a parole hearing.

Under the new program, the Board actively recruits attorneys, reviews qualifications, and interviews each candidate. Each attorney is required to observe parole hearings and participate in several hours of legal and advocacy training conducted by Parole Justice Works, a nonprofit entity with whom the Board has contracted to provide a variety of services. Parole Justice Works is an entity comprised of experience parole attorneys, educators, advocates, formerly incarcerated persons, and victims/survivors.

The Board's prior program educated Board-appointed attorneys on the process and legal framework governing parole hearings. But the Board, as the government agency overseeing parole, refrained from offering advocacy-based guidance to counsel who represented inmates appearing before it.

By contracting with a third-party nonprofit organization, the new approach enlists a separate group of people who are experienced inmate counsel to offer more advocacy-based training to inmate counsel. In contrast to the prior program, this advocacy-based training allows Board-appointed attorneys to learn best practices on how to effectively prepare and represent their clients for their parole hearings.

The new training is multi-faceted, and when fully implemented, it will consist of mandated training annually both in person and online. Further, experienced inmate counsel will mentor and critique Board-appointed attorneys by observing them at parole hearings while representing their inmate-clients and reviewing parole hearing transcripts.

In addition, the Legislature approved an increased pay structure for Board-appointed counsel in Fiscal Year 2019-20. The fee for representing an inmate for a scheduled parole hearing was increased from $400 to $750

per appointment.[47] Counsel are appointed to represent 10 to 13 clients scheduled for their parole hearings at one location during the same week. Counsel are appointed four to five months prior to the week of scheduled hearings and are required to review each client's central file and consult with their client for at least one hour within 30 days of being appointed.

In addition to producing training videos for inmate counsel, Parole Justice Works will also film informational videos about the parole hearing process for the inmate population and for victims and survivors who participate in the hearing process. The informational videos will be produced in conjunction with the Board, CDCR's Office of Victim and Survivor Rights and Services, and a variety of stakeholders. It is anticipated that the video for the inmate population will be played on the Department's inmate television system and that the video for victims and survivors will be available on the Department's website.

[47] The fee of $750 per assignment was based on an average reimbursement rate from 12 county criminal defender's fee schedules applicable in cases when the Public Defender has a conflict and the level of representation is similar to that expected of counsel in a parole hearing.

Determinately-Sentenced Nonviolent Offender Parole Review

Determinately-sentenced nonviolent offenders are also eligible for parole consideration by the Board. In 2015, the Board began reviewing nonviolent "second strikers" for parole once they had served 50 percent of their full sentence pursuant to an order of the Three-Judge Panel in the *Plata/Coleman* class action litigation. This program was replaced in 2017 by the parole review process for determinately-sentenced nonviolent offenders under Proposition 57.[48]

Under Proposition 57, CDCR refers certain determinately-sentenced nonviolent offenders to the Board for review and possible release, once they have served the full term of their primary offense[49]. Persons are reviewed for release based on their criminal history, a review of their institutional records, and after consideration of input received from the inmate, victims, victims' families, and the district attorney's office that prosecuted the person.[50] Unlike the parole hearing process for long-term inmates, parole reviews for determinately-sentenced nonviolent inmates are administrative or "paper" reviews; not in-person hearings.[51]

As mentioned above, the nonviolent offender parole review process replaced an almost identical parole review process that had been in place since January 2015 as a result of a federal court order issued in February of 2014. As a result of that court order, the state implemented the nonviolent, second-strike parole review process. The majority of determinately-sentenced inmates eligible for the nonviolent offender parole review process under Proposition 57 are the same inmates who were eligible for parole review under the nonviolent, second-strike parole review process ordered by the court.

Inmates Eligible for Nonviolent Offender Parole Review

Inmates sentenced to a determinate term of imprisonment are eligible for the nonviolent parole review process.[52] The inmate must have completed the full term of his or her primary offense, which is the single crime for which a court imposed the longest term of imprisonment.[53] Additionally, the

[48] 15 CCR §§ 3490-3491; 15 CCR §§ 2449.1-2449.7.
[49] 15 CCR §§ 3490-3491.
[50] 15 CCR §§ 2449.4, 2449.5.
[51] 15 CCR § 2449.4.
[52] 15 CCR §§ 3490, 3491.
[53] Cal. Const., art. I, § 32, subd. (a)(1)(A); 15 CCR § 3490, subd. (d).

inmate must not be serving a term of incarceration for a violent felony as defined in Penal Code section 667.5, subdivision (c).[54] Inmates who are required to register as a sexual offender under Penal Code section 290 are also not eligible for the nonviolent offender parole review process.[55]

Inmates convicted of nonviolent offenses will be reviewed for eligibility by CDCR.[56] Once an inmate is determined to be eligible for the process, the Department will determine when the inmate will have served the full term of his or her primary offense. This date is called the inmate's nonviolent parole eligible date.[57] Inmates are provided written notice of their eligibility and their nonviolent parole eligible date.[58] Eligibility determinations are subject to appeal through the Department's inmate appeal process.[59]

When Eligible Determinately-Sentenced Nonviolent Offenders Are Referred to the Board of Parole Hearings for Review

Inmates are referred to the Board for a parole review 35 days before their nonviolent parole eligible date so long as they have at least 180 days remaining to serve.[60] Inmates are provided written notice of the outcome of the referral decision by CDCR.[61] Referral decisions are subject to appeal through the Department's inmate appeal process.[62] Inmates who are referred to the Board will be provided a written explanation of the Board's nonviolent offender parole review process, including notification that they have an opportunity to submit a written statement for the Board's consideration when determining whether the inmate should be released.[63] Written statements should be submitted to the Board by the inmate within 30 days of the date the inmate is referred to the Board.

Parole Consideration for Determinately-Sentenced Nonviolent Offenders

If the Board confirms the inmate is eligible for parole consideration, the Board will send notices within five business days to victims and their family members who are registered with CDCR's Office of Victim & Survivor Rights & Services.[64] The Board will also send a notice to the district attorney's office

[54] 15 CCR § 3490, subds. (a), (c).
[55] 15 CCR § 3491, subd. (b)(3).
[56] 15 CCR § 3491, subds. (c), (d).
[57] 15 CCR § 3490, subd. (f).
[58] 15 CCR § 3491, subd. (f).
[59] 15 CCR § 3491, subd. (g).
[60] 15 CCR § 3492, subd. (a).
[61] 15 CCR § 3492, subd. (c).
[62] 15 CCR § 3492, subd. (d).
[63] 15 CCR § 3492, subd. (c).
[64] 15 CCR § 2449.3, subd. (a).

that prosecuted the inmate.[65] The notices alert the victim, victim's family, and the district attorney's office that the inmate has been referred to the Board for review and possible release. The notices also explain that victims, their families, and the district attorney's office have an opportunity to submit a written statement to the Board for its consideration when determining whether the inmate should be released. Written statements should be submitted to the Board by the victim, victims' family, and the district attorney's office within 30 days from the date of the Board's notice.[66]

Once the 30 days has passed, the Board will assign the case to a deputy commissioner. The first thing the deputy commissioner will do is review the case to confirm the inmate is eligible for the nonviolent offender parole review process.[67]

If the deputy commissioner finds the inmate is not eligible, the deputy commissioner will issue a written decision with a statement of reasons explaining why the inmate will not be considered for release. The inmate will receive a copy of the decision and any victims, victims' family members, and the district attorney's office that received notice of the inmate's referral to the Board will be notified.[68]

If the deputy commissioner confirms the inmate is eligible for parole review, he or she will review the case to determine if the inmate would pose a current, unreasonable risk of violence or a current, unreasonable risk of significant criminal activity if released. This is referred to as a review on the merits. The review is patterned after a risk-based, structured decision-making model for determining whether the inmate poses a current, unreasonable risk of violence or an unreasonable risk of significant criminal activity.[69]

Accordingly, the deputy commissioner will weigh a variety of factors and the person will be released if factors aggravating the person's risk do not exist or if they are outweighed by factors mitigating the inmate's risk. The deputy commissioner will consider factors such as the circumstances surrounding the inmate's current conviction(s), the inmate's criminal history and institutional behavior including rehabilitative programming and

[65] 15 CCR § 2449.3, subd. (a).
[66] 15 CCR § 2449.3, subd. (b).
[67] 15 CCR § 2449.4, subd. (a).
[68] 15 CCR § 2449.4, subd. (a).
[69] 15 CCR §§ 2449.4, subds. (b), (c), 2449.5.

institutional misconduct, as well as any input from the inmate, victims, victims' family members, and the district attorney's office.[70]

The deputy commissioner will issue a written decision with a statement of reasons supporting the decision.[71] Inmates who have more than two years left to serve on their sentence at the time of the Board's review must be reviewed and approved by a supervising deputy commissioner.[72] Inmates approved for release by the Board will be processed for release 60 days from the date of the Board's decision.[73] Inmates who are denied release will be eligible for possible referral to the Board again one year later.[74] The inmate will receive a copy of the Board's decision and victims, victims' family members, and the district attorney's office that received notice of the inmate's referral to the Board will be notified of the Board's decision.[75]

Review of the Board's Decision

Within 30 days of being served with the decision concerning jurisdiction or a review on the merits, the inmate may request review of the decision. A hearing officer who was not involved in the original decision shall complete review of the decision within 30 calendar days of receipt of the request and will document the decision in writing. The inmate will receive a copy of the Board's decision and victims, victims' family members, and the district attorney's office that received notice of the inmate's referral to the Board will be notified of the Board's decision.[76]

Referrals and Approvals

More than 8,000 determinately-sentenced persons convicted of nonviolent offenses have been approved for release since 2015. The Board has approved 3,680 persons for release under Proposition 57 (July 2017 through September 2020) and 4,336 persons under the parole consideration process ordered by the Three-Judge Panel in the *Plata/Coleman* class action litigation (January 2015 through June 2017).

Between July 1, 2017 and August 31, 2020, the Board received 21,943 referrals for nonviolent offender parole review. In fiscal year 2021-22, the Board projects 5,881 nonviolent offenders will be referred to the Board for parole review under this program.

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[70] 15 CCR § 2449.5.
[71] 15 CCR § 2449.4, subd. (d).
[72] 15 CCR § 2449.4, subd. (f).
[73] 15 CCR § 3493.
[74] 15 CCR § 2449.4, subd. (h).
[75] 15 CCR § 2449.4, subd. (d).
[76] 15 CCR § 2449.7.

Medical Parole

The Board also conducts medical parole hearings for inmates who suffer from a significant and permanent condition, disease, or syndrome, resulting in the inmate being physically or cognitively debilitated or incapacitated. Eligibility under this program was initially established in 2011 by Penal Code section 3550 and later expanded in 2014 under an order from the Three-Judge Panel in the *Plata/Coleman* class action litigation. The resulting medical parole hearing process is commonly referred to as expanded medical parole.

A medical parole hearing is a hearing to determine if an inmate who is permanently medically incapacitated should be placed in a licensed health care facility in the community. The Department and the California Correctional Health Care Services determine who is referred to the Board for an expanded medical parole hearing.

Inmates Eligible for an Expanded Medical Parole Hearing

Inmates who meet certain criteria to be eligible for referral to the Board for an expanded medical parole hearing. First, the head physician of the institution where the inmate is housed determines whether the inmate suffers from a significant and permanent medical condition resulting in the inmate being permanently medically incapacitated. Additionally, the inmate must be unable to perform one or more activities of basic daily living such that the inmate qualifies for placement in a licensed health care facility in the community. Inmates serving a sentence of life without the possibility of parole or serving a death sentence are not eligible for expanded medical parole.

When Inmates Are Considered for Expanded Medical Parole

Medical personnel at the prison where the inmate is housed, the inmate, or the inmate's family or attorney may request that the inmate's primary care physician in prison consider the person for expanded medical parole at any time. The primary care physician's assessment will be considered by both the chief medical executive and the classification and parole representative at the institution where the person is housed when determining if the person should be referred to the Board.

Expanded Medical Parole Hearing

Expanded medical parole hearings are conducted like parole suitability hearings, with a few exceptions. First, expanded medical parole hearings can be conducted without the person present. The person may attend, but

the Board may conduct the hearing without the person present. Second, the standard the Board applies is whether the person will pose an unreasonable risk to public safety if placed in a licensed health care facility in the community.

If a person is denied medical parole, he or she will not automatically be scheduled for another medical parole hearing in the future. However, the person, his or her family or attorney, or a prison health care staff member may refer the person to the Board again after six months.

If a hearing panel approves a person's release to medical parole, the panel's approval is conditioned upon California Correctional Health Care Services identifying a licensed health care facility that meets the requirements identified by the hearing panel. The hearing panel will specify facility requirements it finds necessary for the person to be safely placed in the community. The panel may also condition the person's placement on his or her compliance with a variety of other requirements such as medical evaluations, compliance with nursing facility rules, and restrictions on communication with specified persons.

All other parole suitability hearing procedures established by the Board not impacted by the provisions outlined above are applied to expanded medical parole hearings, including appointment of counsel, and all applicable hearing notifications, including notice to law enforcement, the district attorney's office that prosecuted the inmate, and notice to victims and victims' family members who have registered with the Office of Victim and Survivor Rights and Services.

If a person is approved for expanded medical parole and is placed in a licensed health care facility in the community, the CDCR and California Correctional Health Care Services will monitor the person's medical condition and behavior while he or she is placed in a licensed health care facility. In the event the person shows significant improvements in his or her medical condition, such that he or she is no longer eligible for expanded medical parole, the person will be removed from expanded medical parole and returned to prison.

Referrals and Approvals

Between January 1, 2011 and September 9, 2020, the Board conducted 271 medical parole hearings, 208 of which were conducted under the expanded medical parole program. The Board has approved 183 inmates for medical parole and denied 88.

Conclusion and Looking Forward

The Board continues to look for ways to improve and streamline its processes, adapt to any new and expanded parole processes, and meaningfully carry out its responsibilities. The Board remains committed to protecting and preserving public safety while ensuring transparency and satisfying the due process rights of all persons who come under the Board's jurisdiction.

The Board will also continue to adapt to judicial interpretations of the law governing discretionary parole. There are a variety of significant court cases pending in state and federal courts. Please see Appendix E for a summary of some of the more significant legal issues pending resolution in the courts.

Appendices

Appendix A
Pre-Hearing Procedures

The procedures below are completed prior to a parole hearing. These procedures are intended to ensure the hearing is complete, fair, and that the rights of everyone who participates in the process are protected.

1. CDCR's Case Records Staff review all inmates for parole eligibility upon admission to state prison and calculate all applicable parole eligible dates for each inmate; the results are provided to the inmate and can be appealed through the Department's inmate appeal process.
2. Six months before an inmate's initial parole hearing is scheduled, Case Records Staff conduct an audit to verify the inmate's parole eligible date(s), shortly thereafter the Board schedule's the inmate's hearing.
3. The inmate's assigned counselor creates a summary of the inmate's historical institutional behavior and programming; when CDCR converted all inmate central files from paper to digital/electronic files in 2013, all pre-existing paper files were scanned into one voluminous electronic document; the counselor reviews this information and identifies relevant information from the inmate's admission date to 2013 and compiles the information for the parole hearing.
4. The inmate's assigned counselor produces and serves on the inmate a Notice of Rights, outlining the inmate's rights during the parole hearing process; the counselor also documents whether the inmate will be using a private attorney or would like an attorney appointed by the Board, any reasonable accommodations the inmate may need under the Americans with Disabilities Act, and whether the inmate would like to review the inmate's central file prior to the hearing.
5. Four to five months before the hearing the inmate is assigned an attorney (if the inmates does not have private counsel); Board staff create an electronic copy of the inmate's Central File, upload it to a secure, cloud-based file-sharing application, and send a link to the inmate's attorney and the district attorney; within 30 days, appointed counsel is required to consult with the inmate for at least an hour.
6. Four months before the hearing the inmate is assigned to a forensic psychologist; the psychologists reviews the inmate's central file, interviews the inmate for approximately two hours, administers the HCR-20, version 3, PCL-R, and the Static 99 (if applicable), drafts a 10 to 20 page Comprehensive Risk Assessment indicating the inmate's risk

for future violence; the report is required to be reviewed and approved by a senior psychologist; also four months prior to the hearing, a supervising correctional counselor reviews the confidential portion of an inmate's central file, summarizes the information, which is then provided to the inmate, the inmate's attorney, the district attorney, and the panel.

7. Three months prior to the parole hearing Board staff provide notice of the hearing to registered victims, district attorneys, the sentencing judge, the inmate's counsel at sentencing, and the law enforcement agency that investigated the commitment offense(s); Board staff also electronically pull relevant documents from the Department's main computer system and the inmate's central file, upload them into a secure, cloud-based file-sharing application and make them available to the inmate's attorney, the district attorney, and the panel assigned to the hearing.
8. Two months prior to the hearing the inmate's counselor serves the inmate with the Comprehensive Risk Assessment and Board staff provide it to the inmate's attorney, the district attorney, and the hearing panel; the inmate's attorney is required to consult with the inmate again for an hour.
9. One month prior to the hearing an interpreter is hired for the hearing, if needed.
10. Any written objections to alleged factual errors in the Comprehensive Risk Assessment are reviewed and addressed by the Board's Chief Counsel and Chief Psychologist.
11. Any pre-hearing motions, requests to postpone or waive the hearing, or requests for substitution of counsel are addressed by a deputy commissioner.
12. Ten days prior to the hearing Board staff compile any information added to the inmate's central file and documents regarding the hearing received since the electronic documents were initially distributed and provides them to the inmate's attorney, the district attorney, and the hearing panel.
13. If an inmate has a physical or cognitive disability, a staff assistant may be assigned to assist the inmate throughout the hearing process.

Appendix B

Summary of Select Criminal Justice Initiatives Impacting the Prison Population and Discretionary Parole in California from 2011 to 2020

2011

- Criminal Justice Realignment: Realigned the threshold for who is sent to state prison, resulting in offenders convicted of lesser crimes serving their time in local jails rather than state prison; also moved responsibility for adjudicating parole violations from the Board of Parole Hearings (Board) to the courts and mandated that parolees who violate the terms of their parole serve time for their parole violations in local jails rather than being returned to state prison

2012

- Proposition 36, "A Change in the 'Three Strikes Law'": Modified the Three Strikes Law to limit third strikes to serious or violent offenses; inmates sentenced to a third strike for a nonviolent offense could petition the court for resentencing

2014

- Elderly Parole: Created elderly parole; persons are eligible for a parole hearing after both reaching age 60 and having served 25 years of continuous incarceration; the Board must give special consideration to the impact of advanced age and long term incarceration on the person's risk to recidivate; implemented by order of the Three Judge Panel in the *Plata/Coleman* class action law suit
- Proposition 47, "The Safe Neighborhoods and Schools Act": Reduced certain drug and theft-related offenses from felonies to misdemeanors; permits persons serving sentences for felony offenses that were reduced to misdemeanors to petition courts for resentencing, and authorizes persons who had completed their sentences for felony convictions that were reduced to misdemeanors to apply to have those convictions reclassified
- Youth Offender Parole Hearings: Created youth offender hearings; all persons who were under the age of 18 when they committed their controlling offense are eligible for a parole hearing after serving 15, 20, or 25 years, depending on the sentence imposed by the court (i.e., 15 years if determinately sentence, 20 years if sentenced to less than 20 to life; 25 years if sentenced to more than 25 to life); persons sentenced under the Three Strikes Law or to life without the possibility of parole are excluded; the Board must give great weight to the factors of youth as detailed in United States and California Supreme Court case law; enacted by Senate Bill 260, Ch. 312, Statutes of 2014

2015

- Term Calculations: Eliminated the need for the Board to calculate release dates and instead requires persons who are granted parole to be released once the Board's decision is final, or once the person has served the minimum sentence imposed by the court, whichever is later; the Board is no longer required to calculate the person's release date based on a variety of factors such as the number of victims and other factors in mitigation or aggravation of the crime; enacted by Senate Bill 230, Ch. 470, Statutes of 2015

2016

- Youth Offender Parole Hearings: Extends eligibility for a youth offender parole hearing to persons who committed their controlling offense while under the age of 23; enacted by Senate Bill 261, Ch. 471, Statutes of 2016

2017

- Proposition 57, "The Public Safety and Rehabilitation Act of 2016": Requires judges (rather than prosecutors) to determine whether juvenile offenders charged with certain crimes should be tried as adults; gives the Secretary of Corrections the authority to determine credit earning for all inmates except condemned inmates and inmates sentenced to life without the possibility of parole; creates a process for persons convicted of nonviolent offenses to be considered for parole once they have served the full term of their primary offense, defined as the longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence
- Elderly Parole: Codified elderly parole hearings in Penal Code section 3055; persons age 60 and who have served 25 years of continuous incarceration are eligible for parole consideration; persons sentenced under the Three Strikes Law, convicted of first degree murder of a peace officer, sentenced to life without the possibility of parole, or condemned are not eligible; enacted by Assembly Bill 1448, Ch. 676, Statutes of 2017

2018

- Youth Offender Parole Hearings: Extended eligibility for a youth offender parole hearing to persons who committed their controlling offense while under the age of 26; enacted by Assembly Bill 1308, Ch. 675, Statutes of 2018; also extended eligibility for a youth offender parole hearing to persons sentenced to life without the possibility of parole for a crime they committed while under the age of 18, once

they have served 25 years of incarceration; enacted by Senate Bill 394, Ch. 684, Statutes of 2018

- Felony-Murder Redefined: Limited application of the felony murder rule to cases where a person directly kills a person in the commission of a felony or an attempted felony, aids and abets the killing, is a major participant in the killing, or when the victim was a peace officer engaged in the performance of his or her duties; inmates previously sentenced under the more expansive prior felony murder rule can petition the court for resentencing; enacted by Senate Bill 1437, Ch. 1015, Statutes of 2018

2020

- Elderly Parole: Extended eligibility for elderly parole to persons who are age 50 and who have served 20 years of continuous incarceration; persons sentenced under the Three Strikes Law, convicted of first degree murder of a peace officer, sentenced to life without the possibility of parole, or condemned are not eligible; enacted by Assembly Bill 3234, Ch. 334, Statutes of 2020
- Compassionate Release: Establishes the Secretary of Corrections as the sole authority to refer inmates who are terminally ill or permanently incapacitated to the sentencing court for recall of sentence and resentencing; removed the Board's authority to refer inmates for compassionate release; expanded eligibility for terminally ill inmates from those who have less than six months to live to those who have less than 12 months to live; enacted by Senate Bill 118, Ch. 29, Statutes of 2020
- Parole Terms: Reduces the length of parole terms for persons released from state prison who are subject to parole supervision by CDCR to two years for determinately-sentenced persons and three years for indeterminately-sentenced persons; requires persons released to parole to be reviewed for discharge from parole after 12 months; discharge is mandatory for determinately-sentenced persons if they have had no parole violations; does not apply to sex offenders; enacted by Senate Bill 118, Ch. 29, Statutes of 2020

Appendix C

Training Provided to Commissioners and Deputy Commissioners in 2019

Commissioners and deputy commissioners receive training throughout the year during monthly Board meetings, the majority of which are open to the public. In addition to routine training required for all CDCR employees, the following training was provided to commissioners and deputy commissioners in 2019:

- *Accommodations Available for Hearing-Impaired Inmates at Parole Hearings,* presented by Daniel Moeller, Associate Chief Deputy Commissioner, BPH
- *Lifer Housing in San Diego,* presented by Ryan Youtsey, Parole Administrator (A), Division of Adult Parole Operations, CDCR
- *Recommendations Regarding Inmate Housing on Non-Designated Yards,* presented by Connie Gipson, Deputy Director, Facility Operations, Division of Adult Institutions, CDCR & Jennifer Neill, Chief Counsel, BPH
- *Articulating Decisions Involving Youth Offenders,* presented by Jennifer Neill, Chief Counsel & Heather McCray, Assistant Chief Counsel, BPH
- *Legal Analysis of Structured Decision-Making Framework,* presented by Jennifer Shaffer, Executive Officer & Jennifer Neill, Chief Counsel, BPH
- *Look into My Eyes: The Impact of Bias on the Accuracy of Assessing Accountability and Remorse,* presented by Dr. Brandon Mathews, Colorado Parole Board Member & Alexandra Walker, Vice Chair, Colorado Parole Board
- *Transgender 101,* presented by Adrien Lawyer, Co-Director/Co-Founder, Transgender Resource Center of New Mexico
- *Legal Implications of Applying the Structured Decision-Making Framework,* presented by Jennifer Shaffer, Executive Officer & Jennifer Neill, Chief Counsel, BPH
- *The Anti-Recidivism Coalition's Hope and Redemption Team,* presented by Sam Lewis, Director of Inside Program, Anti-Recidivism Coalition
- *Articulating a Decision Under the Structured Decision-Making Framework,* presented by Jennifer Shaffer, Executive Officer & Jennifer Neill, Chief Counsel, BPH

- *Legal Implications of Applying the Structured Decision-Making Framework*, presented by Jennifer Neill, Chief Counsel, BPH & Phillip Lindsay, Senior Assistant Attorney General, Jessica Blonien and Sara Romano, Supervising Deputy Attorneys General, Attorney General's Office
- *Applying the Structured Decision-Making Framework Using CDCR Inmate Central Files, the Strategic Offender Management System, and the Board's Information Technology System,* presented by Ralph Serin, Ph.D., C.Psych., Professor in Department of Psychology and Director of the Criminal Justice Decision Making Laboratory at Carleton University, Ottawa, Canada & Jennifer Shaffer, Executive Officer, BPH & Robbye Braxton, Correctional Program Specialist, Dr. David Rentler & Richard Sparaco & Jonathan Ogletree, Subject Matter Experts, United States Department of Justice, National Institute of Corrections
- *Legal Standard for Cases Referred En Banc,* presented by Jennifer Shaffer, Executive Officer & Jennifer Neill, Chief Counsel, BPH
- *Risk Assessment and Parole Considerations of Long-Term Incarcerated Sex Offenders,* presented by Dr. James Rokop, Chief Psychologist, Department of State Hospitals
- *Hearing Structure and Articulating a Decision Under the Structured Decision-Making Framework,* presented by Jennifer Shaffer, Executive Officer & Tiffany Shultz, Chief Counsel (A), BPH
- *Nonviolent Parole Processes Under In re McGhee (2019) 34 Cal.App.5th 902*, presented by Jennifer Shaffer, Executive Officer, BPH
- *Current Safety and Security Issues in the Institutions,* presented by Ralph Diaz, Secretary & Kathleen Allison, Undersecretary, CDCR & Tiffany Shultz, Assistant Chief Counsel, BPH
- *Hearing Structure and Articulating a Decision Under the Structured Decision-Making Framework,* presented by Jennifer Shaffer, Executive Officer & Jessica Blonien, Chief Counsel & Tiffany Shultz, Assistant Chief Counsel, BPH
- *Youth Consideration Under In re Palmer (2018) 27 Cal.App.5th 120, review granted January 16, 2019, S25214*, presented by Jennifer Shaffer, Executive Officer & Tiffany Shultz, Assistant Chief Counsel, BPH
- *Articulating a Decision Under the Structured Decision-Making Framework,* presented by Jennifer Shaffer, Executive Officer & Jessica Blonien, Chief Counsel, BPH

- *Applying the Legal Standards Under California Code of Regulations, Title 15, Section 2253,* presented by Jennifer Shaffer, Executive Officer & Jessica Blonien, Chief Counsel, BPH
- *Addressing Mental Health and Substance Use Disorders in the Criminal Justice System: Programs, Policies, and Treatment Interventions,* presented by Allison G. Robertson, Ph.D., MPH, Associate Professor in Psychiatry and Behavioral Sciences, Duke University School of Medicine
- *Overview of the Office of Victim and Survivor Rights and Services,* presented by Katie James, Staff Services Manager II, CDCR
- *Overview of En Banc Referrals*, presented by Jessica Blonien, Chief Counsel, BPH
- *Waivers, Stipulations, and Postponements,* presented by Jessica Blonien, Chief Counsel & Sara Puricelli, Staff Attorney, BPH
- *You Can't Read the Label from Inside the Jar: Disruptive Truth Bombs about Criminology, Implementation Science, and Real-World Organizational Change,* presented by Alexandra Walker, ABD, Director of Community Relations and Strategy, Alliance for Criminal Justice Innovation
- *Recall and Resentencing Recommendation Program,* presented by Mike Masters, Correctional Captain, CDCR
- *Vicarious Trauma,* presented by Brenda Crowding, Deputy Director of the Office of Internal Affairs and the Office of Civil Rights, CDCR
- *Parole Rescission,* presented by Heather McCray, Assistant Chief Counsel & Chris Hoeft, Staff Attorney, BPH
- *Expanded Medical Parole,* presented by George Bakerjian, Staff Attorney, BPH
- *Changes to the Panel Attorney Appointment Program*, presented by Sandra Maciel, Chief Deputy of Program Operations, BPH
- *Transitional Housing: Past, Present, and Future,* presented by Ryan Souza, Deputy Director, Division of Rehabilitative Programs & Ryan Youtsey, Division of Adult Parole Operations, CDCR & Tiffany Shultz, Assistant Chief Counsel, BPH
- *Analysis of Comprehensive Risk Assessments Administered in 2018,* presented by Dr. Cliff Kusaj, Chief Psychologist, BPH

- *Institutional Misconduct: Theoretical and Empirical Perspectives,* presented by Dr. Lisa Tobin, Psychologist, BPH
- *Overview of the Substance Use Disorder Treatment Program,* presented by Diana Toche, Undersecretary, Health Care Services, CDCR
- *Structured Decision-Making Framework*, presented by Jennifer Shaffer, Executive Officer & Jessica Blonien, Chief Counsel, BPH
- *An Introduction to California Sex Offender Management Board (CASOMB)*, presented by Dr. Lea Chankin, Consulting Psychologist /CASOMB Coordinator
- *Articulating a Decision Involving Implausible Denials*, presented by Jennifer Shaffer, Executive Officer & Jessica Blonien, Chief Counsel, BPH
- *Applying the Legal Standards Under California Code of Regulations, Title 15, Section 2253,* presented by Jennifer Shaffer, Executive Officer & Jessica Blonien, Chief Counsel, BPH
- *Implementing Penal Code Sections 4802 et. Seq. Regarding Pardons and Commutations,* presented by Jennifer Shaffer, Executive Officer & Jessica Blonien, Chief Counsel, BPH
- *Rehabilitative Programming at California Prison Industry Authority,* presented by Randy Fisher, Assistant General Manager over Workforce Development, California Prison Industry Authority

Commissioners, associate chief deputy commissioners, and members of the Board's executive team attended the 2019 Association of Paroling Authorities' Annual Training Conference. Presentations and workshops were provided on the following topics:

- *Ethics,* presented by Marie Ragghianti, Parole Board Administrator
- *Essential Principles of Implementation Leadership,* presented by Brandon Mathews, D.M., Colorado State Board of Parole
- *Interstate Compact,* presented by Ashley Lippert, Executive Director, Interstate Commission for Adult Offender Supervision
- *High Stakes and Missed Opportunities,* presented by Sandy Jones, Executive Director, Idaho Parole Commission & Julie Micek, Director of Parole Supervision, Nebraska Board of Parole & Sheryl M. Ranatza, Chairman, Louisiana Board of Pardons and Parole & Connie Utada,

Associate Manager & Tracy Velazquez, Manager, Public Safety Performance Project, Pew Charitable Trusts

- *Victims Handbook,* presented by Dr. Najah Burton, Supervisory Victims Coordinator, United States Parole Commission, Department of Justice
- *The Value of Structured Decision-Making in Parole,* presented by Richard Stoker, Director, National Parole Resource Center
- *Understanding Criminal Desistance Theory and Offender Change,* presented by Michael Hsu, Chair & Dr. Sid Thompson, former Chair, Oregon Board of Parole
- *Victims' Rights – How to Accord Victims Their Rights and Stay Ahead of Constitutional and Statutory Changes,* presented by Russell Butler, Executive Director, Maryland Crime Victims' Resource Center & Roberta Roper, Victims' Rights Advocate
- *Implementing a Gender Responsive Approach to Women in Parole Decision-Making: Conducting a Self-Assessment,* presented by Becki Ney, Principal, Center for Effective Public Policy & Director, National Resource Center on Justice Involved Women, National Parole Resource Center
- *What the Members Said – Parole Board Decision Making in England and Wales,* presented by Joanne Lackenby, Parole Board Member, England and Wales
- *Examining Risk Assessment and Clinical Judgement in Parole Release Decision-Making,* presented by Dr. Erin Harbinson & Dr. Julia Laskorunsky, Scholars, Robina Institute of Criminal Law and Criminal Justice
- *Taking Parole to the Next Level: Applying What Works and Ensuring Transparency and Fairness in Montana,* presented by Annette Carter, Chair, Montana Board of Probation and Pardons and Bree Derrick, Deputy Director, Idaho Department of Corrections
- *Beyond the Headlines,* presented by Daryl Churney, Executive Director General, Parole Board of Canada
- *ICE Detainers and Deportation,* presented by Joseph Suazo, Detention & Deportation Officer, National Fugitive Operation Program
- *60,481 to 0: Pennsylvania Stands OnBase,* presented by Leo Dunn, Chair, Pennsylvania Board of Probation and Parole

- *A Second Chance: Iowa's Process of Review and Release of Juvenile Lifers,* presented by Jeff Wright and Norman Granger, Vice Chair, New Jersey Board of Parole
- *Life After Life: Adjustment to LIFE in the Community After Being Released from Serving LIFE Sentences in Prison,* presented by Olinda Moyd, Chief, Parole Division of Public Defender Service for the District of Columbia
- *Do No Harm,* presented by Bree Derrick, Deputy Director, Idaho Department of Corrections
- *A Force for Positive Change,* presented by Damon West, Motivational Speaker

Lastly, the Board's Transcript Analysis Program provides commissioners with individualized feedback regarding their parole hearing decisions. Eighteen consultations occurred between the Board's legal division and commissioners under the Transcript Analysis Program in 2019.

Appendix D
Structured Decision-Making Framework

Structured Decision Making Framework Worksheet
For Parole Hearings Conducted by the California Board of Parole Hearings

Derived in past collaboration with Renée Gobeil, Carleton University & Jean Sutton, Parole Board of Canada, 2007

This Framework guides an analysis of current risk and additional factors by Board panels in order to support a decision rationale that is consistent with the Board's governing statutes, regulations, and case law. This is a structured professional judgment model; factors are not used to provide a score. The panel retains its full discretion when determining an offender's suitability for release.

Comprehensive Risk Assessment	Low / Moderate / High

Risk Related Factors

Criminal & Parole History	Aggravating (-)	Neutral	Mitigating (+)

Rating Examples

- **Aggravating**: The extent to which an offender has an early onset of criminality, (i.e., age 11 or younger) multiple crimes with short intervals between, crimes that escalated in seriousness, and multiple parole violations or revocations.
- **Mitigating**: No prior criminal history, or minor infractions with long intervals between crimes.
- **Neutral**: If multiple crimes, they are minor with no escalation of severity, long intervals between.

Long-Term Offender Considerations

Different types of long-term offenders may have different trajectories. Overall, they have lower rates of re-arrests than other violent offenders and rates of re-arrest for homicides are very low. Predictors of recidivism for long-term offenders are not markedly different than for offenders in general, despite having greater periods of incarceration.

Offender Self-Control	Aggravating (-)	Neutral	Mitigating (+)

Rating Examples

- **Aggravating**: The extent to which an offender reflected poor self-control at the time of the crime(s) as indicated by one or more of the self-control factors (e.g., substance abuse, poor problem solving, sexual deviance, etc.).
- **Mitigating**: At the time of the crime(s) offender did not reflect poor self-control as indicated by one or more of the self-control factors (e.g., substance abuse poor problem solving, sexual deviance, etc.).
- **Neutral**: Self-control factors present at the time of the crime(s) do not indicate either serious concern for offender lack of self-control or confidence in offender's ability to maintain self-control at the time of the crime(s).

Long-Term Offender Considerations

There are no unique aspects of self-control based on type of offender or sentence length. Panels should be confident that any of the above disinhibitors that are related to the offender's criminal conduct or prison behavior have been addressed or are no longer relevant.

Programming	Aggravating (-)	Neutral	Mitigating (+)

Rating Examples

- **Aggravating**: The CRA identifies risk factors that remain currently relevant. The offender has not completed correctional programs based on that risk. (Offender was not afforded the opportunity to complete such

programming or offender was assigned to such programming but did not actively participate and complete assignments.)

- **Mitigating**: The CRA does not identify risk factors that remain currently relevant or the factors identified have been addressed by the offender through active participation and completion of required assignments for assigned programming; programming was based on RNR.

- **Neutral**: The CRA identifies risk factors that remain currently relevant and the offender has completed some correctional programs to address those factors, but one or more elements of the offender's RNR have not been adequately addressed.

Long-Term Offender Considerations

Contrary to RNR, for low-risk offenders with serious commitment offenses, the intent of programming is to improve the offender's suitability for parole; programming upon release would also be preferred. Specific responsivity factors (e.g., motivation, language ability, cultural context) are relevant in that they impact offenders' participation in programming. Panels must note this as such factors impede program efficacy. For moderate and high-risk offenders, appropriate programming of sufficient dosage should be required for a positive decision, absent overriding mitigating circumstances. Alternatively, panels should require access to appropriate programming in the community upon release.

Institutional Behavior	Aggravating (-)	Neutral	Mitigating (+)

Rating Examples

- **Aggravating**: Serious misconduct at any point during the current period of incarceration or recent misconduct, regardless of severity.

- **Mitigating**: Absence of misconduct plus behavior that goes above and beyond rule compliance (i.e., meritorious behavior).

- **Neutral**: Absence of misconduct alone is not a predictor of release outcome; no misconduct plus basic rule compliance.

Long-Term Offender Considerations

Long-term offenders typically have low rates of misconduct (lower than other offenders), especially after the first 18 months of adjustment. Those long-term offenders with a pattern of serious misconduct over time or recent misconduct (Rules Violation Reports) (i.e., within 5 years) would be an anomaly and viewed to be higher risk. A pattern of frequent minor misconduct (Counseling Chronos) throughout the sentence would also be a concern, if this reflects ongoing problems with self-control. An apparent relationship or pattern consistent with the dynamics of the commitment offense would also be of concern. Recent (within past year) minor misconduct (Counseling Chronos), depending on context, would not necessarily warrant an assessment of aggravating.

Offender Change	Aggravating (-)	Neutral	Mitigating (+)

Rating Examples

- **Aggravating**: Offender rejects the need for change, has refused programs or been kicked out due to noncompliance, or despite programming continues to express views that demonstrate lack of change.

- **Mitigating**: Clear demonstration of change, regardless of whether the offender completed programs or not.

- **Neutral**: Some evidence offender is different since commission of crime but change is not substantial, clear, or consistent over time.

Long-Term Offender Considerations

Meritorious reports from staff or volunteers might be a good source for indications of change. The CRA might also provide some insights regarding change over time. The panel hearing is an opportunity for panels to examine this

more closely and would be time better spent than rehashing the minute details of the crime, as this is more relevant to offender outcome.

Release Plan	Aggravating (-)	Neutral	Mitigating (+)

Is the release plan realistic for ***this*** offender? Does the offender have protective factors in place in case of lapses, such as pro-social friends, employment? If the offender fails on release, what is the likely impact on the community?

Rating Examples

- **Aggravating**: The offender lacks a concrete, realistic parole plan and there is a nexus between the lack of a parole plan and current dangerousness.
- **Mitigating**: The offender has concrete, realistic parole plans addressing *most* of the community stability factors (e.g., stable housing, prospective employment, pro-social supports, realistic plans to manage risk factors).
- **Neutral**: The offender has concrete, realistic parole plans addressing *some* of the community stability factors with several factors not adequately addressed (e.g. offender has plans to live with supportive pro-social family but it is in the same crime-ridden neighborhood where his criminally involved peers live). The offender offers general statements about risk factors (e.g., "I need to avoid people, places and things I associate with my drug use") but cannot offer specific details or strategies to manage those risk factors.

Long-Term Offender Considerations

The initial transition to assisted living is challenging as offenders decompress from long imprisonment. This initial supportive environment may buffer risk such that the increased risk of initial release (first 6 months) may be delayed. Protective factors change over time and must be considered. Finally, holistic programming (accommodation, employment, mental health, addictions support, social networks, etc.) is essential.

Case-Specific Factors	Aggravating (-)	Neutral	Mitigating (+)

Is there anything that seems salient for this particular offender that may influence/effect risk, change, release planning or risk management that has not been considered?

Rating Examples

- **Aggravating**: There is a unique case-specific factor that increases the offender's current dangerousness.
- **Mitigating**: There is a unique case-specific factor that decreases the offender's current dangerousness.
- **Neutral**: There are no unique case-specific factors that affect the offender's current dangerousness.

Additional Factors

Victim/DA Considerations	Aggravating (-)	Neutral	Mitigating (+)

Did the victim, victim's next of kin, or prosecutor provide information or argument relevant to the express issue of safety or current dangerousness and thus, the offender's suitability for parole?

Rating Examples:

- **Aggravating**: The victim, victim's next of kin, or the prosecutor provided reliable information relevant to the express issue of safety or current dangerousness.
- **Mitigating**: The victim, victim's next of kin, or the prosecutor provided reliable information indicating the offender does not pose a current risk of dangerousness.
- **Neutral**: The victim, victim's next-of-kin, or the prosecutor did not provide information relevant to the express issue of safety or current dangerousness and thus, the offender's suitability for parole.

Youth Offender Factors	Great Weight Applied:	Yes/No

A hearing panel shall find a youth offender suitable for parole unless the panel determines, even after giving great weight to the youth offender factors, that the youth offender remains a current, unreasonable risk to public safety. If

a hearing panel finds a youth offender unsuitable for parole, the hearing panel shall articulate in its decision the youth offender factors present and how such factors are outweighed by relevant and reliable evidence that the youth offender remains a current, unreasonable risk to public safety. The panel shall give great weight to the youth offender factors: Diminished culpability of youths as compared to adults, the hallmark features of youth, and subsequent growth and increased maturity while incarcerated.

Elderly Parole Considerations	**Consideration Given:**	**Yes/No**
The panel shall give special consideration to the offender's advanced age, long-term confinement, and diminished physical condition, if any, when determining the offender's suitability for parole.		

Intimate Partner Battering Considerations	**Great Weight Applied:**	**Yes/No**
The panel shall give great weight to any information or evidence that, at the time of the commission of the crime, the offender had experienced intimate partner battering, but was convicted of an offense that occurred prior to August 29, 1996; the panel shall state on the record the information or evidence that it considered and the reason for the parole decision; the fact that an offender presented evidence of intimate partner battering cannot be used to support a finding that the offender lacks insight into his or her crime and its causes.		

Discordant Information
Is there any discordant or incongruent information that must be considered prior to making a release decision?

Final Analysis	**Aggravating (-)**	**Neutral**	**Mitigating (+)**
Recommendation	**Grant/Deny**		

Appendix E

Summary of Significant Litigation Pending in State and Federal Courts Potentially Impacting Discretionary Parole in California

California Supreme Court

In re Palmer III; California Supreme Court No. S256149
Issues presented are: 1) Did this life inmate's continued confinement become constitutionally disproportionate under article I, section 17 of the California Constitution and/or the Eighth Amendment of the United States Constitution? 2) If this life prisoner's incarceration became constitutionally disproportionate, what is the remedy?

In re Gadlin; California Supreme Court No. S254599
Issue presented is: Under Proposition 57 (Cal. Const., art. 1, §32), may CDCR categorically exclude from early parole consideration all prisoners who have been previously convicted of a sex offense requiring registration under Penal Code section 290?

In re Mohammad; California Supreme Court No. S259999
Issue presented: Proposition 57 amended the California Constitution to provide for early parole consideration for persons convicted of nonviolent felonies. Does the text of Proposition 57 both preclude consideration of the ballot materials to discern the voters' intent and prohibit CDCR from enacting implementing regulations that exclude inmates who stand convicted of both nonviolent and violent felonies from early parole consideration?

People v. Williams; Case: S262229, Supreme Court of California
Issue presented: Does Penal Code section 3051, subdivision (h), violate the equal protection clause of the Fourteenth Amendment by excluding young adults convicted and sentenced for serious sex crimes under the One Strike law (Pen. Code, § 667.61) from youth offender parole consideration, while young adults convicted of first degree murder are entitled to such consideration?

Appellate Court Cases:

In re Canady; Third Appellate District No. C089363
This is a habeas appeal. The trial court found that post-conviction credits earned by inmates must be applied toward the Nonviolent Parole Eligibility Date.

In re Flores; Third Appellate District No. C089974
This is a habeas appeal. The trial court concluded that determinately-sentenced nonviolent offenders are entitled to the same process and protections provided to life inmates under *In re Lawrence*, including the right to attend a live hearing.

In re Kavanaugh; Fourth Appellate District, Division 1 No. D076500
This is habeas appeal. The trial court found that due process requires that determinately-sentenced nonviolent offenders be provided an attorney and a hearing before two hearing officers when they are considered for parole release. *In re Moreno*; Fourth Appellate District, Division 1 No. D076821, SD Super. No. HCN 1586; SCN 367442-1 consolidated with *Kavanaugh*. *In re Smith*; Fourth Appellate District, Division 1 No. D077003; SD Super. No. HC19685; SCD208823 consolidated with *Kavanaugh*

In re Michael Williams; Second Appellate District, Div. 5 No. B303744
Original habeas petition in court of appeal. Williams alleges it is an equal protection violation to treat him differently from persons sentenced to life without the possibility of parole for offenses they committed as a juvenile because he is denied parole consideration. Williams was 21 when he shot two men during a robbery, killing one, for which he was subsequently sentenced to life without the possibility of parole.

Federal Litigation

Jones v. Diaz; N.D. Cal. No. 3:19-cv-7814
Possible class action civil lawsuit challenging delayed implementation of nonviolent parole consideration for indeterminately-sentenced nonviolent inmates.

Exhibit D

Hillary Blout, Executive Director,
For the People

To: Committee on Revision of the California Penal Code

From: Hillary Blout, Executive Director, For The People

Date: 11.1.2020

Re: Resentencing Under Penal Code 1170(d)(1)

INTRODUCTION

Today, there are 2.3 million people behind bars and people of color comprise a disproportionate percentage of this population. According to NYU's Brennan Center[1], a quarter of the current prison population could be released with minimal impact to public safety. However, research shows that with the current pace of reform, we will be waiting another 75 years before seeing a significant change in our carceral footprint[2]. The human toll of this timeline cuts deep for many Americans. With one in every four women with a loved one incarcerated[3], families have been torn apart by a system alleged to keep us safe. Thousands of people cast away; specifically - one out of every seven people sentenced to spend 50 years or longer in prison.[4] These staggering rates of incarceration stem from outdated tough-on-crime policies which many voters and policy-makers now admit are costly, overly-punitive, disproportionately impact people of color, and have questionable public safety benefits. California has made great strides to decrease its prison population, but much work remains. While front-end decarceration reforms are critical to keep people from going *into* prison, if we are ever to ameliorate the consequences of mass incarceration, we need more ways to get people *out*. These back-end reforms must also solve for the thousands of people serving for offenses categorized as "violent" who are often written-off as unredeemable. DA-Initiated Resentencing, through P.C. 1170 (d)(1), has the potential to accelerate California's decarceration efforts as well as redress the harm caused, particularly on black and brown people, by California's *tough-on-crime* policies of the past.

For The People (FTP) is a newly launched, non-profit organization based out of Oakland, California and is leading implementation of AB 2942. FTP supports prosecutors in addressing excessive sentences and our mission is to find people who can be safely released and reunite them with their families and communities. To do this, we partner directly with the prosecutors that put them there, as well as system and community leaders. In 2019, FTP launched a pilot with Santa Clara County DA's Office, Silicon Valley De-Bug and CDCR. After developing these partnerships and refining our model, we were able to bring eight men through the resentencing process and facilitate their release from prison. Collectively, these men had served nearly 100 years in prison and most were serving life sentences. In 2020 we contacted other DA offices and

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[1] See Report by NYU Brennan Center "How Many Are Unnecessarily Incarcerated" available at: https://www.brennancenter.org/our-work/research-reports/how-many-americans-are-unnecessarily-incarcerated

[2] The Sentencing Project, available at: https://www.sentencingproject.org/wp-content/uploads/2018/03/Can-we-wait-75-years-to-cut-the-prison-population-in-half.pdf

[3] Essie Justice Group, available at: https://www.prisonpolicy.org/blog/2018/05/14/essie/

[4] The Sentencing Project, available at: https://www.sentencingproject.org/publications/virtual-life-sentences/

now work with eleven California District Attorney offices as part of our Sentence Review Project (SRP). There are (8) phases of our work that include: 1) working with the DA to establish review criteria; 2) coordinating with CDCR to provide datasets; 3) engaging incarcerated people and obtaining prison records; 4) conducting comprehensive case review; 5) engaging community partners and public defenders; 6) making recommendations to the DA's office; 7) preparing for resentencing hearing/motion prep for DAs; and 8) coordinating the resentencing hearing and ensuring a streamlined release process. From start-to-finish, a single case can take anywhere from 30-50 hours, and range in cost of $2500 to $5,000 depending on the complexity and amount of time needed to coordinate both legal and reentry issues.

PENAL CODE SECTION 1170(D)(1) AND AB 1812

Assembly Bill ("AB") 2942, authored by Assemblymember Phil Ting and effective as of January 2019, allows district attorneys to reevaluate past sentences and facilitate a prison release where further confinement "is no longer in the interest of justice."[5] This new law, amended in Penal Code 1170 (d)(1), adds district attorneys to the list of law enforcement agencies vested with authority to recommend a sentence recall to the court.[6] Once a prosecuting agency moves the court to recall a sentence, the court's discretion is broad and may recall a sentence "for any reason rationally related to lawful sentencing,"[7] "as if [the defendant] had not previously been sentenced"[8] and the Court may consider the entire sentence. [9] The court may then use its full judicial powers available at the time of the resentencing hearing, including considerations such as: (1) which term of imprisonment should be imposed; (2) whether any enhancements charged should be stricken under Penal Code section 1385 (*Romero*); and (3) for multiple charges, whether a sentence should run consecutively or concurrently. The Court has the following limits: (1) the resentence may not exceed the original sentence; (2) the court must award credit for time served on the original sentence;[10] and (3) the court must rely on the ordinary sentencing rules promulgated by the Judicial Council when resentencing a defendant so as to avoid disparity of sentences.[11]

AB 1812 provides guidance on evaluation of evidence, including consideration of "postconviction factors, including, but not limited to, the inmate's disciplinary record and record of rehabilitation while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the inmate's risk for future violence, and evidence that reflects that circumstances have changed since the inmate's original sentencing so that the inmate's continued incarceration is no longer in the interest of justice."[12]

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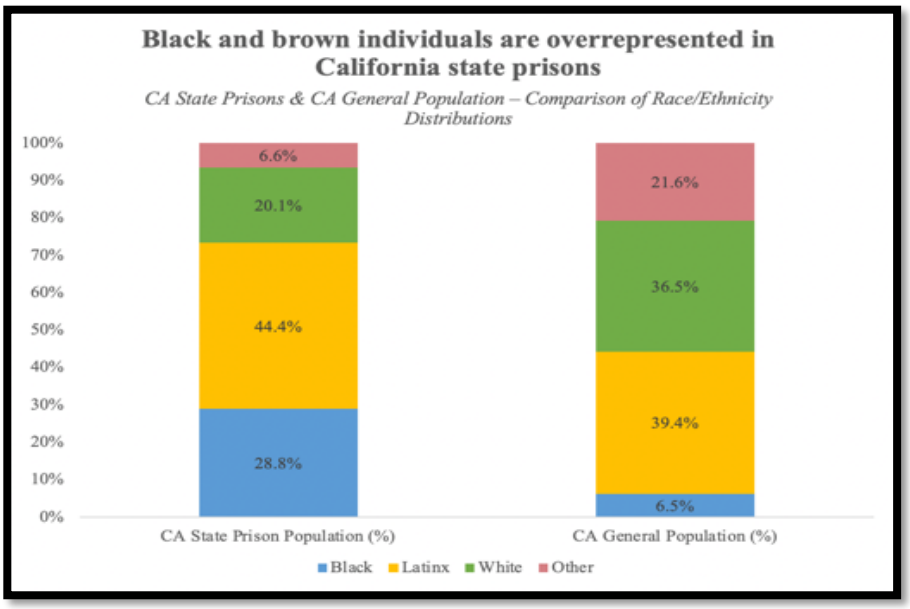
[5] § 1170, subd. (d)(1). (All further citations are to the Penal Code unless otherwise noted.)
[6] *Id.*; see also Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill 2942 (2017-2018 Reg. Sess.) as amended Aug. 17, 2018, p. 3.
[7] *Dix v. Superior Court* (1991) 53 Cal.3d 442, 456.
[8] § 1170, subd. (d).
[9] *In re Guiomar* (2016) 5 Cal.App.5th 265, 274; *People v. Garner* (2016) 244 Cal.App.4th 1113, 1118.
[10] *Dix v. Superior Court*, *supra*, 53 Cal.3d 442, 456; see also *People v. Torres* (2008) 163 Cal.App.4th 1420, 1428-29.
[11] § 1170, subd. (d)(1).
[12] § 1170, subd. (d)(1).

The resentencing court must also follow the direction of section 1170 (a)(1), which declares the purpose of sentencing as "punishment, rehabilitation, and restorative justice" and that the "purpose is best served by [prison] terms . . . proportionate to the seriousness of the offense [and] uniformity in the sentences of offenders committing the same offense under similar circumstances."[13] [14] This means that where there are disparities in sentence, by counties and/or by geography , when dealing with similar crimes, the judiciary is also vested with the opportunity to consider and remedy any proportionality issues of a sentence being reviewed.

OPPORTUNITIES: REDRESS RACIAL DISPARITIES AND STATEWIDE COST SAVINGS

Black and Latinx people are overrepresented in the California prison system. While Black people make up only 6.5% of California's general population, they comprise 28.8% (31,937) of the state's prison population (110,874).[15] Latinx people make up 39.4% of the general population and 44.4% (49,277) of the state's prison population.

Figure 1: CA State Prisons & CA General Population – Comparison of Race/Ethnicity Distributions



[13] §1170, subd. (a)(1) (emphasis added).

[14] The mandate for proportionality in the California Penal Code for both sections 1170(d)(1) and 1385 is reinforced by the guarantees against disproportionate punishment in the Eighth Amendment of the United States Constitution and Article 1, Section 17 of the California Constitution. (See *People v. Williams* (1998) 17 Cal. 4th 148, 160, as modified on denial of reh'g, (Feb. 25, 1998) (citing *People v. Superior Court* (*Romero*) (1996) 13 Cal. 4th 497, 504).)

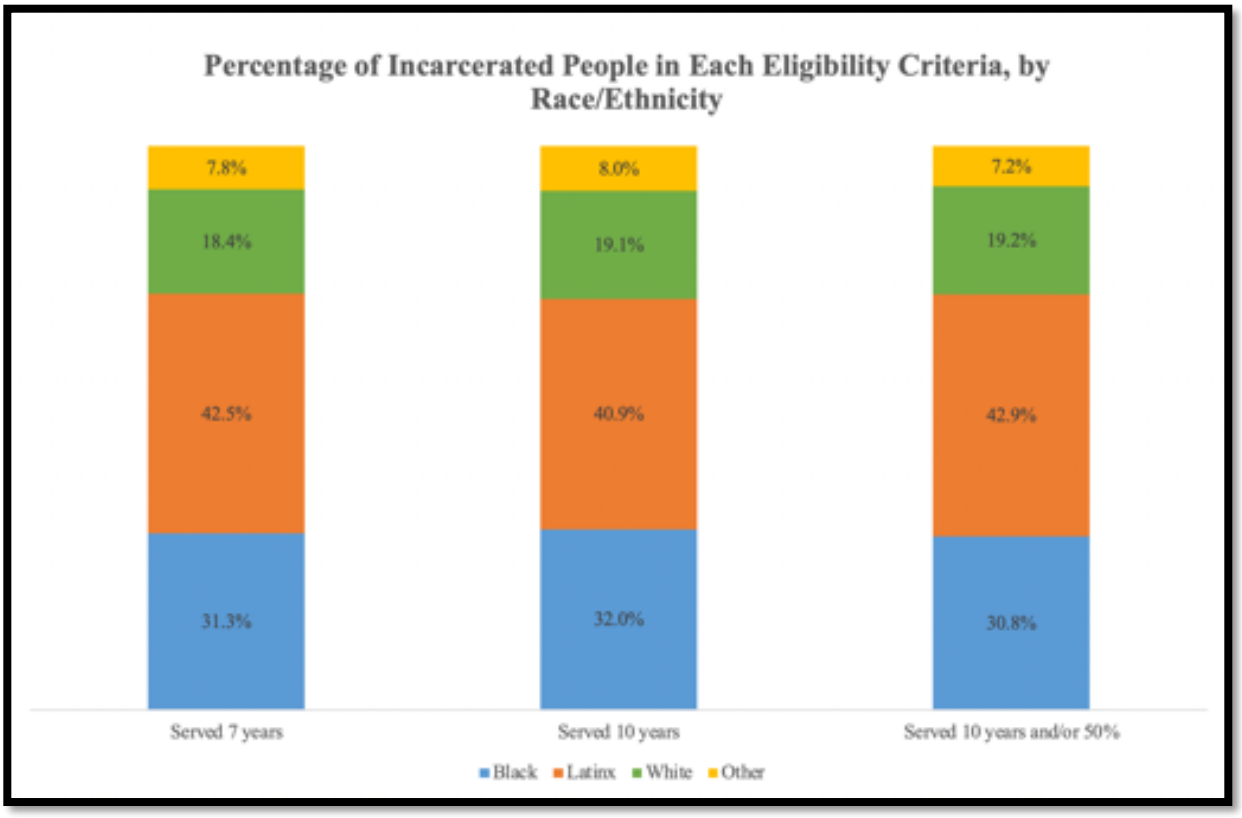
[15] This prison population estimate was drawn from CDCR data from January 2020, prior to early releases due to COVID-19.

Source: CDCR & U.S. Census (2019)[16]

Most California DAs are beginning their review by first looking at two criteria: 1) amount of time served and 2) offense category. Reviewing cases where a person has served between 7 and 10 years, or 50%[17] of their sentence provides an opportunity to evaluate rehabilitation strides or departures from certain sentencing practices. In the overall prison population, 52.0% (57,503) have served at least 7 years of their sentence, 40.5% (44,768) have served at least 10 years, and 59.8% (66,109) have served at least 10 years and/or 50% of their sentence.

Figure 2 shows these populations by race. Within these populations, we see there is higher number of Black and brown people that have already served a significant amount of their prison sentence.

Figure 2: Eligibility with Varying Criteria, By Race/Ethnicity



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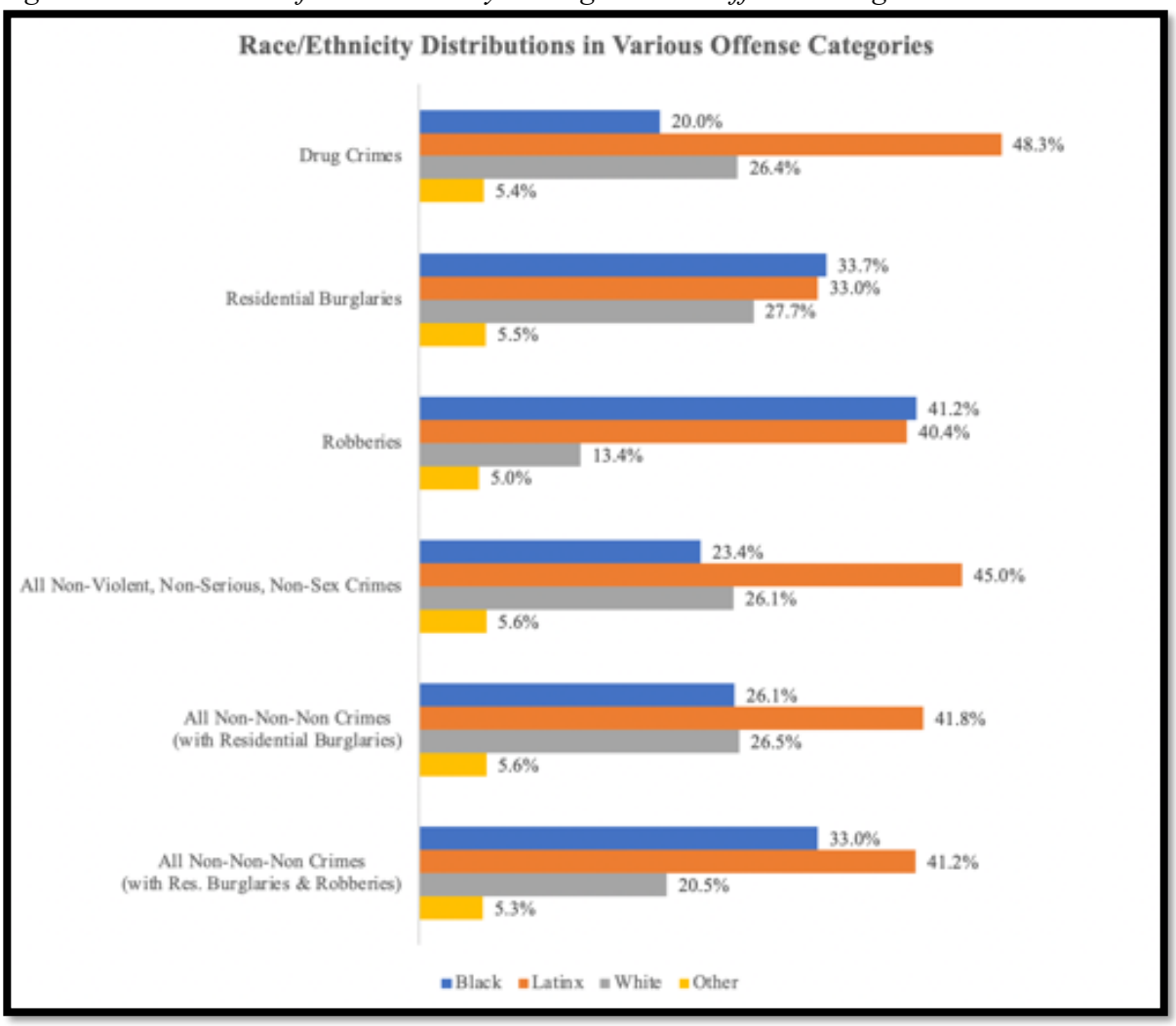
[16] The "Other" category in the U.S. Census includes 15.5% for Asian, 1.6% for American Indian and Alaska Native, 0.5% for Native Hawaiian and other Pacific Islander, and 4.0% for two or more races. Percentages may not add up to 100%, likely due to the possibility of multi-racial people being counted in multiple race categories.

[17] Most California DAs are evaluating cases where the person served at least 7 years and not 50% of a person's sentence, although some national discussions have suggested this criteria as well.

Figure 3 shows the breakdown by race for the offense categories that the majority of California DAs have used as a starting point for evaluating cases. For all categories shown, Black and Latinx people comprise the majority of people serving time in these offense categories.

Figure 3: Distribution of Race/Ethnicity Among Various Offense Categories



Along with reducing racial disparities in the prison system, resentencing and early release through AB 2942 can provide massive savings for the state. As seen in Figure 4, the state will spend $1.2 billion next year on incarcerating people for non-serious, non-violent, non-sex crimes alone.[18] When including residential burglaries with "non-non-non" crimes, the state spends $1.7 billion annually on incarceration, and when including robberies, the state will spends $3.2 billion per year. These projections represent fiscal opportunities for diverting funds towards reentry or prevention.[19]

[18] Based on their most severe offense.
[19] LAO estimates that it costs $81,000 per year to incarcerate an individual in California.

Figure 4: Incarceration Costs Per Year, By Various Crime Groups

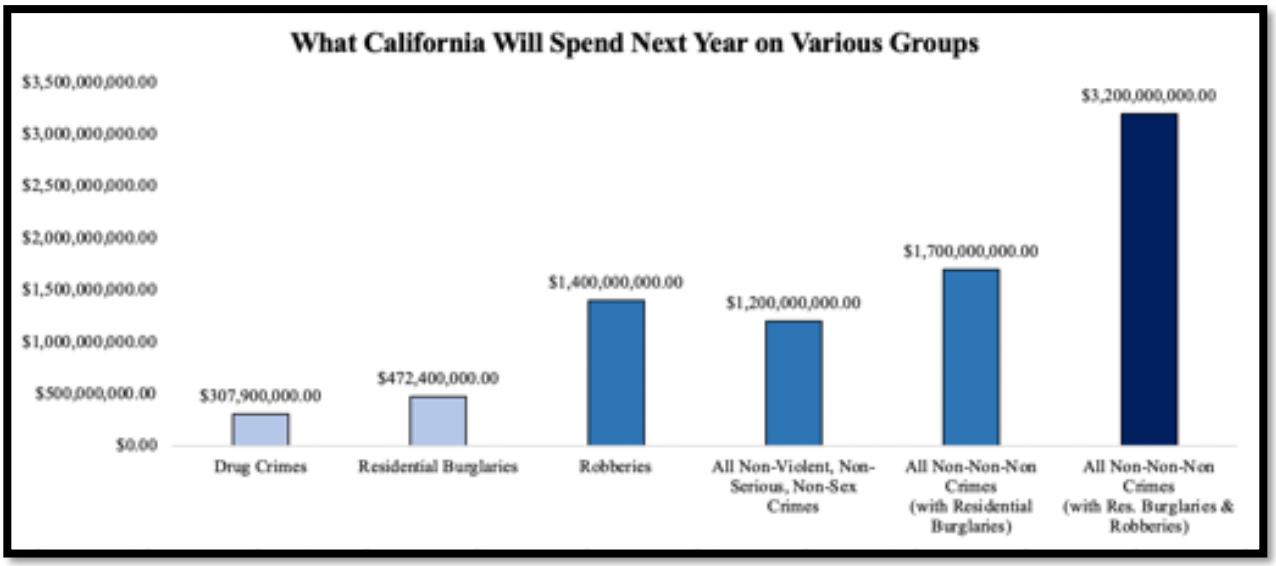


Table 1 breaks down the yearly cost projections by offense category and time served. As illustrated in Table 1, California is slated to spend $1.5 billion next year alone on people that have 1) already served a significant period of time and 2) for crimes that many DAs are open to re-evaluate. If we could release 10% of this population, we could divert nearly $150 million and spend those funds on other priorities.

Table 1: Yearly Costs of Incarceration for Crime Categories, By Varying Eligibility Criteria

Crime Type	Served 7 Years or More		Served 10 Years or More		Served 10 Years and/or 50%	
	Frequency	*Cost*	*Frequency*	*Cost*	*Frequency*	*Cost*
Drug Crimes	702	$56.8 million	543	$43.9 million	1,268	$102.7 million
Residential Burglaries	1,867	$151.2 million	1,271	$102.9 million	2,787	$225.7 million
Robberies	8,976	$727 million	6,163	$499.2 million	11,165	$904.3 million
All Non-Violent, Non-Serious, Non-Sex Crimes	2,270	$183.8 million	1,734	$140.4 million	4,840	$392 million
All Non-Non-Non Crimes (with Residential Burglaries)	4,137	$335 million	3,005	$243.4 million	7,627	$617.7 million
All Non-Non-Non Crimes (with Res. Burglaries & Robberies)	13,113	$1 billion	9,168	$742.6 million	18,792	$1.5 billion
All Incarcerated	57,503	$4.6 billion	44,768	$3.6 billion	66,109	$5.3 billion

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OPPORTUNITIES: CLOSING LEGISLATIVE GAPS & PROVIDING PARITY AND FAIRNESS

Gang Enhancements: With the passage of Senate Bill ("SB") 1393, which amended Penal Code section 1385(a), courts now have the authority to strike gang enhancements "in furtherance of justice."[20] However, this authority is prospective only and lacks any retroactive application. While the impetus of this amendment sought to correct another racialized and unjust aspect of our justice system, its application only corrects future harm and provides no relief for the thousands of incarcerated people who received a gang enhancement and are currently serving an excessive sentence as a result. Therefore, the 1170(d)(1) process presents a unique opportunity to address this gap and remedy certain issues inherent in the use of gang enhancements (i.e., the disproportionate effects they have had on locking up people of color) and their prolific overuse since the STEP Act's enactment.

Three Strikes: The passage of Proposition 36 in 2012, which amended California's "Three Strikes" law, is another policy change with gaps in its application.[21] For those people serving life sentences for a third strike conviction that was serious or violent, as well as third strikes for certain non-serious, non-violent offenses, Proposition 36 provides no remedy. Similarly, 1170 (d)(1) provides a remedy for people excluded from Prop 36 relief, who are rehabilitated, have already been sufficiently held accountable and deserve to come home.

Direct File Cases: With the passage of SB 1391 in 2018, juveniles age 15 or younger may no longer be transferred into adult criminal court for any crime. However, similar to the two opportunities discussed above, SB 1391 is prospective only and does not address the legacy of the most dehumanizing tactic of our tough-on-crime era: the "Superpredator" labeling of youth of color that enabled our nation to send so many young people of color away. Earlier this year, FTP—in partnership with the Yolo County DA's Office and Yolo County Public Defender's Office—successfully moved for the recall and resentencing of Mr. Andrew Aradoz, who was convicted of attempted murder at the age of 14. Given his age, he would not be eligible for a life sentence due to the passage of SB 1391. However, because this law is not retroactive, he was not entitled to such relief. Therefore, 1170(d)(1) presents another opportunity to remedy a now-repudiated policy, affording young people like Mr. Aradoz a second chance.

Legislative Recommendation: For these and any other legislation that provides only prospective application, guidance for the courts could accelerate relief for these types of judicial review. For instance, when evaluating gang enhancements in the 1170(d)(1) context, guidance similar to that provided in AB 1812, would enable greater review of these types of cases while ensuring consistency and integrity in the review process. Such criteria might include looking at the conduct of the incarcerated person and the type and quantity of programming they have done while incarcerated. Similarly, recognition that CDCR's formal procedure for dropping-out and debriefing is not dispositive and is only one factor, among many, that the Court should consider.

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[20] § 1385, subd. (a).
[21] See *People v. Conley* (2016) 63 Cal.4th 646, 657-59.

POTENTIAL BARRIERS AND PENAL CODE AMENDMENTS

The traditional path for LWOP cases and cases with a stand-alone sentence of 25 years-to-life are relegated to habeas or commutation process, but neither of these routes are as direct as 1170(d)(1). Habeas corpus proceedings can involve numerous and lengthy procedural steps and a Standard of Review that can be extremely difficult to surmount, and the high volume of commutation requests makes this pathway a narrow and highly competitive route for relief.

Addressing Special Circumstances and PC § 1385: Penal Code section 1385 provides courts with broad discretion to dismiss an action (in whole or in part) on its own motion or the motion of the prosecutor if dismissal is in the interest of justice. However, it is unclear whether a court has the authority to strike a special circumstance in LWOP or death cases. The California Supreme Court previously held that section 1385 does not permit the trial court to strike special circumstance allegations found true pursuant to the procedures set out in section 190.1.[22] The court reasoned that the plain language and the detailed construction of Penal Code section 190, which prescribes the method of applying special circumstances, renders section 190 special legislation and thus, paramount to section 1385, which provides a general grant of authority.[23] Similarly, resentencing statutes can be construed as general legislation, granting prosecutors and courts broad discretion in resentencing an incarcerated individual in the interest of justice.[24] Therefore, a revision to the Penal Code could provide clarity on judicial discretion involving special circumstances within the purview of section 1385.

25 Years to Life (Stand Alone Sentence): Where a defendant is sentenced to 25 years-to-life as the stand-alone penalty for the commitment offense (such as for murder), it is not clear what actions a court can take within a legal framework to adjust a sentence in the 1170(d)(1) context. Some argue that a court may resentence and stay or suspend the execution of sentence or, that the court could deem this type of sentence "time-served." Similarly, a revision to the Penal Code could provide an exception when all parties agree on a departure from 25-to-life or allow a court to stay a sentence.

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[22] *Rockwell v. Superior Court* (1976) 18 Cal.3d 420, 443.
[23] *Id.*
[24] § 1170, subd. (d)(1).

Exhibit E

Hon. J. Richard Couzens (Ret.)

MEMORANDUM

FROM: **J. RICHARD COUZENS**
Judge of the Placer County Superior Court (Ret.)

RE: **Requests by CDCR for Correction of Sentencing Errors and/or Recall of Sentence (P.C. § 1170, subd. (d)(1)) [REVISED MEMORANDUM BASED ON NEW CASE LAW]**

DATED: **October 20, 2020**

The California Department of Corrections and Rehabilitation (CDCR) has identified over 1000 state prison cases where it believes trial courts may have committed some form of sentencing error. CDCR typically has addressed these concerns by a letter discussing the possible error and requesting the court to review its file to determine if correction is required. More recently, in cases where it suspects sentencing error, CDCR has made a specific recommendation that the court recall the sentence pursuant to Penal Code, section 1170, subdivision (d)(1).[1] This memorandum is offered as a resource for determining a proper and efficient response to these requests for resentencing.

Duty of the court

It is the obligation of the court to impose a legally authorized sentence. "When a court pronounces a sentence which is unauthorized by the Penal Code, that sentence must be vacated and a proper sentence imposed whenever the mistake is appropriately brought to the attention of the court." (*People v. Massengale* (1970) 10 Cal.App.3d 689, 693.)

Because correction of an unauthorized sentence may result in a *substantial* reduction in some prison terms and because many inmates are nearing their projected release date, there is an added responsibility for the court to handle these requests expeditiously.

I. Correction of sentencing error

A. Types of sentencing error

The procedure for correction of sentencing error will depend on the nature of the needed correction and the timing of discovery. (See generally, 6 Witkin and Epstein, California Criminal Law 3d, Criminal Judgment §§ 174 et seq., pp. 202-210; Couzens, Bigelow and Prickett,

[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

Sentencing California Crimes, Chapter 28, The Rutter Group, 2017.) The jurisdiction of the court to modify a judgment or correct sentencing errors is summarized in *People v. Turrin* (2009) 1765 Cal.App.4th 1200, 1205:

> "[G]enerally a trial court lacks jurisdiction to resentence a criminal defendant after execution of sentence has begun. [Citations.]" (*People v. Howard* (1997) 16 Cal.4th 1081, 1089, 68 Cal.Rptr.2d 870, 946 P.2d 828; *People v. Karaman* (1992) 4 Cal.4th 335, 344, 347, 350, 14 Cal.Rptr.2d 801, 842 P.2d 100 [court retains power to modify a sentence "at any time prior to execution of the sentence"]; *Dix v. Superior Court* (1991) 53 Cal.3d 442, 455, 279 Cal.Rptr. 834, 807 P.2d 1063 (*Dix*); *Portillo v. Superior Court* (1992) 10 Cal.App.4th 1829, 1834–1835, 13 Cal.Rptr.2d 709.) There are few exceptions to the rule.
>
> Section 1170, subdivision (d), provides, in relevant part, that a trial court may recall the sentence on its own motion within 120 days after committing a defendant to prison. (*Dix, supra,* 53 Cal.3d at pp. 456, 464, 279 Cal.Rptr. 834, 807 P.2d 1063; *People v. Alanis* (2008) 158 Cal.App.4th 1467, 1475–1476, 71 Cal.Rptr.3d 139.) Section 1170, subdivision (d), does not authorize a defendant to file a motion to recall the sentence. (*People v. Pritchett* (1993) 20 Cal.App.4th 190, 193, 24 Cal.Rptr.2d 391.)
>
> A trial court may correct a clerical error, but not a judicial error, at any time. A clerical error is one that is made in recording the judgment; a judicial error is one that is made in rendering the judgment. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185, 109 Cal.Rptr.2d 303, 26 P.3d 1040; *In re Candelario* (1970) 3 Cal.3d 702, 705, 91 Cal.Rptr. 497, 477 P.2d 729; see *People v. Borja* (2002) 95 Cal.App.4th 481, 483–485, 115 Cal.Rptr.2d 728.)
>
> Also, an unauthorized sentence may be corrected at any time. (*People v. Scott* (1994) 9 Cal.4th 331, 354–355, 36 Cal.Rptr.2d 627, 885 P.2d 1040; *People v. Crooks* (1997) 55 Cal.App.4th 797, 811, 64 Cal.Rptr.2d 236.) "The unauthorized sentence exception is 'a narrow exception' to the waiver doctrine that normally applies where the sentence 'could not lawfully be imposed under any circumstance in the particular case,' for example, 'where the court violates mandatory provisions governing the length of confinement.' [Citations.] The class of nonwaivable claims includes 'obvious legal errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings.' " (*People v. Brach* (2002) 95 Cal.App.4th 571, 578, 115 Cal.Rptr.2d 753.) *People v. Smith* (2001) 24 Cal.4th 849, 102 Cal.Rptr.2d 731, 14 P.3d 942 explained, "We deemed appellate intervention appropriate in these cases because the errors presented 'pure questions of law' [citation], and were ' "clear and correctable" independent of any factual issues presented by the record at sentencing.' " (*Id.* at p. 852, 102 Cal.Rptr.2d 731, 14 P.3d 942.) For example, a sentencing court's computational error resulting in an unauthorized sentence can be corrected at any time. (*People v. Guillen* (1994) 25 Cal.App.4th 756, 764, 31 Cal.Rptr.2d 653.) An unauthorized sentence because of an error in restitution must be vacated and the proper sentence imposed

whenever the matter is brought to the attention of the trial or reviewing court. (*People v. Zito* (1992) 8 Cal.App.4th 736, 740–742, 10 Cal.Rptr.2d 491 [restitution for $300,000 violated ex post facto prohibition to the extent victim restitution and the restitution fine exceeded $10,000 maximum set by pre–1990 law and would constitute an unauthorized sentence].)

B. Scope of court's discretion at resentencing

Whether a sentencing error constitutes general judicial error or an unauthorized sentence is critical in defining the scope of the court's discretion in resentencing. If the error is general judicial error, the trial court has no jurisdiction to modify the sentence unless the sentence is reversed by an appellate court, or the court exercises its discretion under section 1170, subdivision (d)(1). If the court reconsiders the sentence after reversal by an appellate court or pursuant to section 1170, subdivision (d)(1), the court may not impose a sentence longer than the original term. (§ 1170, subd. (d)(1); *People v. Henderson* (1963) 60 Cal.2d 482, 495-497.)

Where the sentence is unauthorized, however, the court may reconsider the entire sentence and impose whatever term could be legally imposed at the original sentencing proceedings, even if the resentencing results in a longer term of imprisonment. " 'When a court pronounces a sentence which is unauthorized by the Penal Code, that sentence must be vacated and a proper sentence imposed whenever the mistake is appropriately brought to the attention of the court.' (*People v. Massengale* (1970) 10 Cal.App.3d 689, 693.) 'When an illegal sentence is vacated, the court may substitute a proper sentence, even though it is more severe than the sentence imposed originally'. (*People v. Grimble* (1981) 116 Cal.App.3d 678, 685, citing *People v. Serrato* (1973) 9 Cal.3d 753, and *In re Sandel* (1966) 64 Cal.2d 412.)" (*People v. Hunt* (1982) 133 Cal.App.3d 543, 564.)

It is immaterial that the unauthorized sentence is discovered as a result of a referral by CDCR under section 1170, subdivision (d). As observed in *People v. Hill* (1986) 185 Cal.App.3d 831, 834:

> "[U]nder other sentencing circumstances the trial court would have the authority to impose the sentence appellant challenges on appeal. When a case is remanded for resentencing by an appellate court, the trial court is entitled to consider the entire sentencing scheme. Not limited to merely striking illegal portions, the trial court may reconsider all sentencing choices. (*People v. Savala* (1983) 147 Cal.App.3d 63, 68-69, disapproved by the same division on another ground in *People v. Foley* (1985) 170 Cal.App.3d 1039, 1044; see *People v. Alvarado* (1982) 133 Cal.App.3d 1003, 1029, and *People v. Gutierrez* (1980) 109 Cal.App.3d 230, 233.) This rule is justified because an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components. The invalidity of one component infects the entire scheme. (*People v. Savala*, *supra.*, 147 Cal.App.3d at pp. 68-70.) We see no reason why this reasoning should not apply where, as here, the Department of Corrections rather than the Court of Appeal notifies the trial court of an illegality in the sentence. The trial court is entitled to rethink the entire sentence to achieve its original and

presumably unchanged goal. Furthermore, there is no contradiction between viewing an aggregate sentence as a whole and the language of section 1170, subdivision (d), which permits resentencing."

C. Penal Code, section1170, subdivision (d)(1)

Section 1170, subdivision (d)(1), provides:

> "When a defendant subject to this section or subdivision (b) of Section 1168 has been sentenced to be imprisoned in the state prison or county jail pursuant to subdivision (h) and has been committed to the custody of the secretary or the county correctional administrator, the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the secretary or the Board of Parole Hearings in the case of state prison inmates, or the county correctional administrator in the case of county jail inmates, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence. The court resentencing under this subdivision shall apply the sentencing rules of the Judicial Council so as to eliminate disparity of sentences and to promote uniformity of sentencing. *The court resentencing under this paragraph may reduce a defendant's term of imprisonment and modify the judgment, including a judgment entered after a plea agreement, if it is in the interest of justice. The court may consider postconviction factors, including, but not limited to, the inmate's disciplinary record and record of rehabilitation while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the inmate's risk for future violence, and evidence that reflects that circumstances have changed since the inmate's original sentencing so that the inmate's continued incarceration is no longer in the interest of justice.*[2] Credit shall be given for time served."

(Italics added.) The only difference between the court's ability to recall a sentence and CDCR's ability to recommend recall is that CDCR is not subject to the 120-day limitation – its authority may be exercised at any time during the prison term. In all other respects, however, the process of recalling the sentence and resentencing is the same regardless of who initiated the request for resentencing.

D. Referral by CDCR

The letters to the court from CDCR, signed by its secretary, provide: "[Section 1170, subdivision (d)] provides that, upon recommendation of the Secretary of the California Department of Corrections and Rehabilitation, the court may recall a previously ordered sentence and commitment, and resentence the defendant in the same manner as if he or she had not

[2] The italicized language was added by a budget trailer bill enacted June 27, 2018. The change was effective immediately.

previously been sentenced, *provided the new sentence is no greater than the initial sentence.*" (Italics added.) In light of the case authority discussed above, the suggestion that the court may not impose a longer sentence than the original term may be misleading. If the letter simply raises equitable factors justifying the reduction of sentence (as, for example, there is a change in the law after the defendant's case became final or the defendant has been an exemplary inmate), the court may not resentence the inmate to a term longer than the original sentence. However, if the original sentence was unauthorized, the court may impose any legal sentence, even if the term is longer than the one originally imposed.

If the court chooses to resentence the defendant under the general authority of section 1170, subdivision (d)(1), and not because the defendant received an unauthorized sentence, the court will be permitted to reduce the term of imprisonment using traditional rules of sentencing. The 2018 amendment to section 1170, subdivision (d)(1), permits the reduction of the judgment, "including a judgment entered after a plea agreement, if it is in the interest of justice." If the court does reduce the sentence imposed as a result of a plea negotiations, the district attorney may ask to withdraw from the plea agreement. Likely the request has no merit. First, it is clear from the amendment the Legislature intends the court to act without being restricted by the terms of the original plea. (See *People v. Arias* (2020) 52 Cal.App.5th 213, 221.) Second, the Supreme Court has refused to permit the prosecution to withdraw from a plea agreement if the defendant successfully obtains a reduction of a negotiated disposition under Proposition 47. (*Harris v. Superior Court (People)* (2016) 1 Cal.5th 984, 991-992.) The authority of the court to override a negotiated term under section 1170, subdivision (d)(1), is similar to the resentencing authority granted the court under Proposition 47.

E. Circumstances justifying the CDCR recommendation for recall of sentence

CDCR, in their recommendations for recall of sentences under section 1170, subdivision (d)(1), identified six major groups of defendants who may have been inappropriately sentenced:

1. *People v. Rodriguez* (2009) 47 Cal.4th 501

In *Rodriguez*, defendant had been convicted of assault with a firearm. (§ 245, subd. (a)(2).) He was also found to have committed the crime with the personal use of a firearm (§ 12022.5, subd. (a)) and that the crime was a "violent" felony committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). In sentencing the defendant for the assault, the trial court imposed a sentence under both enhancements. The Supreme Court found the sentence violated the restrictions of section 1170.1, subdivision (f), which specifies: "When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense." (*Rodriguez*, at pp. 508-509.) The court found the proper remedy is to reverse the trial court's judgment and remand the case for resentencing. "Remand will give the trial court an opportunity to restructure its sentencing choices in

light of our conclusion that the sentence imposed here violated section 1170.1's subdivision (f)." (*Rodriguez*, at p. 509.)

Although not expressly stated by *Rodriguez*, because the sentence was imposed in violation of section 1170.1, subdivision (f), it was an unauthorized sentence.

2. *People v. Le* (2015) 61 Cal.4th 416

The sentencing circumstances in *Le* are substantially similar to those of *Rodriguez*. In *Le*, defendant was convicted of assault with a semiautomatic firearm under section 245, subdivision (b). He was also found to have committed the violation with the personal use of a firearm under section 12022.5, subdivision (a)(1), and that the crime was committed for the benefit of a criminal street gang under section 186.22, subdivision (b)(1). The charging document did not specify whether the crime came within section 186.22, subdivision (b)(1)(B), as a "serious" felony, or section 186.22, subdivision (b)(1)(C), as a "violent" felony. Seeking to avoid the application of *Rodriguez*, the prosecution urged the court to use the enhancement under section 186.22, subdivision (b)(1)(B). The trial court, for the reasons expressed in *Rodriguez*, stayed the enhancement under section 186.22, subdivision (b)(1)(B). The Supreme Court agreed with the trial court's analysis and affirmed the judgment.

Although not expressly stated by *Le*, if the sentence had been imposed in violation of section 1170.1, subdivision (f), it would be an unauthorized sentence.

3. *People v. Gonzalez* (2009) 178 Cal.App.4th 1325

In *Gonzalez*, the defendant was convicted of assault by means of force likely to inflict great bodily injury (§ 245, subd. (a)(1)), and that the crime was committed with the infliction of great bodily injury (§ 12022.7, subd. (a)), and for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). The trial court sentenced the defendant on both enhancements. Based on the reasoning in *Rodriguez*, the court found the imposition of sentence on both enhancements violated the restrictions of section 1170.1, subdivision (g), which provides in relevant part: "[w]hen two or more enhancements may be imposed for the infliction of great bodily injury on the same victim in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense." (*Gonzalez*, at pp. 1331-1332.) The sentence was reversed and remanded to the trial court for resentencing within the limitations of section 1170.1, subdivision (g).

Although not expressly stated by *Gonzalez*, because the sentence had been imposed in violation of section 1170.1, subdivision (g), it was an unauthorized sentence.

4. *People v. Lopez* (2012) 208 Cal.App.4th 1049

In *Lopez*, the defendant was convicted of attempting to dissuade a witness (§ 136.1, subd. (a)(2)), and that the crime was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). Pursuant to the gang finding, the defendant was sentenced to an indeterminate term under section 186.22, subdivision (b)(4)(C). Imposition of the life term is permissible under section 186.22, subdivision (b)(4)(C), only if the defendant is convicted of "threats to victims and witnesses, as defined in Section 136.1." Defendant was convicted under section 136.1, subdivision (a)(2), which prohibits "[k]knowingly and maliciously attempt[ing] to prevent or dissuade any witness or victim from attending or giving testimony at any trial . . . ." Section136.1, subdivision (c)(1), however, applies to dissuasion "[w]here the act is accompanied by force or by an express or implied threat of force or violence, upon a witness or victim . . . ." The court observed that "the information charged Lopez with violating section 136.1, subdivision (b)(2), knowingly and maliciously attempting to dissuade a witness from testifying. The information did not charge Lopez with using an express or implied threat of force. Nor did the instructions inform the jury it must find Lopez used an express or implied threat of force. Nor did the jury make a specific finding that Lopez used an express or implied threat of force." (*Lopez*, at pp. 1064-1065.) "Lopez was not convicted of violating section 136.1, subdivision (c)(1). Nor did the jury find Lopez used an implied or express threat of force in committing the crime. Therefore, the trial court erred in imposing a sentence of seven years to life pursuant to section 186.22, subdivision (b)(4)(C) because the section did not apply to the crime of which Lopez was convicted and because the sentence was based on a fact not found true by the jury. We will vacate the sentence on count 5 and remand the matter to the trial court for resentencing on that count." (*Lopez*, at p. 1065.)

Although not expressly stated by *Lopez*, the sentence imposed by the trial court was unauthorized.

5. *People v. McCart* (1982) 32 Cal.3d 338

In *McCart*, defendant had been sentenced to prison. While in prison, he committed an offense and received a full term consecutive sentence for that crime under section 1170.1, subdivision (b). Thereafter, he committed a second in-prison offense and was sentenced to a full term consecutive sentence for that crime. The Supreme Court, applying the provisions of section 1170.1, subdivision (b), determined that when a defendant is convicted of multiple in-prison offenses, he should receive "a single term of imprisonment for all convictions of felonies committed in prison and sentenced consecutively, whether multiple convictions occur in the same court proceeding or in different proceedings. That this term is to commence when the person would otherwise have been released emphasizes that the new term is to be fully consecutive to the term already being served: i.e., that it must commence at the end of the longest of the prisoner's previously imposed terms." (*McCart*, at p. 343.) The matter was

remanded to the trial court for recomputation of the term for the in-prison crimes. (*McCart*, at p. 346.)

Although not expressly stated by *McCart*, because the sentence was imposed in violation of section 1170.1, subdivision (b), it was an unauthorized sentence.

6. Recall of sentence for purpose of striking an enhancement

Effective January 1, 2018, sections 12022.5 and 12022.53 were amended to allow a court to dismiss the designated gun enhancements in the interests of justice under section 1385. (§§ 12022.5, subd. (c); 12022.53, subd. (h).) The amendments apply to all cases not final as of the effective date of the legislation. (*People v. Robbins* (2018) 19 Cal.App.5th 660; *People v. Woods* (2018) 19 Cal.App.5th 1080; *People v. Chavez* (2018) 21 Cal.App.5th 971; and *People v. Almanza* (2018) 21 Cal.App.5th 1308.) CDCR, however, is utilizing its authority under section 1170, subdivision (d)(1), in certain instances to recommend consideration of dismissal of the firearm enhancements for cases final as of January 1, 2018. Recalling of the sentence by the court under these circumstances would not be based on the original sentence being unauthorized; rather, it would be based on equitable considerations. The court has complete discretion as to whether the sentence is recalled and, if it is recalled, whether the sentence will be modified by striking either the enhancement in its entirety or the punishment for the enhancement. (§ 1385, subd. (c)(1).)

Because the original sentence was authorized, the court could not impose a sentence longer than the original term. (§ 1170, subd. (d)(1).)

F. Appeal by the inmate

The denial of a request for resentencing under section 1170, subdivision (d), is an appealable order. Although the recall of a sentence is initiated by the court, the defendant having no independent right to request recall, our Supreme Court has held the denial of such a request is an "order made after judgment, affecting the substantial rights of the party," and, as such, may be appealed. (§ 1237, subd. (b).) (*People v. Loper* (2015) 60 Cal.4th 1155, 1167.)

G. Cases acted upon by the courts prior to the change to section 1170, subdivision (d)(1)

As noted above, the Legislature amended section 1170, subdivision (d)(1), by a budget trailer bill signed June 27, 2018. The amendment authorizes the court to modify a sentence even if it is a product of a plea agreement. The amendment also permits the court to consider various post-sentencing factors in determining whether to recall the sentence and, if recalled, the terms of the new sentence. If the court has ruled on a request by CDCR for resentencing prior to the change in the law, likely the court has no jurisdiction to make further orders with respect to the request absent a motion for reconsideration or a new request under section 1170, subdivision (d)(1), based on the change of law. If the court received a request for resentencing

prior to the amendment of the statute, but had not ruled on the request as of the effective date of the budget trailer bill, undoubtedly the court should rule on the request under the provisions of section 1170, subdivision (d)(1), as they have now been amended.

II. Suggested procedure for handling CDCR requests for resentencing under § 1170, subdivision (d)(1)

A. Identify the proper judge for ruling on the request

In most circumstances the original sentencing judge should handle the request for resentencing. (See, generally, *People v. Jacobs* (2007) 156 Cal.App.4th 728, 737, and *People v. Arbuckle* (1978) 22 Cal.3d 749, 756.) There is at least a possibility the sentencing judge will remember the case, understand some of its complexities, and be in the best position to assist in resolving any sentencing issues. If the original judge is not reasonably available, however, the matter may be referred to any judge for review.

B. Review by the court

The judge should review the letter from CDCR and the entire file to determine the nature of the problem and whether there is a proper reason for a correction. Although CDCR staff is well trained in California sentencing law, at times they misinterpret a code section, a case decision, or the state of the record. The court should verify the circumstances of the alleged error and determine the proper means for addressing the issue.

Even if there is a prima facie basis stated for modifying the sentence, the court may desire further documentation from CDCR regarding the defendant's circumstances. For example, whether relief will be granted may depend on the defendant's disciplinary record while in custody. The court should not hesitate to request further relevant documentation.

C. Summary disposition

If the court finds the CDCR comments facially wrong, or if the court is being invited to exercise its equitable power to modify the sentence, but declines to exercise such authority, the court should feel free to respond accordingly by letter, with copies of all correspondence being sent to counsel of record. There is no need to formally recall the sentence under section 1170, subdivision (d)(1). If one or both of the attorneys disagree with the court's assessment, they may invite further consideration by the court at a noticed hearing. In such circumstances, the court should follow the procedures outlined for a formal disposition, *infra*.

People v. McCallum (2020) ___ Cal.App.5th ___ [B301267] (*MCallum*), holds the defendant is not entitled to a hearing on the resentencing, but the court should give the defendant an adequate opportunity to address concerns raised by the CDCR request. "We conclude the statutory language of section 1170, subdivision (d)(1), read in the context of section 1170 as a whole, shows the Legislature did not intend to require a trial court to hold a hearing before

acting on a recommendation by the Secretary for recall and resentencing. It is up to the Legislature to address in the first instance whether an inmate should be afforded a hearing in response to a recommendation by the Secretary for recall and resentencing. [¶] However, in light of McCallum's substantial right to liberty implicated by the Secretary's recommendation to recall McCallum's sentence (People v. Loper (2015) 60 Cal.4th 1155, 1158, 1163, 184 Cal.Rptr.3d 715, 343 P.3d 895 (Loper)), the trial court abused its discretion in denying McCallum an opportunity to present information relevant to the Secretary's recommendation. . . . We reverse and remand for the trial court to allow McCallum and the People an opportunity to present additional information relevant to the Secretary's recommendation, and for the trial court in light of this information and any briefing provided by the parties to exercise its discretion whether to recall McCallum's sentence. If the court recalls McCallum's sentence, he would have a right to be present at a resentencing hearing." (*McCallum*, *supra*, at p. ___.) "[T]he court must consider evidence offered by the defendant in support of his assertion that the dismissal would be in furtherance of justice." (*Loper*, at p. 1167, 184 Cal.Rptr.3d 715, 343 P.3d 895, quoting *People v. Carmony* (2004) 33 Cal.4th 367, 375, 14 Cal.Rptr.3d 880, 92 P.3d 369.)

There is no right to appointed counsel prior to summary denial of resentencing. (*People v. Frazier* (2020) ___ Cal.App.5th ___ [B300612].)

If the problem is merely clerical error, such as a mathematical mistake in the calculation of custody credits or an error in the preparation of the abstract of judgment, the court should prepare a tentative response, with copies of all correspondence to counsel for comment within a designated number of days. If no objection is received to the tentative response, the court should forward the response to CDCR with an amended abstract of judgment, as may be appropriate. If there is an objection to the tentative response, the matter should be set for hearing. If the matter is resolved by summary disposition, the court should enter a minute order denying the CDCR request for recall of the sentence.

Any informal response to CDCR should include a copy of their original request for correction of the sentence.

D. Formal disposition by hearing

If the problem identified by CDCR presents a significant issue with the sentencing, such as with an unauthorized sentence, or if either party objects to the proposed summary disposition with reasons such that the court should hear the request on its merits, the matter should be set for a hearing.

1. *Order setting the matter for a status hearing*: The court should enter an order setting the matter for a status hearing on the request for resentencing. Some care should be exercised in crafting the court's order. At this initial stage of the process the court should NOT RECALL the sentence, but should merely set the matter for a hearing to determine whether the court SHOULD RECALL the sentence. If the court actually recalls the sentence, there will be no existing commitment of the defendant to CDCR and he

must be returned to the court pending further proceedings. As a consequence, the defendant likely will forfeit his existing housing status and opportunities for participation in programs. Since in many cases the resentencing will not result in the defendant's actual release from custody, the proper course is to keep him in the physical custody of CDCR pending the procedure for resentencing, unless the defendant actually requests his personal appearance in the proceedings. It may even be possible for the defendant to appear by remote communication under section 977, subdivision (c)(2)(A). A suggested form of order setting the matter for consideration of resentencing is attached as Attachment A.

2. *Counsel and the defendant must be notified*: The notice of hearing should be sent to all counsel of record and to the defendant. If counsel is no longer involved with the case, the court will need to appoint or reappoint the public defender. (See *People v. Frazier* (2020) ___ Cal.App.5th ___ [B300612] [[W]e need not, and do not, decide whether at some point prior to an actual resentencing hearing a due process right to counsel may attach under section 1170, subdivision (d)(1) —for example, if the court elects to conduct an evidentiary hearing to aid it in exercising its discretion whether to recall the sentence. We hold only that the filing of the Secretary's recommendation letter inviting the court to exercise its jurisdiction pursuant to section 1170, subdivision (d)(1), to recall a sentence, without more, does not trigger a due process right to counsel.].)

3. *The initial setting should address potential resolution*: The court should set the initial appearance as an opportunity for the court and counsel to discuss the sentencing problem and for consideration of any proposed disposition. Sentences imposed after jury trials likely will be easier to resolve because the court has total control over the structure of the final sentence. Sentences imposed as a result of a plea, however, will raise additional concerns because either or both of the parties likely will end up with something different than their bargain. The negotiations likely will involve a discussion of all the charges, dismissed or admitted, available custody credits, and the potential revision of the consecutive/concurrent structure of the sentence. The discussion also may involve the waiver of certain sentencing limitations, such as the prohibition against double punishment under section 654. If the status conference produces an agreed disposition, the court should follow the applicable procedures outlined in paragraphs 5 and 6, *infra*.

4. *Setting of formal hearing*: If the parties cannot reach an informal resolution, the court likely has no option but to set the matter for a contested hearing. Defense counsel will be required to determine whether the defendant wants to be present for the hearing. The defendant has the due process right to be present at the resentencing hearing. (*People v. McCallum* (2020) ___ Cal.App.5th ___, ___ [B301267].) Unless there are any major factual questions, likely the defendant will waive his presence because absence from prison may cost him a place in a program or a particular housing unit. If the defendant's appearance is to be waived, a formal written waiver should be filed as

required by section 977. The potential issues at the hearing may involve whether any error occurred, whether the original sentence was unauthorized, and the sentencing options available to the court.

In determining whether to reduce the sentence under the general authority of section 1170, subdivision (d)(1), and not because of an unauthorized sentence, "[t]he court may consider postconviction factors, including, but not limited to, the inmate's disciplinary record and record of rehabilitation while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the inmate's risk for future violence, and evidence that reflects that circumstances have changed since the inmate's original sentencing so that the inmate's continued incarceration is no longer in the interest of justice." Such factors would be irrelevant in determining whether to vacate an unauthorized sentence – if the sentence is unauthorized, it must be vacated regardless of any mitigating or aggravating factors. However, once the court determines the original sentence is unauthorized, such factors would be relevant in determining the length of the new sentence. The court also may consider factors that existed at the time of the original sentencing.

The court is not bound by the terms of any plea agreement. "[T]rial courts are not bound by the terms of an earlier plea agreement when resentencing under section 1170, subdivision (d)(1). (See § 1170, subd. (d)(1) ['The court resentencing under this paragraph may reduce a defendant's term of imprisonment and modify the judgment, *including a judgment entered after a plea agreement*, if it is in the interest of justice' (italics added).].) Indeed, section 1170, subdivision (d)(1) expressly contemplates that the trial court may take into account postconviction factors such as a prisoner's record of rehabilitation, age, diminished physical condition, or other factors suggesting that the prisoner's term of imprisonment should be reduced or 'the inmate's continued incarceration is no longer in the interest of justice.' (*Ibid.*) Such considerations would prove meaningless if the trial court were constrained by the dictates of an earlier plea agreement." (*People v. Arias* (2020) 52 Cal.App.5th 213, 221; italics in original.)

There is an open question whether the trial court, in granting a resentencing under section 1170, subdivision (d)(1), must consider changes in the law occurring between the finality of the case and the resentencing proceeding. In *People v. Federico* (2020) 50 Cal.App.5th 318, the court held the defendant was not entitled to a juvenile transfer hearing as required by Proposition 57 because the initiative was enacted long after the original criminal proceeding became final. The court rejected defendant's argument that the case became active once the court resentenced the defendant under section 1170, subdivision (d)(1). The Supreme Court has granted review of the decision.

5. *No change in the sentence*: If the court determines no change in the sentence is to be made, an order should be made to that effect and entered in the minutes. A copy of the order should be sent to all counsel. A copy of the order and a copy of the original

request for recall of the sentence should be sent to CDCR. The entry of the minute order is necessary to clearly trigger any appeal period.

6. *Correction of the sentence*: If the court determines correction of the sentence is necessary, the form of order will depend on the nature of the correction. If the correction is being made because the original sentence was not authorized, the court should not utilize the provisions of section 1170, subdivision (d)(1). The suggested order should state:

> The court finds the sentence imposed by this court on ____ (date) is not authorized and is hereby vacated. The reason the court finds the sentence is unauthorized is [state the reasons – the court may draw its reasons from the CDCR letter, if appropriate]. The following sentence is hereby imposed by the court: [may be any sentence authorized at the time of the original sentencing, even if the term is longer than the original sentence].

If the correction is being made for equitable reasons such as a change in the law after the defendant's conviction became final or defendant's exemplary conduct in prison, the court should order the recall of the sentence under section 1170, subdivision (d)(1):

> Upon recommendation of the California Department of Corrections and Rehabilitation, the court hereby recalls the sentence ordered on ____ (date) under the provisions of Penal Code, section 1170, subdivision (d)(1), for the following reasons: [state the reasons]. The following sentence is hereby imposed by the court: [may not be longer than the original sentence].

The forgoing orders should be stated verbally on the record and included in the minutes.

The court should impose the new sentence, observing all of the appropriate formalities of an original sentence to state prison. If reasons are required for a particular sentencing choice, they should be expressed on the record.

7. *Documentation to CDCR*: If the court corrects the sentence, it must send CDCR an amended abstract of judgment and a copy of the original letter from CDCR. The custody credits must be updated to the date of the new sentence. Since the court is correcting only the sentence, the defendant remains under the jurisdiction of CDCR, even though he may be temporarily housed in the county jail. The responsibility to calculate the custody credits is governed by *People v. Buckhalter* (2001) 26 Cal.4th 20 – the court must calculate the actual time in jail and the actual time in prison up to the date of resentencing, and all of the conduct credits while in jail. CDCR is responsible for calculating conduct credits earned in prison.

8. *Appeal of the denial of relief*: The denial of relief requested by the defendant based on a CDCR request for resentencing is reviewable on appeal, applying an abuse of discretion standard. (*People v. Arias* (2020) 52 Cal.App.5th 213 218-220 (*Arias*); *People v. McCallum* (2020) ___ Cal.App.5th ___, ___ [B301267]; *People v. Frazier* (2020) ___ Cal.App.5th ___, ___ [B300612].)

   Because the denial of relief is based on post-sentencing conduct by the trial court, the defendant need not obtain a certificate of probable cause to appeal the trial court's decision. (*Arias, supra,* at pp. 218-220.)

III. Questions

If there are questions about the procedure for recall of a sentence under section 1170, subdivision (d)(1), and any required resentencing, Judge Couzens may be reached at: richardcouzens@gmail.com.

ATTACHMENT A: FORM OF ORDER SETTING MATTER FOR HEARING

PEOPLE OF THE STATE OF CALIFORNIA **Plaintiff,**	
vs.	**No.**
JOHN DOE, **Defendant.**	**SETTING OF STATUS CONFERENCE TO DETERMINE WHETHER SENTENCE SHOULD BE RECALLED (Pen. Code, § 1170(d)(1))**

The court has received a request dated _____from the secretary of the California Department of Corrections and Rehabilitation recommending that defendant's sentence imposed on _____ be recalled pursuant to Penal Code, section 1170, subdivision (d)(1). A copy of such recommendation is attached hereto as Exhibit A.

The court hereby sets this matter for an initial status conference to determine whether the court should exercise its discretion to recall defendant's sentence, such conference to be held on _____ (date) at _____ (time) in Department ___ of this court. The court expressly declines to recall the sentence until further hearing. The defendant is not to be transferred from state prison to county jail and shall not be produced for future hearings unless expressly so ordered by this court.

[If needed] _____ (counsel) is hereby appointed to represent the defendant in connection with the potential recall of sentence and any resentencing.

Dated: _____ _____

JUDGE OF THE SUPERIOR COURT

Exhibit F

Sam Lewis, Executive Director, Anti-Recidivism Coalition

I'd like to speak to rehabilitative programming in the California Department of Corrections. In doing so I'd like to break it down from the perspective of both a service provider and as someone that spent decades inside this system.

Based on my experience of being incarcerated for twenty-four years, my creation and participation in rehabilitative programming including therapy, self-help, and education make me a subject matter expert. This experience also includes being a service provider including facilitating career readiness workshops, recruiting employers to hire formerly incarcerated people, assisting with finding housing, I9 documents, transportation need, and community support, and much more.

Rehabilitative Programming

Rehabilitation starts the very first day a person is incarcerated. I will limit my focus on the California Department of Corrections and Rehabilitation, CDCR. Within the CDCR, people go to what's call a Reception Center. Normally a person waits in the Reception Center for about 90 days until they are classified. This is process that the CDCR uses to determine where a person will be housed. During this time in the Reception Center, normally there are no rehabilitative programs happening while a person waits to be transferred. Just recently, in the past two years, CDCR has attempted to add some rehabilitative programming to Reception Centers. I cannot stress the importance enough of adding robust rehabilitative programming that includes self-help, and therapeutic programs to every Reception Center. The goal should be to get every new commitment involved in programming immediately.

When describing rehabilitative programs, I will break them down into four categories. Self-Help, Therapy, Education, and Vocations.

Self-Help: Self-Help Rehabilitative Programs include programs that are facilitated by people that are incarcerated.

Therapeutic Self-Help: Therapeutic Self-Help Programs are normally facilitated by people that are in custody, Community Based Organizations, and volunteers. These programs include programs such as Dog Training, Meditation, and Gardening. Each of these programs provide unique ways of healing to its participants.

Therapy: Clinical Therapy Rehabilitative Programs are programs that are facilitates by trained / certified Therapists and / or Psychologist. These programs include both group and one on one settings. Therapy is vitally important to address various traumatic experiences individual have lived through. Therapy is also vitally important to the individual rehabilitative process.

Education: Educational Rehabilitation Programs include ESL (English Second Language) GED / High School, and Post-Secondary Education. Studies indicate that the further a person goes with their education, the lower their potential for recidivism is. Educational rehabilitative

programs build confidence, and often expands the global view of all incarcerated individual that participate.

Vocation: Vocational Rehabilitative Programming **should** prepare incarcerated individuals for immediate employment opportunities upon their release. Sadly, most vocational courses within CDCR are out dated or do not provide enough training to translated into employment ready. This can be easily fixed by allowing vocations that are in demand to be taught within facilities.

Re Entry: Re Entry is a vital component of rehabilitation. I believe that this part of the process ensures that a person does not recidivate. When considering the entire process, the two parts compliment and complete one another. If the true goal of our Criminal Justice System is public safety both parts of the process must be included.

I can also speak to the specifics reentry.

Housing

Therapy

Employment

Community Support

Exhibit G

Adnan Khan, Executive Director,
Re:Store Justice

Committee on Penal Code Reform

Why there should be discretion in Sentencing

By Adnan Khan

"A people confident in its laws and institutions should not be ashamed of mercy." —Justice Anthony M. Kennedy, Associate Justice, U.S. Supreme Court. Granting mercy should be the cornerstone of our sentencing structure– rather than people being locked away for inordinate amounts of time, there needs to be a focus on the individual and their direct needs.

In March 2003, I agreed to commit a crime. The plan was for me to grab some marijuana and run. No weapons were to be used. If so, I would not have agreed to it. I assumed that no one would call the police for stealing weed, and that would be the extent of the harm. I never imagined a death. In our fake drug deal plan, someone I knew only in passing was recruited to be the getaway driver. After I grabbed the weed, it was dark but it appeared the driver began punching the young man. I got out of the car and yelled, "What the heck are you doing? Get back in the car!" I would soon find out he used a knife. Much later, I learned he was schizophrenic and hadn't taken his medication. As for me, I was 18, homeless, abandoned by my parents. I had dropped out of high school and used marijuana and drank regularly. I had never held a gun. I was arrested at 2am the next morning and I did not know what the charges were. Was it robbery or possession of weed? I was scared and regretted my actions immediately. At the police station I went through the procedure of stripping out, fingerprinting, DNA swab, etc. Then in the interrogation room I learned the young man had died. I cried hysterically. I quickly explained my role. After a long and exhausting interview, I was transferred to county jail and was charged with robbery and murder.

The charges confused me. But I could not worry about that yet because I was headed to my first experience with incarceration. No bail option for me. I was frightened. Other incarcerated men told me I could ask the law library for the law relevant to my case. A few days later, I received a stapled copy of the felony murder statute. The language was confusing, and I found myself looking up words in each sentence. After decoding it, I realized that because I committed a robbery, I was equally guilty of the murder. The reality settled in.

My intention was to grab a bag of marijuana and run. I was not the person responsible for the murder. I was not armed. I had no intent to kill. The jury found that I evinced no reckless indifference to human life. I had no reason to believe that my accomplice was armed, in direct contravention of the plan to steal. I had no reason to believe that he even had the capacity to commit a potentially fatal act because I was completely unaware of his unmedicated psychosis. At the time of my sentencing, a forensic psychologist reported to the court that, based on his clinical interview of me, the administration of a battery of psychological tests, and interviews of my close family members, his conclusion in "one of the most tragic cases [he had] worked on in almost 30 years as a forensic psychologist," was that "there is not a scintilla of clinical evidence in the results of [his] assessment that suggests any propensity for violence or aggressive behavior in Mr. Khan's personality."

To further the non-sensical sentencing, the individual who perpetrated the murder predicating my felony-murder conviction was permitted to plead guilty to second degree murder and receive a lesser sentence; the two young men who planned the predicate felony robbery and recruited me and the responsible party were given immunity and never "punished" at all. Since our system currently focuses on punishment, my case in itself shows the disparity and the power of the prosecutors to decide who to charge and who not to charge.

At the time of my crime, I was the classic definition of what we now call a "youthful offender" – 18 years old, homeless, parentless and a high school drop-out.

The probation officer asserted extraordinarily in her report to the sentencing court that, were it legally permissible, a probationary sentence would be the appropriate punishment for me. But even a report from law enforcement didn't matter, because of laws and ballot measures that were passed decades before I was born, my fate was sealed, I was sentenced to a mandatory 25 years to life. At the time people were not getting paroled and it was considered a death in prison sentence. Even 5 years at the age of 18 felt like a lifetime. Because of risk assessment tools that factored my age, my lack of a high school diploma (which I did earn in county jail but that wasn't factored in), my marital status (single), amongst many other things I was classified as "high risk" and sent to a maximum security prison where I quickly learned that survival was paramount. It took me over a decade of good behavior to get my "points" lowered so that I could transfer to a

level 2 prison at San Quentin and access education, programming and most importantly, community. Eventually, thanks to Senate Bill 1437 and courageous legislators, I was resentenced from a life sentence to 3 years, having already served 5 times that amount, the judge did not put me on parole, which allows me to vote in the upcoming election.

I am not unique, many of the people I have left behind have caused harm when they were young, many decades ago and are swallowed whole by a system that brands them a “violent offender” and relief is unattainable. However, there is ample evidence, from their behavior in prison and well regarded research, that they pose no threat to society.

We need to look at our whole sentencing structure and redo it. Life sentences that make no sense, sentencing enhancements that are unjust, racist, and arbitrary and a parole process that is irrevocably broken. We need to cease legislating for the exceptions. Our whole system would change if we were able to ask ourselves “How did we fail this person?” and “How can we make everyone involved whole again?”.

Exhibit H

Shanae Polk, Director of Operations, 2nd Call

Committee on Revision of the Penal Code
Submission of Shanae Polk
November 6, 2020

I want to take you through a series of events that led me to sitting here with you today. At 12 years old, my brother was shot and killed by LAPD. At that moment 3 things happened: 1. I lost all respect for authority. 2. I no longer valued life — mine or anyone else's. 3. I became desensitized.

Over the next 5 years between 12 and 17, I lost my brother, 2 cousins and my father. I had become a walking time bomb and didn't know it.

When I was 19, I was living what I thought was a normal life. Then one day at work I got into an argument with a coworker. The argument turned into insulting each other's families. I got so upset by what was being said that I took the life of Diane Poole.

I was on the phone with my brother when the argument escalated, he said to me "Leave, go home. I'm on my way." I knew at that moment that Diane was going to be killed. I used my brother as weapon. I was charged and convicted of aiding and abetting second-degree murder. My brother went on the run and was never arrested for this crime. Two years later he committed a murder-suicide.

I served close to 17 years of a 15-to-life sentence. It took many years of the same unhealthy behavior before I came to the realization that something wasn't right with me. Once I acknowledged that, it made it easier for me to start my journey of self-healing and forgiveness.

I accumulated several write ups in the first 9 years of my incarceration, including assault on staff, battery on an inmate, and inciting riots. The list goes on. These write-ups along with a lack of insight led to being denied parole at my first board hearing in 2012. I submitted a request to advance my parole, did what was asked of me — and more — and was found suitable at my second hearing in 2014.

Developing mentally, working though the grief and loss issues I had, while making a positive shift in prison was difficult. Which was expected. What I didn't expect were the hoops I had to jump through to get what was required and recommended by BPH for me to be suitable for parole. There isn't a process for lifers who need to meet certain requirements in a timely manner. I was told to take a grief and loss class, yet one didn't exist. I needed to take Anger Management but the waiting list for lifers was over a year because the prison would prioritize short termers, those going home within 18 months. Although I found a way around this problem there are many who haven't.

I paroled in 2015 and I am now the Director of Operations at 2nd Call, a non-profit designed to save lives by creating healthy minds.

Exhibit I

Anne Irwin, Director,
Smart Justice California

Committee on the Revision of the Penal Code
c/o UC Davis School of Law
400 Mrak Hall Drive
Davis, California 95616
Via email to: tnosewicz@clrc.ca.gov

Re: What We Can Learn from Norway

November 9, 2020

Dear Committee Members,

I am the founder and director of Smart Justice California. Through our education and lobbying work, SJCA encourages California state and local policymakers to embrace meaningful, data-backed criminal justice reforms that achieve safety and well-being at the community level, and accountability and healing and the individual level. Prior to founding SJCA, I was a public defender in San Francisco for many years, where I maintained a robust trial practice.

In preparing this submission and my remarks to the Committee later this week, I am cognizant that you have by now heard from many experts in the field, including some of the people on whom I regularly rely for policy guidance. To avoid being redundant, my input will focus primarily on what I believe we can learn from another society that has developed and implemented a very different blueprint for holding people who commit crime accountable and simultaneously rehabilitating them: Norway. To be sure, there are several countries that could serve as models for a more effective and humane penal policy. I offer Norway as a lens for examining our own penal framework because I have studied Norway's approach, including traveling there in 2019 with a California delegation that included state legislators, Governor Newsom's public safety advisors, CDCR leadership, CCPOA leadership, academics, and formerly incarcerated individuals.

I will also weigh in on the category of offenses that qualify as strikes under California's three strikes law, including sharing my firsthand experience of overbreadth and lack of proportionality among various strike offenses.

Finally, I will share a concept for incentivizing county-level actors to reduce their reliance on state prison commitments.

The Norway Model: Preparing Better Neighbors

Why Norway?

In the 1980s and 1990s, while California policymakers and voters were busy enacting an extensive patchwork of harsh sentencing laws – notably, without any empirical evidence that lengthier sentences would deter crime or reduce recidivism – Norwegians were undergoing their own system overhaul. By the early 1990s, Norway's correctional system was in crisis: Incarceration rates were increasing. Recidivism rates were above 60 percent. And violence inside prisons was frequent, including the murder of two correctional officers during one year. Rather than double down on more incarceration, as we did in California, Norway introspected and rebuilt their entire penal system from the ground up, beginning with a set of guiding principles rooted in empirical data.

In 1997, after several years of work by experts, Norway adopted a new criminal justice blueprint and then diligently implemented it. The result is a cohesive, coherent penal system built on a foundation of clear guiding principles in which every law, policy and practice is rooted. After more than twenty years of rebuilding, what is the result? Today Norway's recidivism rate is about 20 percent, and they incarcerate at a rate of 72 people for every 100,000 people in the population. In contrast, California's incarceration rate is 581 people for every 100,000 people in the population, and our recidivism rate – while improving marginally – remains abysmal.

At about the same moment in history, Norway and California stood at similar crossroads, and we chose philosophically and tangibly opposite paths. California decided to drastically increase incarceration – both in length and frequency – without considering the efficacy of that approach or the opportunity costs of warehousing people for long periods of time. It is undeniable that, as our prison budget skyrocketed, fewer and fewer state resources were left to invest in prevention, rehabilitation, and reentry. In short, we had no master plan. And our results bear that out.

Sentencing in Norway

We could learn from several other features of Norway's penal philosophy, but because of scope and time, I will focus on Norway's approach to sentencing.[1] However,

[1] For example, **the normality principle**: For those in prison, the restriction of liberty is the punishment. No other rights have been removed. Therefore, life inside the prison must resemble life outside the prison as much as possible, and the inmate will serve their sentence at the lowest possible security level. The goal is to make daily life inside the prison walls as similar as possible to life outside the prison walls, without compromising security. **The progression principle**: Linked with the principle of normality, from the very first day they enter prison, an

it is undeniable that Norway's criminal justice system is far more effective at reducing recidivism because of their integrated approach to sentencing and incarceration. How can we pinpoint the appropriate length of incarceration without accounting for *what happens* during that period of incarceration? In the mind of Norway's penal approach, the efficacy of any particular sentence length depends entirely on what happens while the sentence is being served. I counsel this body to closely examine the quality and nature of incarceration in California, lest your efforts to right size the length of incarceration are futile. Perhaps the most salient lesson we learn from Norway and its sister penal systems is that you can safely shorten periods of incarceration across the board if and when you make those periods truly rehabilitative.

The overarching goal of Norway's penal approach – their North Star – is to 'prepare you to be a better neighbor.' This approach reflects the reality that nearly 100 percent of Norwegian inmates will eventually be released from prison, so society will be safer and generally better off if rehabilitation is the singular goal of both the length and content of incarceration.

At a deeper level, Norway's approach to sentencing and incarceration is rooted in a set of fundamental beliefs about the human condition: First, people can change their mindset and behavior given the right support, resources, and opportunities. In other words, people are fallible but redeemable. Second, people are deeply affected by and act in response to their life circumstances. Criminal behavior is most often rooted in one's life circumstances. And the circumstances of one's incarceration will shape their behavior upon release. As one prison official explained during one of our Norway prison tours: "If we treat inmates like animals in prison, then we will release animals onto the streets." Put simply, at a societal level, Norwegians value the humanity in all people, even people who have committed crimes of violence. One Norwegian prison warden captured this sentiment when describing the people living in his prison: "These are people like you and I, with feelings, ambitions and dreams in life."

How does this approach translate into a sentencing scheme? All Norwegian sentences are based on the empirically-backed premise that lengthy incarceration is usually counterproductive:

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inmate's path through their sentence is aimed at successful reentry. The more institutionalized a system, the harder it will be to return to freedom. Inmates proceed toward their release date from higher security to lower security facilities, through halfway houses whenever possible, and ultimately to community supervision. Each level of progression comes with increasing responsibility and freedom. **Dynamic security**: The physical security provided by walls, locked doors, cameras and other "static" measures, must be complemented by the dynamic security that can only be provided by an alert, compassionate staff with knowledge of the inmates under their control. Dynamic security requires that staff have positive, professional relationships with inmates based on firmness and fairness. Staff may be trained in skills like motivational interviewing. They understand inmates' personal, life circumstances and invest in their successful return to the community.

a long prison sentence with a high security level and an abrupt transition to freedom means a high risk of recidivism following release. Penal implementation out in the community is more effective for rehabilitation than prison and is therefore the best long-term public protection.[2]

These are the main features of criminal sentencing in Norway:

- In 1981, Norway abolished the life sentence and replaced it with a 21-year maximum sentence, which is reserved for the most serious offenses. It is Norway's equivalent of California's capital sentencing.[3]
- Norway recently added a 30-year sentence for crimes related to genocide, crimes against humanity, or war crimes.
- The average prison sentence is 8 months long. Almost 90 percent of prison sentences are less than one year.
- The majority of non-serious offenses are punished by fines, community service, mandated drug treatment and/or electronic monitoring, not incarceration.

Obviously, California's approach to sentencing is dramatically different from Norway's, particularly California's morass of sentence enhancements enacted largely during the last forty years. I have shared this very general overview of Norway's philosophy, practice, and results to counter the notion that, if we begin to move away from lengthy determinate and indeterminate sentences, we will compromise public safety. To the contrary, Norway's murder rate in 2018 was .53 per 100,000 people. In that same year, California's murder rate was 4.4 per 100,000 people.

For a body like yours, tasked with rethinking California's penal approach, let Norway be an example of a very different model for achieving both accountability and public safety without over-incarcerating.[4]

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[2] Norwegian Ministry of Justice and the Police, *Punishment That Works: Less Crime, A Safer Society – Report to the Storting on the Norwegian Correctional Services*, 2008.

[3] Where mental illness – broadly speaking -- is at issue, judicial discretion is retained in order to continue confinement beyond the maximum penalty where release poses a clear public safety risk.

[4] If you are interested in learning more about Norway's criminal justice system, I recommend beginning with these articles: https://www.bbc.com/news/stories-48885846; https://www.nytimes.com/2015/03/29/magazine/the-radical-humaneness-of-norways-halden-prison.html; https://www.nytimes.com/2019/11/12/nyregion/nyc-rikers-norway.html; https://www.motherjones.com/crime-justice/2017/07/north-dakota-norway-prisons-experiment/.

Three Strikes Sentencing: Proportionality and Overbreadth

In my work as a public defender, I navigated California's complicated three strikes sentencing scheme on a daily basis. In applying the categories of strike offenses listed in Penal Code 667.5 ('violent' felonies) and Penal Code 1192.7 ('serious' felonies), I regularly encountered disproportionality and overbreadth. I encourage this committee to closely examine how each enumerated offense is applied in practice to various types of conduct. I will provide a few examples of the most typical circumstances in which the application of a strike category and the sentence that flowed therefrom was disproportionate to the conduct at issue.

Robbery (P.C. 211)

Snatches: Over the years, I handled hundreds of cases involving a cell phone snatch, or the snatching of some other valuable article out of the hands of the victim. Because the definition of robbery includes the use of any modicum of force – even a slight tug – these fundamentally non-violent incidents were classified as violent strikes, even though the perpetrator had no weapon, threatened no violence, and inflicted no physical harm whatsoever on the victim.

I regularly spoke with victims in these cases and asked if they felt that prison was an appropriate sentence for the defendant. Overwhelmingly, the victims felt that prison time was disproportionate to the harm caused. When I asked victims if they felt that the defendant should receive a strike, such that two more offenses of this nature would garner a 25-to-life sentence, not a single victim agreed that such a consequence was warranted. On several occasions, the victim was so disturbed at the prospect that this incident would amount to a strike that they wrote letters to the judge or prosecutor, or appeared in court to voice their objections.

I recommend that the robbery statute (P.C. 211) be broken into degrees reflecting whether a weapon was used, violence was threatened or used, or injury was inflicted. Robberies that do not involve the use of a weapon or violence, or the infliction of injury, do not warrant the application of strike sentencing enhancements.

***Estes* Robberies:** I know that you have already heard testimony regarding *Estes* robberies, where a theft becomes a robbery after-the-fact. I will not belabor the point other than to share that, in my own practice, *Estes* robberies were commonplace and I concur with prior presenters to this committee who recommended that conduct amounting to an *Estes* robbery be excluded from strike penalties.

Burglary (P.C. 459)

In my practice, the most frequent types of first-degree residential burglaries occurred in the curtilage of a residential building, including the shared garages and lobbies of apartment buildings. In these cases, the burglar never entered any apartment or anywhere else where people actually resided. Often, the burglar never got anywhere near a residence or a resident of the building. Under the circumstances, the application of a strike and enhanced sentencing is disproportionate to the harm caused. I recommend breaking the burglary statute (P.C. 459) into additional categories, so that only the most serious types of burglary offenses are categorized as strikes, e.g. entering the core of a residence – not a separate garage or lobby – while the residents are present.

As long as California has a three strikes sentencing law, we must ensure that first, second, and third strikes are applied prudently and only to conduct that truly warrants the lengthy sentences that flow from strike enhancements. I encourage this committee to undergo a comprehensive inventory of the offenses listed in P.C. 667.5 and P.C. 1192.7(c) and determine whether **all** of the practical applications of these offenses warrant strike enhancements. Where you encounter overbreadth and disproportionality, like the types I have described here, I encourage you to craft changes to the Penal Code that cure these frequent miscarriages of justice.

Incentivizing Non-Prison Resolutions

Currently, District Attorneys in California bear no financial accountability for the cost of state prison sentences. Those costs are borne entirely by the State. The result is that a county like San Francisco, which sends the fewest people to state prison each year per capita, costs the state millions of dollars less annually than a county like Tulare County, which has among the highest prison commitment rate in California. County-level officials, like the District Attorney, have no incentive to reduce the number of people they send to state prison each year because they do not bear any of the costs of state prison incarceration. To the contrary, counties incur the cost of county jail incarceration (with some notable exceptions), so they are actually incentivized to send people to state prison instead of sentencing them to county jail time.

I recommend exploring fiscal incentives for District Attorneys to avoid state prison sentences and reserve them for only the most serious offenses. For example, by providing financial incentives, the State could encourage District Attorneys to utilize their authority to seek resentencing under Penal Code section 1170(d). The State could

also create a formula for annually assessing each county's prison commitment rate and provide financial grants for counties that fall within the bottom 25 percent of per capita prison commitments. To be sure, there are a number of methods for implementing financial incentives. I encourage this body to vet the merits of various options.

I appreciate the opportunity to weigh in on matters of such high consequence. The system introspection that you are undergoing is long overdue. I commend you for this undertaking and I am honored to be a resource.

Sincerely,

Anne Irwin
Founder and Director
Smart Justice California
anne@smartjusticeca.org
415-515-4965

Exhibit J

Jay Jordan, Executive Director, Californians for Safety and Justice

Californians for Safety and Justice is an advocacy organization working to replace over-incarceration with new approaches to safety designed to stop the cycle of crime and improve community wellbeing. We work to change laws and systems to put the communities that have been most harmed and least helped at the center of public safety strategies and public safety investments. We also engage in crime survivors organizing through our flagship project, Crime Survivors for Safety and Justice, which has chapters in San Francisco, the East Bay, the Central Valley, Los Angeles, Sacramento, San Diego, Stockton, and the Inland Empire.

To ensure that victims' experiences and needs are a central part of policymaking processes, Californians for Safety and Justice conducted the first-ever survey of California crime victims in 2013. Last year we renewed our efforts to ensure that survivors' voices are centered in safety and justice policymaking and conducted an updated survey - the second of its kind in California. The surveys are important steps toward understanding who survivors are, how survivors are impacted by crime, what they need to recover from crime, and what they want from the criminal justice systems.

The surveys found that crime is a traumatic experience for most survivors, but that few are adequately supported by the criminal justice system. Both surveys found that most survivors in California lack access to victim services in the aftermath of crime.

The surveys found that California survivors believe our state sends too many people to prison, for too long, and that our current incarceration policies make people more - not less - likely to commit another crime.

Both surveys found that strong majorities of California crime victims also continue to see the need for public safety solutions that emphasize prevention, treatment, and rehabilitation over incarceration. The 2019 survey specifically found that victims 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 victims of serious violent crime are just as likely to support these new safety solutions as victims of lesser crimes.

The surveys found that, instead of spending more on prisons and jails, survivors prefer a wide range of investments and new safety priorities including more spending on mental health treatment, on prevention, and on healing services. And survivors support reducing sentence lengths to pay for these critical investments.

Sentencing and Safety in California

In 2007, the California prison system was in a state of crisis. The system was nearing 200% of capacity, was the subject of a major federal litigation, and eventually a court order to decarcerate. Soon after, policymakers began a series of reforms designed to address the

overcrowding crisis and rethink the state's approach to criminal justice, incarceration, and public safety.

In 2009, California passed legislation establishing non-revocable parole. In 2011, the California adopted realignment, one of the most significant shifts in responsibility for lower-level offenses away from state prisons in the country. From 2012 to today the state has adopted numerous major ballot initiatives reducing incarceration and rebalancing public safety priorities by attacking long sentences, reducing admissions to the state prison system, and improving release options. In 2012, the voters approved Prop 36 reducing the use of extremely long sentences under Three Strikes. In 2014, the voters approved Prop 47 shifting six low-level felony offenses to misdemeanors. In 2016, the voters approved Prop 57 improving the state's approach to rehabilitation and release for people sentenced to state prison. And just last week, California voters spoke clearly again when they resoundingly rejected an attempt to undo some of this progress through Proposition 20. Over the same period, the legislature has passed dozens of legislative reforms reducing extreme sentences, shifting the state's approach to mental health and drug laws including increased alternatives to incarceration, limiting the use of probation and parole, and more.

While the progress California has made over the last decade is impressive and has been necessary to keep the state prison population and spending on state prisons from becoming worse than they are, there is still much more to be done. California still spends $13 billion each year on state prisons. At the same time, communities across the state - especially those most harmed and least helped by crime and incarceration - are in need of investments in local safety programs that address drivers of crime like mental health and behavioral health treatment, as well as support services for victims of crime.

California's prison population remains high and, more and more, is driven by people serving very long sentences, often as a result of severe sentencing enhancements. This is true despite widespread agreement among criminologists that long sentences do not yield public safety benefits, that increasing sentence lengths is ineffective at reducing recidivism, but that providing opportunities for rehabilitation decreases crime.[1] The experts agree when it comes to California, specifically, as well: researchers estimate that California's heavy reliance on incarceration has yielded diminishing returns since 1980 when the state incarceration rate was 91 per 100,000 population. Since 1990, the impact of the state's incarceration rate on crime has been essentially zero.[2]

Long prison sentences are ineffective public safety policies in part because prison, even when the prison term involves a true focus on rehabilitation, is ultimately a back-end, downstream solution. Prison is only available as a response in those small number of episodes of crime and violence that are reported to law enforcement, cleared, charged, and result in a conviction and prison sentence. We know that only about half of crimes are even reported to law enforcement

[1] National Institute of Justice, *Five Things About Deterrence*; National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (2014); Nagin, Daniel S., "Deterrence in the Twenty-First Century," Crime and Justice in America: 1975-2025, ed. M. Tonry Chicago, Ill.: University of Chicago Press, 2013: 199-264.
[2] Oliver R., Eisen, L., & Bowling, J. (2015). What Caused the Crime Decline? Brennan Center of Justice.

in the first place, and that clearance rates for those crimes that are reported are low both nationally and in California (about 45% for violent crimes and 11-12% for many property crimes).[3]

The opportunity for significant improvements in public safety outcomes in California is not in the state prison system, but in addressing the well-known drivers of crime in local communities. There is near-universal agreement among safety and justice experts and stakeholders, advocates, and across diverse California communities that the communities most impacted by crime and incarceration are experiencing an untenable lack of support - especially now. To best leverage limited public safety resources to improve public safety outcomes, California needs to reorient its public safety investments by reducing spending on state prisons full of people serving excessive sentences, and by instead using those resources to increase investments in local efforts that address health and safety gaps in communities.

Recommendations

We hope this committee's work will drive California's ongoing leadership on reduced reliance on incarceration and renewed commitment to better public safety priorities. The committee's broad mandate situates its members and staff well to investigate and propose additional bold changes to reduce incarceration, limit extreme sentences, and improve rehabilitation and release pathways. The committee has already heard from numerous experts and stakeholders and has considered a number of reforms that legislators can adopt in the coming year to reduce the number of people entering state prisons, reduce long sentences, reduce the size and financial burden of the state prison system and free up state dollars for critical community supports and proven local safety solutions.

While legislative and ballot reforms like realignment, Prop 47, and others have reduced the number of people churning through state prisons on short felony sentences, there remains a significant number of people who are admitted to CDCR only to be released within a short amount of time - often under a year. We encourage the committee to consider reforms that further reduce the number of people transferred to state prisons on these short sentences. There are a range of solutions available including local criminal justice system supervision or custody as well as alternative, non-prison programs. It may be the case that there are a number of differently situated sub-populations driving these short prison terms and that a fuller range of non-prison options is necessary to best address the multiple drivers.

One such sub-group of this short sentence population is entering state prisons due to restrictions in the penal code on probation eligibility or statutory presumptions against probation. We encourage the committee to examine and eliminate, to the extent possible, the wide patchwork of probation restrictions effectively creating mandatory minimum sentences in a

[3] National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (2014), 133. National UCR Data from FBI, *Crime in the United States 2016*; California and LA data from CA DOJ Open Justice Data Tool.

number of cases.[4] For many lower-level cases, the penal code should instead operate based on a presumption *for* probation or other non-prison sentence.

We also encourage the committee to use its mandate to streamline the penal code and address areas where parallel but uncoordinated system changes, caselaw, or other dynamics have generated outcomes that do not align with public safety priorities. These include *Estes* robberies in which shoplifting offenses are charged as robberies and classified as violent felonies based on even minor altercations with security guards, and discrepancies that have developed over time in rates of credit earning for similarly situated populations depending on whether they are held in prisons or jails.

Finally, we encourage the committee to propose reforms that limit key drivers of excessive sentences - including and especially sentencing enhancements - and to propose reforms designed to improve the availability and operation of discretionary release mechanisms to address excessive sentences. We recognize that many of the most critical drivers of excessive sentences are the product of ballot initiatives that, for the most part, have not been and cannot be revisited and reconsidered by the legislature in decades - and we encourage the committee to take up those matters in future work. But we also recognize that there are numerous other changes the committee can and should propose that will mitigate the impact of these very severe, decades-old enhancements in areas where the legislature can amend the law and/or provide structure, guidance, and legislative support to improve existing discretionary processes including judicial authority to strike prior convictions, discretionary parole processes, and "second look" processes like 1170(d)(1) sentence recalls.

<u>Future Work</u>

We appreciate that the committee has dedicated its first year to the examination, study, and development of reform proposals that the legislature can take up and adopt. We also recommend that the committee continue its work in the coming year by examining to reforms to California's most severe sentencing enhancements, including but not limited to second and third strike sentencing and the five year enhancement for prior serious or violent convictions, both of which are the product of decades-old ballot initiatives and in need of rigorous examination and reform.

These enhancements are responsible for many of the most extreme sentences in the penal code, are a significant contributor of over-incarceration in the state prison system, and a key driver of the $13 billion California spends every year on prisons that could instead be used to support proven public safety interventions and local public safety programs, services for crime survivors, schools, health care, mental and behavioral health interventions, and other key programs for safe communities.

[4] To the extent that some number of these restrictions or limitations are the result of decades-old ballot initiatives, we also encourage the committee to take up a close examination of those initiatives and the excessive sentences they generate in the coming the year.

California is poised to take the next step in its leadership on criminal justice reform, continue to reduce the size and budget of the prison system, and invest in true public safety priorities, but to do so it must address these major, structural drivers of the state prison population.

Thank you again to the members and staff of the Committee on the Revision of the Penal Code for the work the committee has done and will continue to do. We look forward to the committee's ongoing work, recommendations to the legislature, and examination of ballot-made sentencing provisions in the next year.

Jay Jordan

Attachments

- Safe and Sound: Strategies to Save a Billion in Prison Costs and Build New Safety Solutions
- Crime Survivors Speak: A Statewide Survey of California Victims' Views on Safety and Justice
- How California Can Cut Prison Spending, Protect Health and Education Spending, and Improve Public Safety

DECEMBER 2017

SAFE AND SOUND

STRATEGIES TO SAVE A BILLION IN PRISON COSTS AND BUILD NEW SAFETY SOLUTIONS

CALIFORNIANS FOR SAFETY AND JUSTICE

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executive summary

IN THE LAST SEVERAL YEARS, California has emerged from a long history of being a laggard on criminal justice reform to becoming a national stand out. After decades of prison building and an overcrowding crisis so severe that prison capacity exceeded 200%, a groundswell response—litigation, media attention, legislation, voter action and a grassroots advocacy movement—has put the state on a new path.

THE LONG OVERDUE TASK OF REPLACING INEFFECTIVE OVER-INCARCERATION WITH SMART JUSTICE IN THE NATION'S MOST POPULOUS STATE IS FINALLY UNDERWAY.

There is much to celebrate.

Between 2006 and 2016, California has seen: A 25% drop in state prison incarceration. A 10% statewide average drop in county jail populations. A 64% drop in the number of people on state parole and a 22% drop in the number of felony filings in criminal courts annually. Today more than 1.5 million Californians are eligible to remove nonviolent felony convictions from their old conviction records—opening the door to new opportunities for stability and empowerment. Rehabilitation programs are becoming more available to people in the justice system to help stop the cycle of crime. Trauma recovery centers are expanding across the state—from just one five years ago to eleven centers today—providing crisis care and help for underserved survivors of violent crime. And, with the incarceration declines, hundreds of millions of dollars are finally being reallocated from bloated, costly prisons to community-based treatment and prevention.

Still—California has a **very long way to go.**

Despite this progress, the Golden State's incarceration rate is still so high that it remains a historic anomaly. California still spends more than $11 billion a year on state prisons. That's a 500% increase in prison spending since 1981. In fact, California spends as much today on prisons as every state in the United States *combined* spent on prisons in 1981 and it has increased annual prison spending at a rate that has significantly outpaced other states. When local crime response costs in California are factored in, such as the cost of county jails, that figure is nearly doubled from $11 billion to $20 billion annually.

What's most vexing about these heavy spending levels is how little translates to actually keeping Californians safe in the long run.

A decisive body of research and innovation has shown that zeroing in on community stability, not incarceration, more effectively prevents and stops the cycle of crime. Yet the state's public safety spending priorities are too far removed from addressing immediate community wellbeing needs. Recidivism remains a problem. Too many people remain struggling with mental health, substance abuse, homelessness and trauma without treatment. And too many communities where crime is concentrated remain unprotected from harm.

Excessive prison spending and over-incarceration is not only preventing California from resolving the crises in our communities that give rise to crime, it is a causal factor in making the cycle of crime worse.

To fill the gap in information about the impact of crime, mental health, substance use and convictions on Californians and their families, Californians for Safety and Justice commissioned the first-of-its-kind *Survey of California Victims and Populations Affected by Mental Health, Substance Abuse and Convictions* in September 2017. Those findings, combined with a review of research from the California Department of Health Care Services, the Substance Abuse and Mental Health Services Administration and other expert sources uncover a stark set of core crime drivers that remain unresolved.

Unaddressed Mental Health Needs:

- Nearly 1 in 4 Californians has experienced anxiety, depression, or another mental health issue that affects their wellbeing and stability and nearly 1 in 6 need mental health services.
- At least 43% of Californians who seek mental health treatment do not receive it.
- Californians dealing with mental health issues experience numerous negative impacts, including interfering with daily life activities, interfering with ability to develop or maintain close relationships, interfering with ability to work, and interfering with ability to maintain housing. The negative impacts of mental health issues disproportionately impact low-income people.
- An estimated 1.9 million, or 1 in 20 Californians, struggle with *severe* mental health challenges but only about 56% receive some kind of treatment.
- More than half of people with convictions self-report that mental health or substance abuse issues were either the top factor or a major factor leading to their involvement in crime.

Nearly **1 in 4 Californians has** experienced anxiety, depression, or another **mental health issue** that affects their wellbeing and stability and nearly 1 in 6 need mental health services.

Untreated Drug and Alcohol Abuse:

- Nearly 1 in 12 Californians has had substance abuse or addiction issues, including alcohol, prescription medication, or other drugs.
- Only about 6% of people who need drug treatment for addiction receive it.
- Substance abuse or addiction issues disproportionately impact low-income people.
- Californians dealing with substance abuse issues experience numerous negative impacts, including interfering with daily life activities, interfering with ability to develop or maintain close relationships, interfering with ability to work, and interfering with ability to maintain housing.

Nearly **1 in 12 Californians has** had substance abuse or **addiction issues,** including alcohol, prescription medication, or other drugs.

Unaddressed Trauma and Lack of Support for Survivors:

- Nearly 1 in 3 Californians has been a victim of crime.
- Most California crime survivors experience stress and trauma after the crime, but the majority do not receive support from victims services programs.
- Of survivors who report the crime to the police, only 10% receive victim assistance.
- On average, 62% of adults in California have experienced at least one trauma during childhood. About two out of three survivors of violent crime experience four or more lifetime traumas, including repeat victimization.

> Nearly **1 in 3 Californians has** been a **victim** of crime.

Extreme Barriers to Stability for People with Convictions:

- An estimated 8 million Californians have a criminal conviction record.
- The negative impacts that people with convictions experience after completing their sentence include: difficulty finding a job, struggling to pay fines or fees, trouble sleeping or other health issues, difficulty obtaining an occupational license, and difficulty finding housing.

> There are over **4,800 legal restrictions facing people with convictions**—after sentence completion—that place **limits on access to jobs,** housing and more. Seventy-three percent of these legal barriers are permanent.

Despite the starkness of these persistent community challenges, opponents of criminal justice reform have resisted implementing recent policy changes in favor of attempting to resituate "tough on crime" rhetoric and the wasteful incarceration policies of the past.

Today, California stands at **a decisive moment.**

The reforms to date have alleviated the prison crisis, begun reallocating dollars, and taken the state to a new plateau. But California communities deserve more—more help, more dignity, more safety and much more real protection from harm.

In the next five years, California leaders must commit to further reducing state incarceration and prison spending to finally achieve a balanced approach to public safety. If California leaders can continue to right-size the state's incarceration rate—and substantially reduce prison spending—the state would have increased capacity to invest in new safety solutions that more effectively support people vulnerable to crime, prevent crime from happening in the first place and stop the cycle from continuing.

This report outlines the strategies available to local jurisdictions to reduce the flow of people into the justice system and the burdens local criminal justice systems face. It also describes the sentencing and prison length of stay reforms that can continue to safely reduce the number of people in state prison, strategies that are supported by data on what works to reduce recidivism.

If state leaders implement the sentencing and prison length of stay reforms outlined in this report, the state could safely reduce the length of prison terms for the majority of people in prison by 20%, and reduce the number of people in state prison by about 30,000.

REDUCING STATE IMPRISONMENT BY 30,000 PEOPLE WOULD ALLOW CALIFORNIA TO CLOSE 5 PRISONS AND SAVE—CONSERVATIVELY—ABOUT $1.5 BILLION IN STATE PRISON SPENDING.

Spent differently, $1.5 billion could go a long way to supporting California's communities in need. There are many dozens of important strategies the state could expand with additional resources, from family support programs to early childhood education or afterschool programming, to employment assistance programs or support for low-income seniors and more.

This report identifies some of the especially acute unaddressed community needs that are actively contributing to criminal justice burdens and the cycle of crime, and the solutions that can be scaled up to meet these needs. While not exhaustive, an investment of $1.5 billion in any of the following strategies would go a long way toward developing a balanced and effective approach to public safety.

1. Build a Shared Safety Infrastructure

Shared safety means giving all Californians access to health, protection and stability. There are challenges to achieving this, but with the smart reallocation of resources, California can make substantial inroads in identifying the community risk factors that contribute to the cycle of crime and improving community well-being.

Three specific opportunities to scale up a robust shared safety infrastructure include: 1) expanding mental health treatment to address severe mental health challenges; 2) expanding drug abuse treatment to address addiction; and 3) expanding diversion and housing programs for chronically homeless populations involved in crime.

For example, any of the following goals could be achieved with $1.5 billion:

- **Treat 150,000 patients with severe mental health diagnoses;**
- **Treat 150,000 patients with substance use disorders; or**
- **House 50,000 individuals struggling with chronic homelessness.**

2. Support Survivors to Recover from Harm

Despite the rhetoric of the tough on crime era, the needs of the majority of crime survivors have never been at the center of public safety policy making. Putting survivors' needs first means ensuring that safety investments flow from the needs of crime survivors and those most vulnerable to becoming victims of crime.

A key gap in victim support is ensuring that every crime victim has an opportunity to recover from harm. Trauma recovery centers provide holistic services focused on mental health treatment and help survivors get back on their feet, avoid being victimized again, and gain stability. Restorative justice, a collaborative process to resolve crime incidents by repairing the harm caused and addressing crime drivers, improves survivor satisfaction with case resolution and reduces recidivism.

For example, using $1.5 billion to better support survivors could allow California to:

- **Establish over 1,000 trauma recovery centers across the state; or**
- **Convene over a million restorative justice dialogues.**

3. Make Second Chances Real

Stopping the cycle of crime means holding people who commit crime accountable and ensuring their release and reintegration into society is primed for stability. When people exiting the justice system are prevented from accessing jobs, housing, social supports and reuniting with family, or are saddled with untenable criminal justice debt, it is near impossible for them to contribute to our communities. Making second chances real means giving people exiting the justice system a chance at stability and redemption.

For example, investing $1.5 billion in second chances could:

- **Employ 300,000 people with convictions through workforce development; or**
- **Create over 3,000 "clean slate" assistance programs to help reduce barriers to stability for people with convictions.**

Californians Want **More Bold Change**

The strategies proposed in this report to reallocate $1.5 billion from prison spending to community stability are not only more effective strategies to stop the cycle of crime, they are broadly supported by Californians from all walks of life.

The 2017 Survey of California Victims and Populations Affected by Mental Health, Substance Use and Convictions, found that:

Fifty-five percent of Californians surveyed support closing state prisons to fund local mental health treatment and substance abuse treatment.

- **Nearly 8 in 10 think rehabilitation, drug treatment, and mental health treatment are better ways to prevent future crimes than punishment through incarceration.**
- **6 in 10 oppose laws that restrict employment and housing options for people with felony convictions, after they complete their sentence.**
- **Nearly 7 in 10 prefer holding people accountable for their crimes by requiring alternatives to prison such as mental health treatment, drug treatment, or community supervision. Only 16% prefer putting them in prison.**

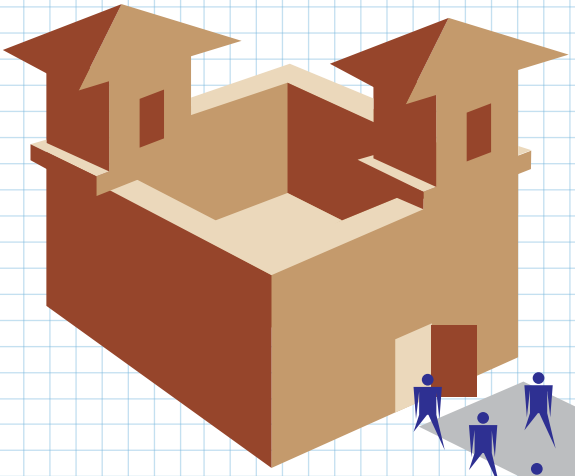
Nearly **7 in 10 support** clearing the records of people who complete their entire sentence if they remain crime free for seven years.

The Time is Now

There has never been a more important time to take the goal of rebalancing the state's public safety priorities to the next level.

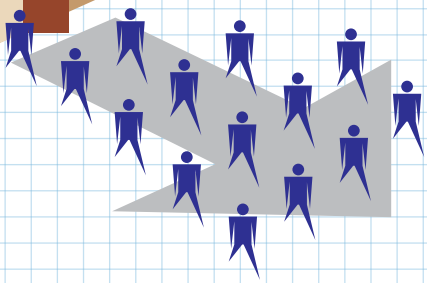
The incarceration rate is declining, but much greater declines are needed to substantially reduce prison spending. As long as the state continues to overspend on prisons, the unresolved drivers of crime will continue plaguing vulnerable communities.

Concrete and bold steps must be taken over the next five years to advance new safety priorities rooted in community health and wellbeing. The needs are prevalent and knowable. The solutions are emerging and scaleable. The public is ready and deserving. The time is now.



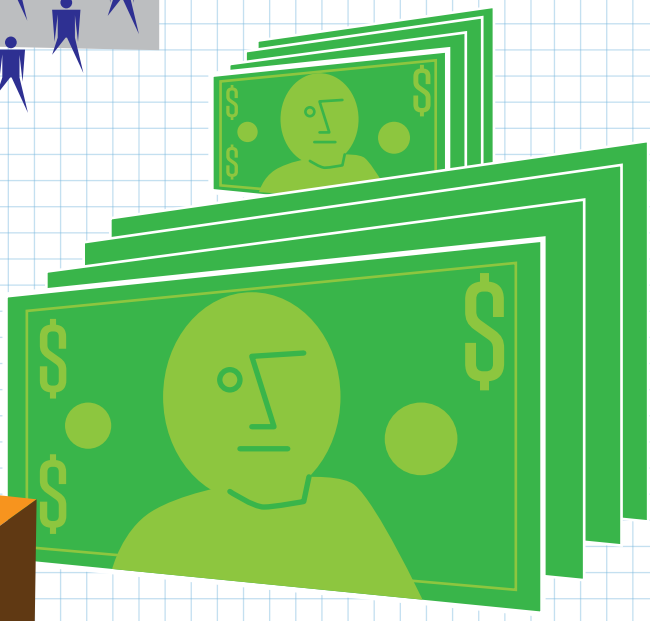
REDUCE

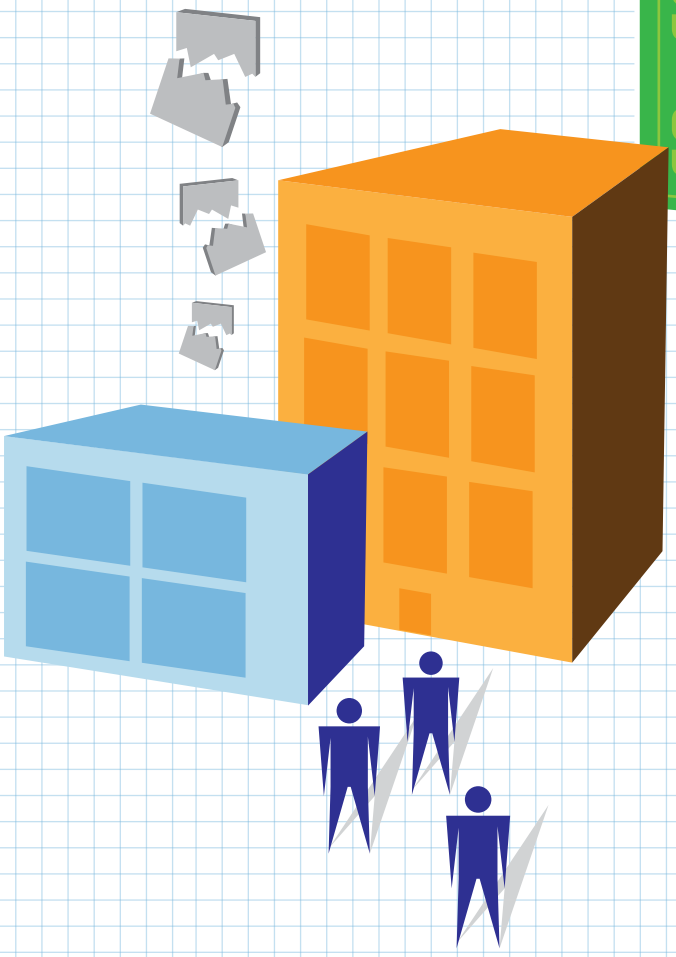
STATE INCARCERATION BY 30,000 PEOPLE



SAVE

$1.5 BILLION IN STATE FUNDS





INVEST

in any of the following

TREAT **150,000** PATIENTS WITH SEVERE MENTAL HEALTH DIAGNOSES;

TREAT **150,000** PATIENTS WITH SUBSTANCE USE DISORDERS;

HOUSE **50,000** INDIVIDUALS STRUGGLING WITH CHRONIC HOMELESSNESS;

ESTABLISH OVER **1,000** TRAUMA RECOVERY CENTERS;

CONVENE OVER **A MILLION** RESTORATIVE JUSTICE DIALOGUES;

PUT **300,000** PEOPLE WITH CONVICTIONS ON THE PATH TO EMPLOYMENT; OR

CREATE OVER **3,000** CLEAN SLATE PROGRAMS.

introduction & background

California Today:
Bold Reforms Won, Much More Work to Do

AFTER MANY YEARS OF FAILED "TOUGH ON CRIME" POLICIES that swelled prison populations and prison spending in California, and across the nation, the Golden State has made big changes over the last decade to reenvision its approach to criminal justice. Formerly home to one of the largest prison crowding crises in U.S. history, California now stands at the forefront of a growing national trend toward reduced incarceration and rebalanced priorities to achieve public safety.

The large-scale policy shifts that have made California a leader in criminal justice reform include:

- **State parole reform** (2009) creating a form of non-revocable state parole;
- **Public Safety Realignment** (2011) shifting responsibility for managing people convicted of lower-level felony offenses from state prisons to county jail and probation systems;
- Voter-enacted ballot initiatives including:

  Proposition 36 (2012) changing the 1994 Three Strikes law to authorize a third strike (which can result in a sentence of 25 years to life in prison) only if the offense is serious or violent in nature;

  Proposition 47 (2014) changing six nonviolent crimes from felonies to misdemeanors, reallocating resulting prison cost savings to prevention, treatment and trauma recovery services, and giving people with old nonviolent felony convictions the opportunity to remove the felony from their records; and

  Proposition 57 (2016) prohibiting prosecutors from filing juvenile cases in adult court; authorizing parole review consideration for people in state prison for nonviolent crime convictions; and increasing earned time credit for people in state prison to become eligible for parole consideration earlier based on participation in education or rehabilitation programs;
- **Dozens of legislative reforms** that are reducing extreme sentencing for young adults, changing drug laws, reducing probation violation penalties and increasing alternatives to incarceration.

> **"For over 40 years, I have thought about crime and our prison system. I was the one who signed the new laws in 1977, and I know that our current system of fixed, rigid sentences—changed constantly by politicians—doesn't work. Proposition 57 will change this and make our communities safer."**
>
> **California Governor Jerry Brown,** op-ed *The Mercury News*, October 21, 2016

The justice reform movement that achieved these bold statewide changes has been unprecedented: a multi-faceted effort involving people from all walks of life, including community activists, advocacy organizations, forward-thinking law enforcement leaders, faith leaders, service providers, public officials at both the state and local level, and many more.

Beyond policy shifts, this robust movement has spurred systems change, culture change—and controversy. California now stands at a new defining moment. Entrenched interests are pushing to have the state turn back the clock on justice reform by rebuilding the architecture of over-incarceration.[1] Meanwhile, leaders in reform see an urgent need to go further, to build a new public safety infrastructure on the values, priorities and science that have bolstered the reforms of the past decade.

To finally achieve an effective, fair and holistic public safety strategy, California has much more work to do. Spending on prisons and jails continues to be extremely high. Many thousands of people remain incarcerated with little public safety rationale. Most importantly, imbalanced spending means California's diverse communities still lack the prevention and health infrastructure needed to stop the cycle of crime and support community wellbeing.

> **"The biggest gift of the day is for people to remove the 'Scarlet F' too many with a felony record continue to wear. Proposition 47 is a light in the mass incarceration keyhole."**
>
> **Susan Burton,** founder and executive director, A New Way of Life Reentry Project, op-ed, *LA Progressive*, September 27, 2015

The Red Herring: Crime Rates and Justice Reform

The continued resistance to holistic reform is often anchored in misunderstandings about the relationship between criminal justice policy and crime rates. A robust base of evidence shows that high incarceration rates do not drive declines in crime,[2] despite the "tough on crime" rhetoric that dominated the criminal justice debate in the 1980s and 90s.

> **"[T]he evidence base demonstrates that lengthy prison sentences are ineffective as a crime control measure."[3]**
>
> **National Academy of Sciences**

In fact, over the past decade, 27 states that have reduced imprisonment have seen continued reductions in crime.[4] California has led the charge: cutting its prison population by 25%,[5] its jail population by 10%,[6] its parole population by 64%[7] and its number of felony criminal filings by 22%[8]—all alongside a violent crime decline exceeding the national average.[9] While the rate of decline has slowed in recent years, violent and property crime rates are at a historic low and violent crime has declined in 20 of the past 23 years.[10]

> **"We can reduce both crime and incarceration."**
>
> **Jeff Rosen,** Santa Clara County District Attorney, op-ed, *The Mercury News*, October 29, 2015

Recent year-to-year fluctuations in crime rates have caused some to suggest crime shifts have been caused by criminal justice reforms. However, researchers have not found a causal link between crime trends and the recent wave of reforms, with the possible exception of some auto theft trends. Notably, after a one-year uptick in some crime rates following the implementation of Public Safety Realignment, statewide crime rates decreased again the next year, while the reform remains state law.[11]

California's crime rates are lower today than in 2010, just prior to its most significant criminal justice reforms. Although crime trends vary from place to place, about 58% of California jurisdictions have successfully reduced property crime throughout the reform period.[12] This shows that reducing incarceration has not prevented most jurisdictions from combating crime.

While over-incarceration doesn't improve crime trends, it does harm communities, especially communities of color. **In California, African American men are incarcerated at nine times the rate—and Latinos at twice the rate—of their white counterparts.**[13]

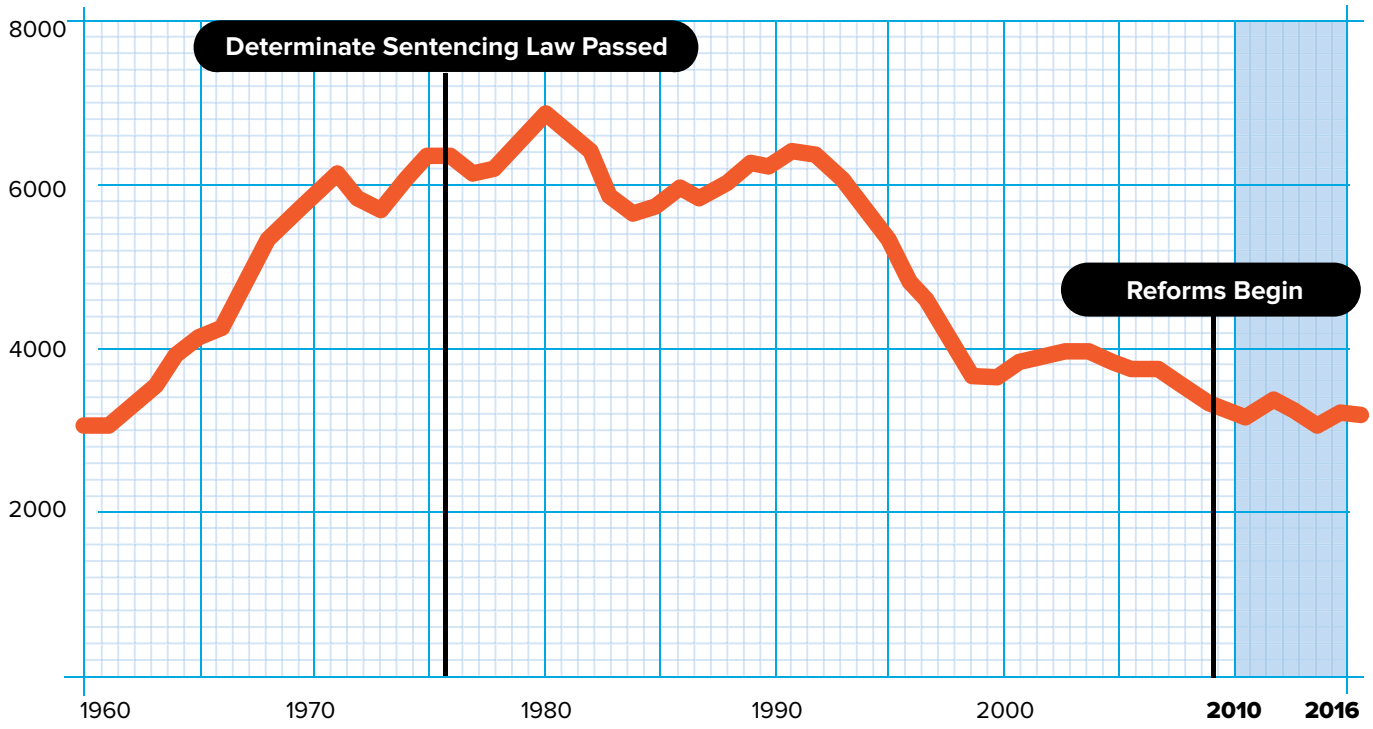
> **"Many features of the U.S. criminal justice systems—including unwarranted disparities in imprisonment, invidious bias and stereotyping, police drug arrest practices, and racial profiling—disproportionately affect blacks and Hispanics."[14]**
>
> **National Academy of Sciences**

Incarceration can cause severe physical and mental harm,[15] destabilizing families and reducing access to housing and employment on release.[16] These impacts are not only felt by the incarcerated individual but intergenerationally, by loved ones, children and community.[17]

California's crime rate is maintaining a historic low[18]

California Crimes Reported

Rate Per 100,000 Population



The Real Problem:
Health and Safety Gaps in Local Communities

Crime debates aside, there is near-universal agreement among safety and justice experts, advocates and diverse Californians that the lack of support for communities impacted by both crime and incarceration is untenable. Many drivers of crime are knowable and preventable. Yet instead of focusing on holistic crime prevention, **California's imbalanced safety investments are, at best, ignoring the cycle of crime—and, at worst, subsidizing it.**

Too many Californians are vulnerable to the cycle of crime, and poor communities are especially hard hit. One in five Californians live in poverty—the highest poverty rate in the nation.[19] Especially vulnerable are people struggling with mental health issues, substance abuse, or unaddressed trauma, combined with economic or housing instability. These populations suffer from the shortage of mental health professionals and programs and lack access to substance abuse treatment.[20] Most crime survivors have little to no access to trauma recovery or other forms of recovery assistance.[21] People exiting the justice system with conviction records face debilitating barriers to employment, housing and other supports known to drive down recidivism.[22]

It is time to stop masking bloated incarceration budgets as the best way to protect the public and rethink the site of our public safety investments. Working together to build safety for all requires deepening our understanding of who is most vulnerable and what it will take to truly break cycles of harm. Now is the time for California's leaders to invest in a broader set of safety priorities and to embrace deeper reforms that will finally allow the state to replace over-incarceration with shared safety—a safety that provides protection from harm to vulnerable Californians, and that is rooted in community health and wellbeing.

> **"[W]e need a new way of thinking about what community safety truly means…Just as the word peace means more than the absence of war, and health means more than the absence of disease…safety means more than an absence of crime."**
>
> **Dr. Robert K. Ross,** President and CEO, The California Endowment, op-ed, *Los Angeles Times*, November 1, 2016

Achieving Public Safety Requires **More Bold Change**

There is perhaps no greater responsibility of local government than protecting public safety. To do so effectively, criminal justice reforms must involve shifting financial resources toward building community wellbeing and preventing crime if they are to succeed. This report describes a variety of strategies to safely reduce the number of people in the justice system, while saving billions in prison costs. With further rebalancing, California will attain the investments necessary for a new safety infrastructure built on prevention, mental health and substance abuse treatment, trauma support for survivors, housing, and economic opportunity.

California Legislature, Voters Delivering on Criminal Justice Reforms

Over the past decade, a broad alliance of advocacy organizations working collaboratively in communities and in the State Capitol have spurred on California's political leaders and the electorate to undertake a transformation of the state's criminal justice system. Below is a list of some of the big reforms achieved legislatively in the past few years—there are many more.[23]

Each of the legislative reforms and voter-enacted ballot initiatives highlighted addressed critical policy issues such as jail and prison overcrowding, extreme sentencing for young adults, over-criminalization and unnecessarily punitive sentencing for low-level drug and property offenses and technical probation and parole violations, and increasing the availability of alternatives to incarceration focused on reducing recidivism through rehabilitation. Each represents a significant reform in its own right, with real and measurable impact.

Leaders from across the state have made this possible, including the following advocacy groups and associations—there are many more:

A New Way of Life
All of Us or None
American Civil Liberties Union
Anti Recidivism Coalition
California Attorneys for Criminal Justice
California Calls
California Public Defenders Association
California Immigrant Policy Center
California State Conference of the NAACP
Californians for Safety and Justice
Californians United for a Responsible Budget
Center on Juvenile and Criminal Justice
Chief Probation Officers of California
Children's Defense Fund
Coalition for Humane Immigrant Rights
Community Coalition
Courage Campaign
Drug Policy Alliance
Ella Baker Center for Human Rights
Equality California
Essie Justice Group
Friends Committee on Legislation
Human Rights Watch
Immigrant Legal Resource Center
Justice Advocacy Project at Stanford Law School
Legal Services for Prisoners with Children
Los Angeles Chamber of Commerce
National Center for Youth Law
UnidosUS (Formerly National Council of La Raza)
National Employment Law Project
Pacific Juvenile Defender Center
PICO California
Post-Conviction Justice Project of the University of Southern California Gould School of Law
Prison Law Office
SEIU
William C. Velázquez Institute
Youth Justice Coalition
Youth Law Center

Reforms to Reduce Over-Incarceration in State Prison and Discriminatory Sentencing

- SB X3-18 (Ducheny - 2009) created a form of non-revocable parole.
- AB 109 (Committee on Budget - 2011) diverts large numbers of people from prison and parole to county jails and probation through "Realignment."
- Prop 36 (2012) revised the three strikes law to require that the third strike be serious and/or violent.
- SB 1010 (Mitchell - 2014) eliminated the crack and powder cocaine sentencing disparity.
- SB 1310 (Lara - 2014) reduced deportations of individuals convicted of low-level misdemeanors.
- Prop 47 (2014) reclassified simple drug possession and low-level property crimes as misdemeanors and reallocated prison spending to treatment, victim services and education, thereby reducing the state prison population by about 4,500 people..
- Prop 57 (2016) increased time credit earning and expanded parole eligibility for people convicted of nonviolent crimes.
- SB 239 (Weiner - 2017) eliminated criminal laws that target and punish people living with HIV who engage in consensual sexual.

Reforms to Reduce Sentences/Punishment for Nonviolent, Non-serious Crimes

- SB X3-18 (Ducheny - 2009) increased the threshold values for property crimes for property crimes, and removed people convicted of certain low-level offenses.
- SB X3-18 (Ducheny - 2009) removed people convicted of certain low-level offenses from active parole supervision.
- SB 180 (Mitchell - 2017) the "RISE Act," eliminates certain drug sentence enhancements.
- SB 620 (Bradford - 2017) allows judges' discretion on whether to apply gun sentence enhancements.

Reforms to Reduce Over-Incarceration of Youth and Young Adults and Increase Their Opportuniites for Rehabilitation

- SB 9 (Yee - 2012) prohibits life without the possibility of parole for juveniles. Supported by SB 260 (2013) created a youth parole hearing process for individuals who were under 18 when they committed a crime for which they received a lengthy or life sentence.
- SB 261 (Hancock - 2015) extends youth parole hearings to individuals who were under 23 when they committed a crime for which they received a lengthy or life sentence.
- SB 382 (Lara - 2015) established just criteria for judges to consider when determining whether a minor should be charged as a juvenile or an adult.

Reforms to Support Crime Survivors, Reduce Crime and Support Communities by Assisting Victims and and Improving Access to Mental Health Care and Other Opportunities for Rehabilitation

- SB 678 (Leno - 2009) created incentive funding for counties to reduce the number of people returned to prison for felony probation violations.
- SB 71 (Committee on Budget and Fiscal Review - 2013) created a funding stream to develop statewide Trauma Recovery Centers.
- AB 752 (Jones-Sawyer - 2013) increased the number of individuals in county jails participating in work furlough programs.
- AB 218 (Dickinson - 2013), the "Ban the Box" law, prohibits employers from inquiring about an applicant's prior convictions during the job application process.
- AB 720 (Skinner - 2013) facilitated Medi-Cal enrollment of eligible individuals in county jails.
- SB 1161 (Beall - 2014) expanded mental health and substance use disorder treatment services for Californians eligible for Medi-Cal who are in need of, or are currently seeking, treatment.
- SB 1310 (Lara - 2014) reduced deportations of individuals convicted of low-level misdemeanors.
- SB 843 (Committee on Budget and Fiscal Review - 2016) created three Law Enforcement Assisted Diversion (LEAD) pilot programs that offer people suffering from drug addiction alternatives to incarceration
- AB 340 (Arambula - 2017) establishes an advisory working group to develop tools and protocols to screen and treat children for trauma.
- AB 1384 (Weber - 2017) provides programmatic guidelines for Trauma Recovery Centers funded by the Victims Compensation Board.
- AB 1008 (McCarty - 2017) prohibits employers from inquiring into or reviewing a job applicant's conviction history until after the applicant has received a conditional offer.
- AB 1115 (Jones-Sawyer - 2017) gives thousands of Californians with prior convictions increased opportunities to expunge their criminal record after demonstrating their commitment to rehabilitation.
- SB 54 (De Leon - 2017) the "California Values Act," prohibits state and local law enforcement agencies, including school police and security departments, from using money or personnel to investigate, interrogate, detain, detect or arrest persons for immigration enforcement purposes.
- SB 238 (Hertzberg - 2017) gives discretion to law enforcement to transport low-risk individuals suffering from a mental health or substance abuse crisis to a hospital or other urgent care facility for mental health evaluation and treatment, instead of jail. Supported by the Los Angeles County District Attorney.

Reforms to Reduce Incarceration Costs for Local Governments

- SB 678 (Leno - 2009) created incentive funding for counties to reduce the number of people returned to prison for felony probation violations.
- AB 720 (Skinner - 2013) facilitated Medi-Cal enrollment of eligible individuals in county jails.
- AB 752 (Jones-Sawyer - 2013) increased the number of individuals in county jails participating in work furlough programs.

DEEPEN CRIMINAL JUSTICE REFORM

IN THE PAST DECADE, CALIFORNIA HAS PASSED GROUNDBREAKING REFORMS that have scaled down its prison population by 25% while maintaining historically low crime rates. Laws including Public Safety Realignment and Propositions 36, 47 and 57 acknowledge over-incarceration wastes taxpayer dollars and may actually increase crime by imposing harm on individuals, families, and communities.[24] While these innovations have ushered in change, much deeper reforms are needed.

Over-Incarceration Remains

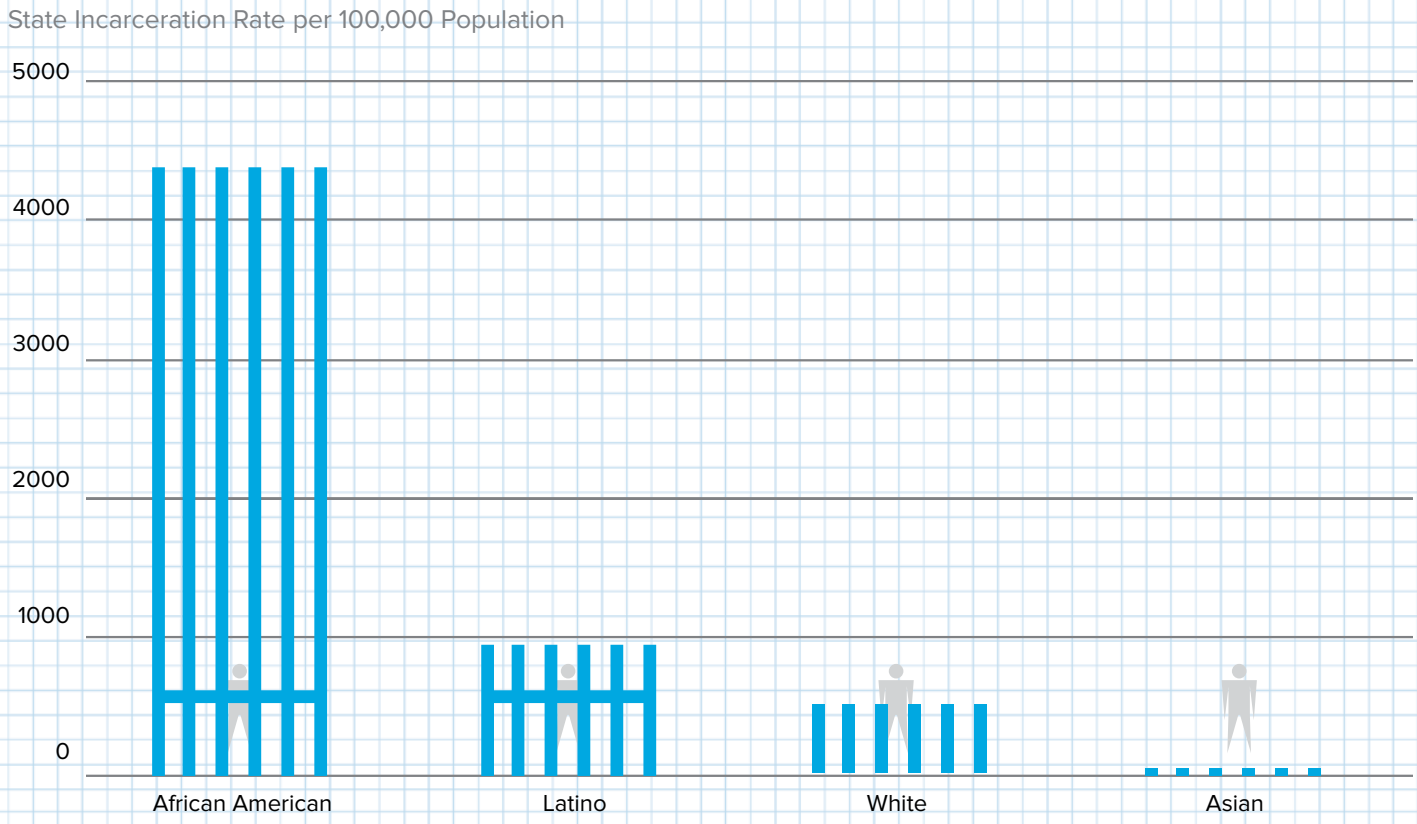
In 2016, over 200,000 people were held in California's prisons and jails and over 300,000 were under some form of community-based correctional supervision, including county probation and state parole.[25]

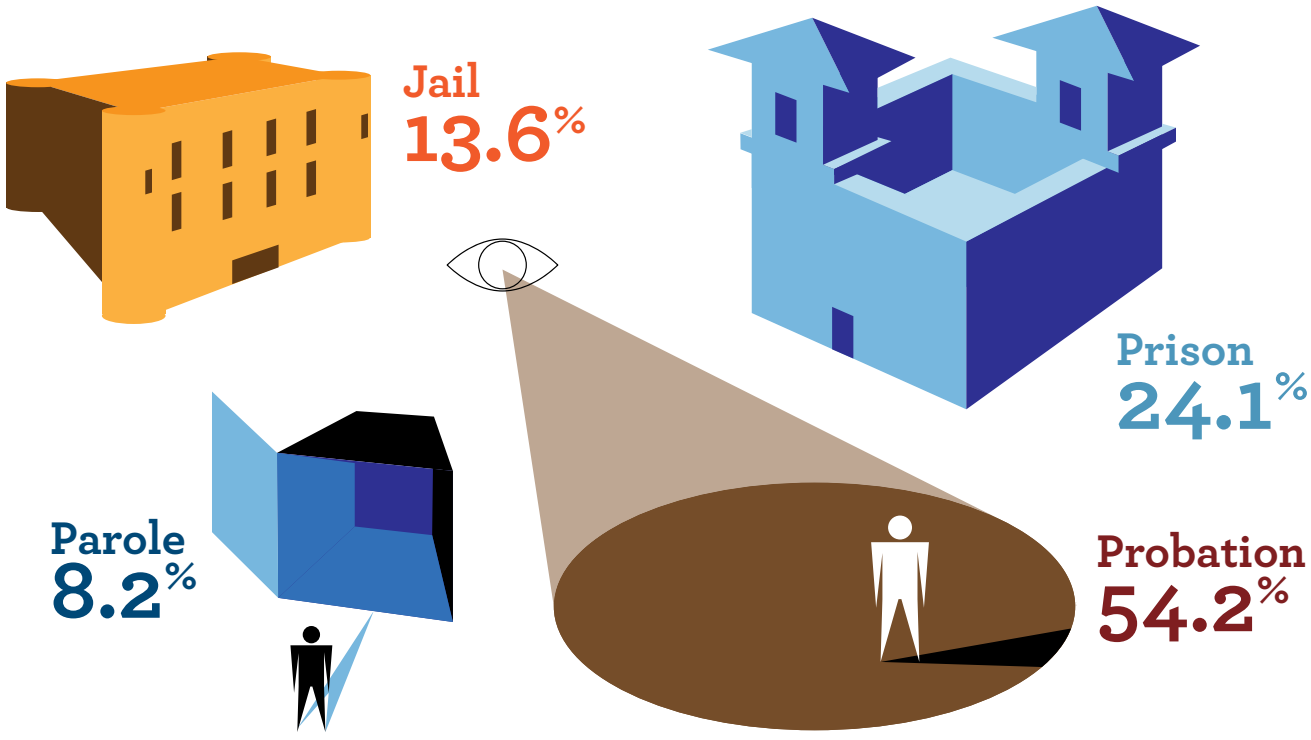
Even though crime rates now are at a similar level as they were in 1960, the state incarceration rate is three times higher than it was back then. California's incarceration rates peaked in 2007 at 469 per 100,000 population. Today, the incarceration rate stands at about 330 per 100,000 population,[26] a measurable but insufficient decline. For African American men, the rate is far worse than the statewide average: 4,367 per 100,000 population; for Latinos, it is 922. That's nine times higher for African Americans and twice as high for Latinos than whites.[27]

Criminologists agree: high rates of incarceration do not reduce crime.[28] In fact, researchers estimate that California's heavy reliance on incarceration has yielded diminishing returns since 1980 when the state incarceration rate was 91 per 100,000 population. Since 1990, the impact of the state's incarceration rate on crime has been essentially zero.[29]

The negative consequences of continued high incarceration rates go far beyond failing to have a measureable impact on crime. High incarceration rates also have significant negative impacts on the families and children of people in the justice system. Incarcerated people and people with conviction records have shorter life expectancies and suffer significantly higher rates of chronic illness.[33] The children of adults in the justice system also fare far worse in health outcomes, academic success, social mobility and life expectancies.[34]

Racial disparities in state incarceration persist[30]





California's adult correctional system supervised about 540,000 people[32]

Crowded Jails are a Feature of Local Criminal Justice Systems

34 jails in California in 21 counties were operating over capacity in December 2016.

California jails emergency released **5,800** individuals due to overcrowding in the month of December 2016.

64% of California's jail population is awaiting trial or sentencing as of December 2016; many people remain in custody pretrial because they cannot afford bail.

Only **29 of 58** counties provide all four core pretrial release services (eligibility screening, validated risk assessment, court recommendations and community supervision) and even in those counties capacity is limited to reach all potentially eligible pretrial jail people and place them into pretrial release programs.

BSCC. (2017). Jail Profile Survey. http://www.bscc.ca.gov/; Californians for Safety and Justice. (2015). Pretrial Progress: A Survey of Pretrial Practices and Services in California. Californians for Safety and Justice.

Local Safety Solutions Lacking

Local criminal justice systems need a range of responses that are graduated, proportional and risk-based to hold individuals accountable. These responses should replace one-size-fits-all penal code sentencing mandates with consideration of individual case circumstances and risk factors. The most effective responses prioritize addressing the potential risk for reoffending and include appropriate treatment to reduce recidivism.[35]

While state prison incarceration remains stubbornly high, some of the 25% decline in state imprisonment has increased pressure on local justice systems: some state reforms have resulted in people who would have previously been to state prison now being held in local criminal justice systems. For many counties, high state prison commitment rates have now been replaced by high county jail rates—a change in address but not a more effective solution.

Local corrections agencies have seen the scope of their roles shift with the changing needs of a growing population, but too often this has not been accompanied with adapting practices to increase the use of graduated sanctions or alternatives to incarceration. Many counties struggle with jail crowding and high rates of recidivism.

Local and state leaders can take immediate steps to rebalance the state's approach to safety. The key reforms described in this section would further reduce over-incarceration both locally and in the state prison system while expanding more effective options to stop the cycle of crime.

Local Reform: Expand Options Beyond Incarceration

Local criminal justice systems need a range of options beyond incarceration to effectively hold individuals accountable for their crimes and to stop the cycle of crime. While jail time is needed in some instances, evidence suggests that diversion or alternative sentencing works better than jail for the majority of people who commit lower-level offenses or who are a lower-risk to public safety.[36] Some research even maintains that jail can make matters worse—the environment can increase criminality for lower-risk populations.[37]

Local jurisdictions need responses that are graduated, effective and proportional to the seriousness of the offense. These responses should address the potential risk for reoffending and include appropriate treatment to reduce the risk of recidivism.[38] Incarceration must be reserved for the smaller number of high-risk individuals when there are no effective alternatives.

Nearly every county in California has some alternative options, whether it's a diversion program, homeless outreach, community courts or supervised community probation combined with treatment. The big challenge is bringing these options to scale. Too often, these programs are only capable of reaching a small number of people who may be eligible.

Rough estimates indicate that 35% to 65% or more of individuals arrested and jailed on any given day have an underlying mental health or substance use disorder.[39] Homelessness also contributes significantly to the likelihood of entering the criminal justice system; homeless individuals are arrested more often, incarcerated longer, and re-arrested at higher rates than those with stable housing.[40] Despite the frequency of these underlying drivers of crime, the local programs and infrastructure needed to detect and resolve these issues is sorely lacking.

To reduce the flow of people into the justice system and the burden on local justice system resources, state leaders should conduct a comprehensive study on the number of people entering the system with mental health needs, substance use disorders or homelessness issues and the local strategies used. Local jurisdictions must be incentivized to adopt alternative responses to these problems. A number of promising models are described below.

Expand First Response Options at the Point of Contact

Police are frequently the sole first responders called to handle complex social challenges that they alone are ill-equipped to resolve. Few law enforcement agencies have options beyond citation and release or taking individuals into custody and transferring them to jail. Many of these scenarios involve crises for which treatment, counseling, conflict mediation or other options would work better to stop recidivism than arrest and jail time. Jail often exacerbates illness, addictions, and behavioral challenges[41] that social workers, crisis interventionists and mental health experts are often better equipped to address.

1. Integrate mental health and crisis intervention in emergency response services.

Emergency services can be expanded to provide a first response alternative to law enforcement through 911 dispatch that is mobile, accessible 24/7, and staffed by first responders trained in mental health and crisis intervention who can intervene and de-escalate situations without making an arrest.[42] A police department directive to avoid making arrests in situations where mental health is a factor, coupled with appropriate diversion services, can lead to lower arrest rates and can increase access to mental health treatment.[43] In California, about 5,000 individuals in local jails are being detained in designated parts of the jail for people with mental health issues on a given day.[44] Many of these individuals may be more appropriate candidates

for mental health treatment outside of the jail to more effectively address their mental health needs and reduce the burden on jails. The potential for programs like Los Angeles' Systemwide Mental Assessment Response Teams (SMART) (see page 24 for details) to be scaled up or replicated in other jurisdictions should be evaluated.

2. Establish crisis stabilization centers and detoxification centers.

As alternatives to jail, these centers can help stabilize people experiencing temporary crises and are operated by treatment experts, trauma-informed and accessible to law enforcement.[45] A national model in Bexar County, Texas (a county with a population of about 1.8 million, which is comparable to Alameda or Sacramento County in California) was able to divert 26,000 people per year from jails and emergency rooms and save more than $10 million annually.[46]

3. Expand law enforcement pre-booking diversion options such as LEAD.

In pre-booking diversion programs such as Law Enforcement Assisted Diversion (LEAD), police refer people committing low-level drug and prostitution crimes with underlying substance abuse or mental health issues to community-based health and social services rather than arrest them. Participants engage in supervised programming to address their crime drivers and stabilize. Five-year follow-up studies of pilot programs in Washington State report substantial reductions in recidivism.[47] In 2016 Governor Brown authorized the development of LEAD pilot programs for four California jurisdictions.[48] That same year, statewide, California law enforcement made 37,695 felony and 176,023 misdemeanor drug offense arrests, and 7,256 misdemeanor arrests for prostitution—all potentially LEAD-eligible depending on the specific circumstances.[49] Even assuming a very low percentage of these arrests were found to be eligible cases: just a 10% eligibility rate would translate to over 22,000 individuals diverted from local jails and criminal courts to drug treatment and other social services.


WELCOME CENTER
Justice Fair
WELCOME CENTER
Justice Fair

Coordinated response to mental health crises can improve access to treatment

For over four decades, the Los Angeles Police Department (LAPD) has deployed its Mental Evaluation Unit (MEU) to assist police officers with mental health calls for service. MEU's Triage Unit assists officers in real time and has access to both justice system and mental health system databases to inform street-level responses and coordinate care. In 1993, the LAPD and Los Angeles County Department of Mental Health developed police/mental health teams called Systemwide Mental Assessment Response Teams (SMART). SMART intentionally links individuals with mental health diagnoses to services in their community. In 2001, the LAPD implemented a Crisis Intervention Team program that is made up of volunteer community members.[50] In 2015, MEU assisted with over 16,000 calls for service, and SMART teams responded to over 5,000.

Jail diversion can save millions of dollars annually

The Bexar County Jail Diversion Program in Texas serves individuals with substantial mental health problems rather than housing them in jail. This nationally-recognized program involves a number of partners, including city, county, and state government officials, law enforcement and criminal/civil courts, private and state hospital facilities, and advocacy programs. The four key entry points into diversion are through Crisis Intervention Teams (CITs), Deputy Mobile Outreach Teams, Pretrial Services, and the Central Magistration Facility. Each of these entities uses an array of screenings and assessments to determine eligibility for diversion. The diversion program diverts 26,000 people per year from jails and emergency rooms and saves more than $10 million annually.[51]

Police retool to treat drug addiction as a health problem

In recent years law enforcement has innovated new approaches to address drug-related crimes that do not involve the criminal justice system.

Law Enforcement Assisted Diversion (LEAD) is a pre-booking diversion pilot program that connects people who commit repeat, low-level drug crimes to community-based health and social services as an alternative to jail and prosecution.[52] Five years after enrolling in the program, LEAD participants report 58% lower odds of being arrested, 34% lower odds of being arrested for a new offense, and 39% lower odds of being charged with a felony.[53]

Medication-Assisted Treatment (MAT) combines behavioral therapy with proven medications to treat addiction, improve health outcomes and prevent relapse.[54] A Baltimore study found that increasing the availability of opioid treatments assisted with buprenorphine and methadone significantly correlated to a reduction in overdose rates by half.[55] MAT is widely considered among the most effective forms of treatment for opioid addiction.[56]

Refocus the role of the prosecutor

Prosecutors hold enormous power and discretion in the criminal justice system: they alone decide whether to bring criminal charges, what charges to bring, and what punishment to seek.[57]

Seven in ten victims prefer that prosecutors focus on solving neighborhood problems and stopping repeat crimes through rehabilitation, even if it means fewer convictions and prison sentences.[58]

Across the country, new prosecutors have begun promoting a different approach to their role, shifting their focus from securing convictions to solving crime problems in collaboration with the community. They are also working to expand options beyond incarceration that can hold people accountable, address the harm caused, and reduce repeat offending.[59]

Prosecutors can refocus their role by evaluating the amount of time they spend on lower-level crimes for which there may be a community solution and identifying the potential, underlying drivers of common criminal activity so those drivers can be addressed holistically in partnership with communities and other system leaders.

Additionally, prosecutors should evaluate the plea bargaining process to ensure it is fair and proportionate, and implement evidence-based approaches to prosecutions, including reserving the decision to file criminal charges and seek jail or prison time for high-risk, high-harm individuals.

Prioritize Jail Space for Public Safety, Not Poverty

Investments in jail expansion have skyrocketed across the state in the past decade.[60] Historically used for short-term custody, including for individuals who have not been convicted and are awaiting their criminal trials or people serving misdemeanor sentences, jails under the 2011 Public Safety Realignment law now also house people serving sentences for some lower-level felony crimes. These sentences are longer than misdemeanor sentences. Consequently, the number of people entering jails that serve sentences longer than a year or more has increased.[61]

Prior to Realignment, many jails were already overcrowded or at capacity. After it's passage many local jurisdictions experienced increased jail populations and sought to expand jail capacity. **Since 2007, California has allocated more than $2.5 billion to pay for additional or replacement jails in almost every county.**[62]

Proposition 47 alleviated some jail overcrowding by reducing six minor crimes from felonies to misdemeanors.[63] But the underlying crisis of crowded jails and moves toward jail expansion continues to persist across the state.

As counties grapple with jail populations, a key underlying question has been underexamined: who are the majority of people in county jails? Jails, like state prisons, are also unsuitable to resolve many underlying crime drivers. For too many people in county jails, their crimes were related to addiction or mental health issues, combined with poverty or homelessness. Many more people are in county jails because they cannot afford to pay bail, so they await their trials in jail for days, weeks and months at a time.[64]

Sixty-four percent of people in California jails are being held pretrial.[65] California detains a greater percentage of its pretrial population than the rest of the country: of the total number of arrestees pending trial, California detains 59% and releases only 41%, exceeding the national average.[66]

A focus on the pretrial population is critical to reducing over-incarceration in county jails. Overuse of pretrial detention wastes jail space on individuals that may be safe for release if they could afford bail. It has been shown to reduce public safety because detained individuals who serve jail time are more likely to commit crimes than if they had been released pretrial.[67] Pretrial detention also exacts heavy financial and social tolls.[68] High rates of pretrial detention costs to counties include booking, screening, housing, clothing, and feeding low-risk individuals, many who have special mental and physical health needs.[69] Pretrial detention disrupts people's work and personal lives leading to further instability; they often lose employment, housing, transportation, child support and other resources.[70]

Napa: Reaping the benefits of pretrial risk assessment

Individuals arrested for a new felony offense in Napa are screened and assessed by pretrial services staff within the probation department who prepare daily reports for an on-call judge. In these reports, release recommendations are made based on assessed risk, allowing the on-call judge to make a decision within 24 hours. Napa's pretrial release program also provides risk-based supervision, with success rates consistently above 90%. Countywide crime rates have stabilized.[73]

If California reduced its pretrial detention population by just 10%, local criminal justice systems could save about $550,000 per day on average.[71] Santa Clara County found that providing pretrial services cost just $15-$25 per day compared to $204 for jail. It saved $33 million in six months by keeping 1,400 defendants out of jail, while maintaining a 95% court appearance rate and no decline in public safety.[72]

Expand Graduated Responses and Reduce Pressure on Probation Systems

In California, the vast majority of convictions for criminal law violations result in a sentence including probation. In 2016, there were 137,415 felony convictions, 66% of which resulted in sentences of straight probation or probation and jail.[74]

Probation is a community supervision sentence—meaning the person is not incarcerated but typically is required to report to a probation officer that supervises the individual, remain crime-free and, in some instances obey curfews, participate in drug testing or meet other individualized requirements such as treatment. The vast majority of people on probation are on what is called "administrative" probation, meaning the probation officer has hundreds of cases that are not actively supervised and the person on probation is not participating in treatment programs. Recent state reforms have increased the number of individuals with higher risks and needs on probation, and requiring more active supervision by probation officers.[75]

Many probation departments are expanding tailored supervision and developing "graduated responses" to manage people on probation who are higher-risk to reoffend—requiring frequent check-ins, more required programming combined with supervision, and quick sanctions when people violate the terms of their probation.

With the changing role of probation and the changing needs of the population of people on probation as incarceration declines, additional reforms would reduce pressure on probation departments with high caseloads and allow for more focused supervision for people who are higher-risk.

1. Set shorter probation terms.

Currently, felony probation terms carry a maximum of five years.[76] In 2016, there were 190,600 people on felony probation serving an average three year-term.[77] Research indicates these probation terms are too long and serve little public safety benefit. People are at greatest risk of new law violations in the first few months of supervision; after 15 months, the public safety benefits decrease.[78] Experts suggest that frontloading resources within the first six months to a year of supervision and shortening sentence lengths overall will promote positive safety outcomes.[79, 80] If California set a maximum probation term of 12 to 18 months for misdemeanor probation and 18 to 24 months for felony probation, this would enable probation departments to focus supervision and services to those who are high-risk. According to one study, the approximate annual cost of probation is $4,500 per person, so reducing the average length of felony probation terms by just one year could potentially avert about $800 million annually—resources that could help provide more intensive supervision to people on probation that are high risk.[81]

Contra Costa: Success with shorter probation terms

Contra Costa County's judges issue a significant number of probation sentences that are 24 months or less, shorter probation terms compared to other counties. These shorter terms, which include targeted treatment, have contributed to countywide lower recidivism rates and high probation completion and termination rates.[88]

2. Continue Expanding Graduated Responses to Probation Violations.

Many new commitments to prisons and jails are for probation violations.[82] In some cases, probation violations are technical, such as failing to pay fees, missing probation appointments, or failing to complete a treatment program or drug test.[83] Some of these violations could be effectively handled through graduated responses instead of a return to incarceration. The Chief Probation Officers of California has been leading legislative and systems change reforms to expand effective graduated responses to reduce the burdens on jails and prisons of probation violations. Community service or more intensive supervision can hold individuals accountable without interrupting stabilizing factors such as employment or housing, while returns to incarceration—especially prison—may increase recidivism.[84] Probation agencies can also use graduated incentives—earned compliance credits—to reinforce positive change.[85] While progress has been made, 30% of prison admissions in California are still for probation violations, some of which may be avoidable.[86] If the state could further reduce these admissions by one-third, this could amount to a reduction of about 3,600 prisonadmissions annually.[87]

Sacramento: Probation One Stop Shop Reduces Recidivism

Sacramento Probation Department's Adult Day Reporting Centers offers case management, counseling, treatment, programs and education—all delivered in one centralized location. The department partners with community organizations to provide evidence-based services including vocational and job training, post-traumatic stress counseling, and individually tailored treatment. Eighty-eight percent of participants have no new criminal convictions during their first year back in the community.[89]

Sentencing Reform: **From Lengthy and Ineffective to Evidence-Based and Smart**

Between 1984 and 1991, more than 1,000 felony sentencing laws were passed, including more than 100 sentence enhancements across 21 separate sections of California law.[90]

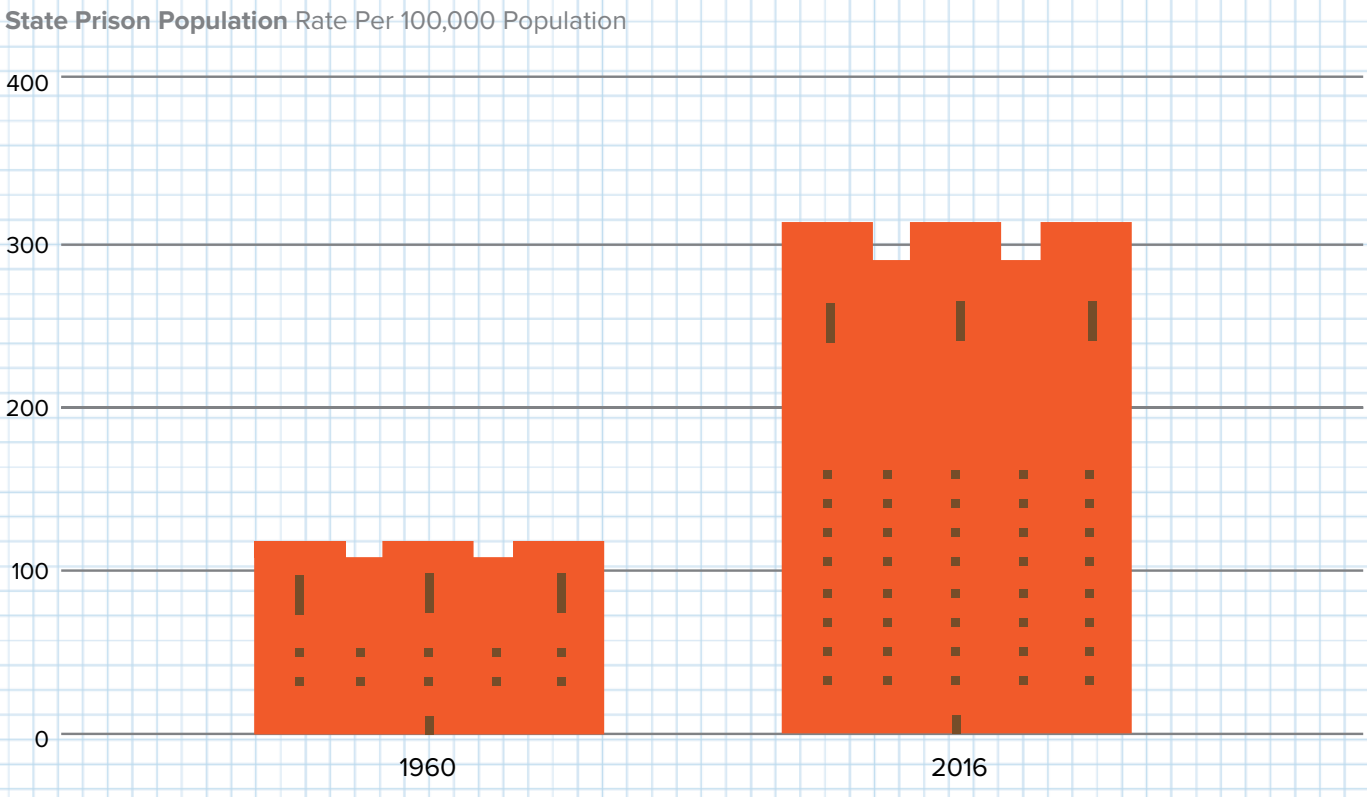
Voters and state leaders ushered in these "tough on crime" laws, such as the state's infamous Three Strikes law, based on the argument that they would reduce crime and protect victims. But decades later, experts agree the primary impact has been ballooning incarceration rates, especially for communities of color, and excessive state prison spending—all without offering a substantial public safety benefit.

Today, many national experts are urging policymakers to reconsider mandating lengthy sentences and permit greater discretion.[91] This would allow for sentencing to be proportionate to the harm caused and aligned with what evidence suggests would most effectively reduce repeat offending and keep communities safe.[92]

What the Research Says: Most of the Time, Shorter is Smarter

Research shows that longer sentences do not reduce recidivism more than shorter sentences—and may actually increase recidivism.[93] One study found that incarceration for any longer than 20 months has minimal to no effect on reducing recidivism upon release.[94] Another study found that the ideal sentence length to ensure accountability and minimize recidivism for serious crimes such as robbery and burglary was about 14 months: any longer actually increased the likelihood the person would return to committing crimes upon release.[95]

State incarceration rate remains high despite lower crime rates[31]



Research has also shown that lengthy sentences have diminishing returns because people tend to commit fewer crimes as they get older.[96] Additional research indicates that programs that allow for early release for qualified incarcerated people do not negatively affect recidivism rates.[97] In California, at its highest incarceration rate, almost 70% of people released from prison returned within three years. Comparatively, people who received drug treatment in prison and in the community show much lower recidivism rates.[98]

Some argue that, even if long sentences have no impact on recidivism, they are still preferred because they deter people from committing the crimes in the first place. However, research shows us this assumption is unfounded. Longer sentences do not have a stronger deterrent effect than shorter sentences.[99] This may be because many people are under the influence of alcohol or other drugs when they commit crimes, thus impairing their ability to rationally weigh the consequences of their actions.[100] Others may be unaware of the complex ways sentencing laws operate to lengthen the penalty for their actions.[101] Research also indicates that incarceration fails as a deterrent because people are more deterred by the likelihood of being caught than by the severity of the penalty they may face if they are actually caught.[102]

Put simply, people in prison today are serving longer sentences than is effective to hold them accountable, reduce recidivism and protect public safety. Recently, after years of study, national experts concluded that prison sentences could be shortened by 25%—across the board—without negatively impacting public safety.[103]

> **"Contrary to the mythology that incarcerating more people for longer makes us safer, it is likely that for years we have incarcerated far more people than necessary for the purposes of actually keeping us safe. While there are those who insist criminal justice reforms put the public at greater risk, this appears to be true neither in California nor across the country."**
>
> ***Orange County Register* Editorial Board,** October 1, 2017.

So, if evidence shows that lengthy sentences do not reduce repeat offending and do not deter people from engaging in crimes, why has it been so difficult for policymakers to follow the data and shorten sentences for the majority of crimes, to reduce taxpayer burdens and free up resources for more effective public safety strategies?

Crime, especially serious crime, is an emotionally charged topic and, understandably, some may be driven to solely seek punitive responses, regardless of efficacy. However, most people today—including survivors of violent and serious crime—want a government response that primarily focuses on what works to make sure the crime never happens again.

- By a 2 to 1 margin, crime survivors think that California should focus more on providing supervised probation and rehabilitation programs than sending people to jail and prison.
- By a 7 to 1 margin, crime survivors think that California should invest more in health services like mental health and drug and alcohol treatment than invest more in jails and prisons.

While conversations on crime policy are often sensationalized and difficult, the public is ready for a new dialogue. The majority of voters believe that prisons do not work to reduce repeat offending nor make any difference in safety outcomes.[104]

To achieve what Californians want—a more balanced approach to public safety—decision makers will need to scale back how long people spend in prison.

If California leaders recalibrated sentences and lengths of stay in prison for the majority of crime categories, excluding convictions that result in a sentence of life without the possibility of parole or a death sentence, the state could safely continue to substantially reduce imprisonment.

Below, we draw on the work of experts to suggest ways that California can achieve that. We also encourage the state to move towards a more rehabilitative model by expanding rehabilitation programs and focusing incarceration time on preparedness for release.

1. Replace Mandatory Sentence Enhancements with Increased Judicial Discretion

"Sentencing enhancements" are laws that require judges to add more time to a sentence length when certain factors are present during the commission of a crime. The most well-known enhancement law in California is the state's Three Strikes and You're Out law—a law that was, until voters recently reformed it, the most stringent enhancement law in the nation.[105] There are many others.

While most everyone agrees that people repeatedly engaging in violent crime or engaging in especially dangerous behavior need to be held accountable and incapacitated until they are safe for release, the impact of most "enhancements" has been to significantly lengthen the time people serve in prison, and the taxpayer cost of their incarceration, without having a commensurate impact on recidivism or public safety.[106] These mandatory laws, largely enacted haphazardly by state legislatures, have also stripped judges from the ability to individually analyze each case and consider the circumstances of the crime, the individual and the input of the victim in fashioning the most appropriate sentence to ensure accountability, reduce recidivism and repair the harm caused.

About 80% of individuals in California prisons are serving a sentence that includes a mandatory enhancement.[107] California lawmakers should remove and replace these ineffective sentence-lengthening mandates with judicial discretion, guided by evidence of what works to reduce recidivism, so judges can determine the appropriate sentence length in each case.

Antiquated "Felony-Murder Rule" Does Not Deter Crime

In California, a person may be convicted of first or second-degree murder even if the person did not personally commit the homicide and did not intend to kill anyone.[108] The law authorizes murder prosecutions in instances when a person engages in a criminal act that contributes to someone's death or engages in a criminal act with another person that does kill someone, even if the person charged had no knowledge of the homicide. According to one estimate, nearly 20% of all murders annually fall under the felony-murder rule.[109] While engaging in high-risk behaviors that could result in someone's death are behaviors for which accountability is required and incapacitation may be the only appropriate response, this overly-broad definition of murder culpability has not been demonstrated to deter crime or recidivism and contributes to disproportionate sentencing.[110] The United States is one of the only countries in the world that allows for prosecutions under this rule, and four states have now abolished this rule out of concern for its excessively harsh and disproportionate impact. In 2017, the California State Legislature proposed a reconsideration of this rule along with other excessive sentencing schemes.[111]

2. Evaluate Suitability for Release for People Considered Low-Risk

Experts agree that shortening sentences for the majority of people in prison who are eligible for release can be done without compromising public safety.[112] To reduce unnecessary incarceration and its associated financial and social costs, there must be opportunities to shorten time served when an individual no longer poses a public safety risk.

Today, the majority of people in California prisons were convicted of a serious or violent crime.[113] While these individuals must be held accountable, the length of their sentence is not correlated with evidence-based practices on the best way to prevent future repeat offending.

Based on risk assessment reviews of people in state prison, Department of Corrections and Rehabilitation data indicates that almost half of California's current prison population (48%, which is about 63,000 people) have been assessed as low-risk to reoffend.[114] Most of these individuals will be released at some point—a small portion are serving life sentences without the possibility of parole or death sentences. So, it would be prudent to take immediate steps to review the status of the individuals that will be released and evaluate for potential earlier release based on risk assessment. For many, they have now been incarcerated for longer than necessary to protect public safety.

If only 10% of the individuals currently assessed as low-risk were evaluated and released, that would reduce California's prison population by about 6,300.

3. Increase Parole Grants for Individuals Who Participate in Rehabilitation

Some people are sentenced to prison for what are called "determinate" sentences: specific mandated sentence lengths (often resulting from mandatory enhancements). Other people are sentenced to prison for "indeterminate" sentences, meaning they have been sentenced to prison for a range of time (such at 25 years to life) and the state "parole board" determines the actual release date after the minimum of the range has been served. The parole board is responsible for evaluating individuals with indeterminate sentences to decide when they can be released.

Proposition 57: An Opportunity to Change Prison Culture

Passed overwhelmingly by voters in 2016, California's Proposition 57 is a groundbreaking ballot initiative that has the potential to substantially reduce unnecessary incarceration and change prison culture toward a rehabilitation focus. Under Proposition 57, individuals in prison can accrue earned time credits toward release by participating in rehabilitation programs and maintaining good conduct.[118] For the first time, the majority of people in prison will have an opportunity to earn parole review by engaging in education, treatment, victim awareness, job training and other rehabilitation programs strongly associated with reducing recidivism and improving the prison culture itself. Shifting from warehousing people to a focus on productive preparation for release reduces violence, improves working conditions, and supports better life outcomes for people post-release.[119] California's 2017-18 budget estimated that Proposition 57 will reduce the prison population by 11,500 people by 2021.[120] Some experts believe the measure could have even greater impact if it is fully implemented in accordance with the measure's intent. To achieve maximum impact, California leaders should apply earned time credits retroactively to people that completed programs prior to the implementation of Proposition 57 and ensure as many people as possible that will be released can earn credit under the measure. If Proposition 57 were applied retroactively, up to 30,000 people could be eligible for release.[121]

Between 1980 and 2012, the California Board of Parole Hearings denied 95% of all parole cases.[115] Some of these release denials may have been based on continued dangerousness of the individual, however, in many instances, release decisions are not based on objective risk assessment or an evaluation of rehabilitation achievements.[116] Arbitrary or inconsistent parole decision-making not only burdens taxpayers with the cost of continued incarceration of individuals who may be safe for release, but discourages people in prison from participating in rehabilitation programming.

Parole boards should focus on assessing rehabilitation and encouraging people in prison to engage in educational, rehabilitation and workforce training programs. As many people as possible who will be released should be able to earn earlier parole consideration for participation in appropriate rehabilitation programming, to reduce unnecessary incarceration and incentivize people in prison to rehabilitate themselves and prepare for a successful release.

In addition to increasing parole opportunities for individuals that engage in rehabilitation while incarcerated, parole boards should also be required to evaluate parole decisions based on current risk to public safety. If parole boards deny release the decision should provide specific and tangible evidence that an individual poses a continued risk to public safety. If the person does not, it should be presumed they will be released. Parole board practices can also be improved through professionalizing and depoliticizing parole boards and increasing opportunities for rehabilitative programming.[117]

> **"The preliminary reforms that many states already have enacted reflect a growing realization that mass incarceration is economically unsustainable and socially disastrous. But to reverse four decades of bad policy, state lawmakers will have to adopt a more decisive and systematic approach to sentencing reform"**
>
> ***New York Times* Editorial Board,** Dec. 24, 2016.

Implement These Reforms to Reduce Prison Lengths of Stay by at Least 20%

Taken together—replacing mandatory penal code sentence enhancements with guided judicial discretion; evaluating current low-risk individuals for release; and expanding earned time credit for rehabilitation programming—these reforms would reduce prison lengths of stay for the majority of people in prison and result in a precipitous drop in the state prison population.

While estimating the exact population impact is difficult to predict, if the reforms cut prison lengths of stay by just 20% for the five crimes that make up the majority of California's prison population that is eligible for release, that would result in a prison population reduction of at least 30,000 fewer people behind bars.[122]

Setting a goal of further reducing state imprisonment by 30,000 people through shortening prison lengths of stay by 20% for individuals that will be released would not increase recidivism and would not impact crime rates.[123] The state can safely achieve this goal to save prison costs and rebalance our approach to safety.

REALLOCATE TO REBALANCE OUR APPROACH TO SAFETY

DESPITE SUBSTANTIAL PROGRESS IN CRIMINAL JUSTICE REFORM, California still spends more than $11 billion a year on state prisons. That's a 500% increase in prison spending since 1980-81.[124] In fact, California spends as much today on prisons as every state in the United States combined spent on prisons in 1981, and it has increased annual prison spending at a rate that has significantly outpaced other states.[125]

When local corrections costs—such as jails, courts and probation—are factored in, that annual figure almost doubles to $20 billion.[126] With this level of investment, Californians deserve an opportunity to evaluate the efficacy of these expenditures.

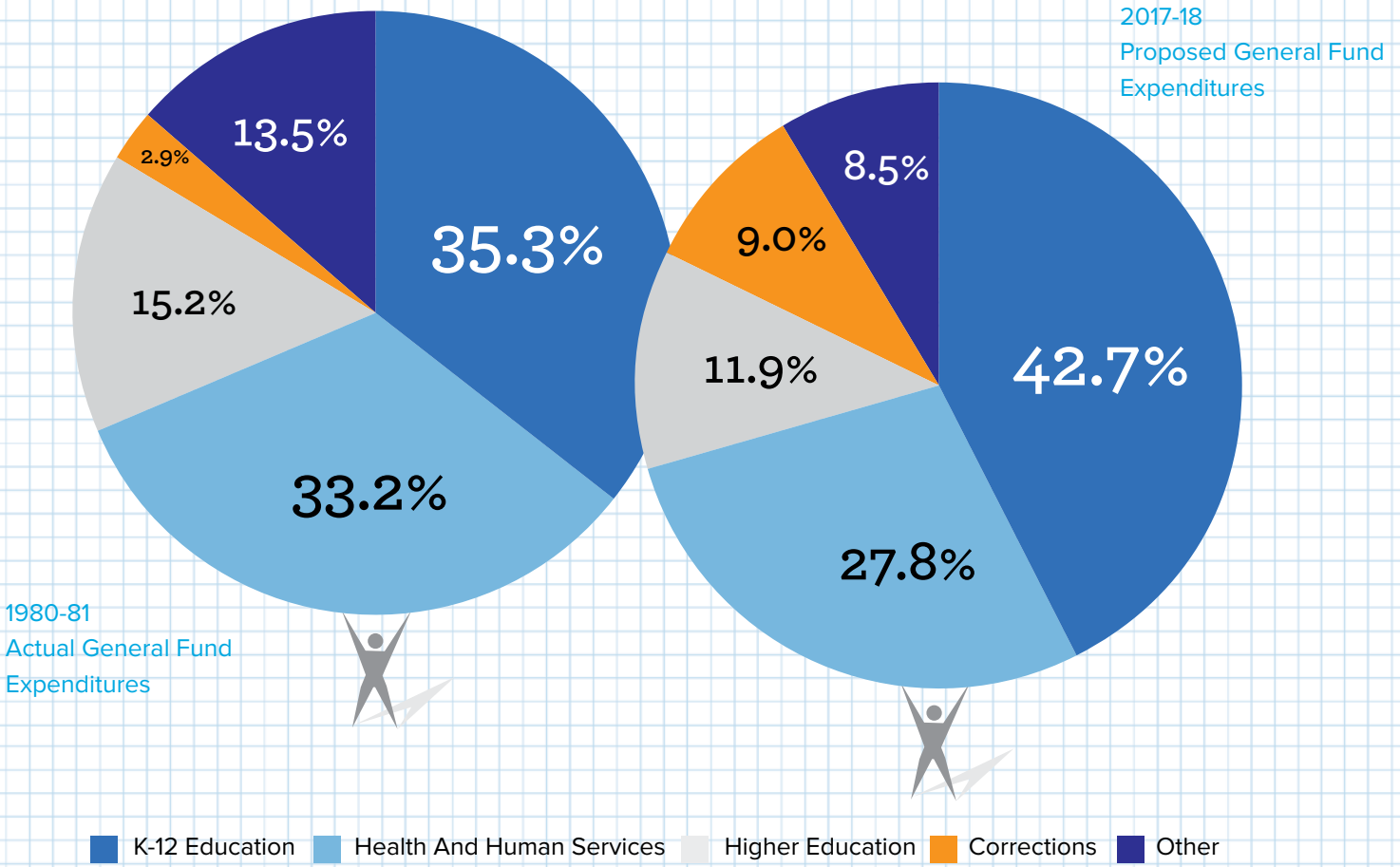
There are at least two important reasons to go further in safely reducing incarceration.

First, there is no public safety justification for continued over-incarceration. It contributes to high recidivism rates and community instability, and has no impact on crime rates. Public safety would be improved through reduced recidivism by:

- Developing local options beyond arrest and county jail detention to reduce the flow of people into the justice system and stop burdening local justice systems with problems such as mental health, addiction, homelessness that they are ill-equipped to resolve; and,
- Replacing mandatory prison sentence enhancements with guided judicial discretion; releasing individuals in prison who are assessed as low-risk; and maximizing earned time credit people that participate in rehabilitative programming to reduce prison lengths of stay by at least 20%.

Second, reducing incarceration also saves substantial taxpayer dollars that would be better invested in a holistic and balanced approach to public safety.

State corrections has increased as a share of spending since 1980-81[129]



Shrink the State Prisons Budget

From 1980 to 2010 the share of California's general fund that was spent on corrections nearly quadrupled from 2.9% ($604.2 million) to 10.5% ($9.6 billion), consuming a larger portion of state resources at the expense of other necessary safety investments.[127] In 2017-18, $11.2 billion was allocated to state corrections, comprising 9.0% of state general fund expenditures.[128] Meanwhile, the proportions of the general fund allocated to health and human services and higher education have decreased.

If the state corrections budget mirrored its 1980-81 share of total spending, it would be $3.6 billion—$7.6 billion less that we spend today.

Each of the proposals to shrink incarceration included in this report would pave a pathway for sharply reduced corrections spending. It is difficult to precisely estimate the overall impact of the proposals combined because individuals under correctional supervision may be affected by more than one of the reforms proposed. However, if the state could reduce prison length of stay by just 20% for most individuals who can be released, today's prison population would be reduced by at least 30,000 people, saving, at the very least, the marginal cost estimate of about $241 million. However, with population reductions of that size, the state could also close facilities and save more dollars.

If California closed 5 prisons in response to population reductions, it could save at least $1.5 billion annually in the state's prisons budget.

Prisons are expensive

State corrections spending covers the costs of operating 34 prisons for adults, three youth prisons, state parole operations and state contracts with other state-used detention facilities.[130] California prisons have very high fixed costs because the state must pay the operating costs of each facility, including 24-hour staffing and basic utilities, regardless of how many people are incarcerated in the facility.[131] Most prison spending increases have been driven by rising staffing costs and improved healthcare for incarcerated individuals.[132] Today, about 60% of state corrections spending is allocated to prison security and operations; roughly 20% goes to healthcare for incarcerated adults. Less than 4% of state corrections spending is allocated to rehabilitation services in adult prisons.[133]

Reducing the number of people incarcerated is a critical mechanism to reduce costs, but there is a limitation to the fiscal impact of reduced incarceration if the reduction level is not large enough to reduce the overall number of prisons in operation. While California spends roughly $75,000 per person incarcerated in state prison a year,[134] the savings associated with reducing the number of people incarcerated vary. At minimum, for every person that is not in prison, the state saves what are called "marginal costs" (for housing, clothing, meals etc., currently estimated at $9,300 a year). However, the state does not save what are called "fixed costs" (such as building maintenance and staffing), unless the number of people in prison declines enough to begin closing portions of facilities or entire prison facilities.[135] Most prisons in California house between 2,000 and 5,000 people. A sustained population reduction of about 5,000 people would allow the state to close a facility entirely.[136] Depending on the facility closed, this could reduce state corrections spending by about $300 million per prison.[137]

Reallocate State Prison Dollars **to Communities**

If the state set a goal to safely further reduce prison incarceration by achieving a 20% reduction in length of incarceration—which would reduce incarceration by at least 30,000 people—this could allow the state to close five prisons and save the state at least $1.5 billion annually.

$1.5 billion could go a long way toward re-balancing the state's approach to public safety. The state could invest in community stability and more effectively prevent the cycle of crime. Reallocating from prisons to communities, California could scale up a robust shared safety infrastructure, with strategies such as expanding mental health treatment for people with severe mental illness; expanding housing-based programs for chronically homeless populations; expanding victim access to trauma recovery; and, giving individuals leaving the justice system a chance at stability and redemption.

Counties can also reduce local justice system costs and recidivism rates, and reinvest local dollars into a stronger shared safety infrastructure, through the local strategies proposed herein. Given wide variations in county budgets and local practices, we do not estimate the potential savings impacts. However, local leaders can, and should, assess the drivers of the local justice system costs and jail population pressures and take immediate action to expand options beyond arrest and incarceration to improve outcomes and stabilize communities.

Los Angeles County: Calculating local costs averted by Proposition 47

The Los Angeles Board of Supervisors has taken unprecedented action to proactively implement 2014's Proposition 47 ballot initiative through a series of board resolutions, including motions to link people eligible for record change with employment opportunities, the first-of-its-kind resolution in the country.[138] One of the Board actions in 2016 required the Los Angeles County auditor-controller to conduct an analysis of savings generated locally by Proposition 47. The analysis found that roughly estimated about $9.2 million in local Proposition 47 costs were averted due to workload changes in the first year since the measure passed.[139] The auditor also found that no the departments had adequate methods to measure the budgetary impacts of Proposition 47 and the analysis was based on the limited data available.[140] In response, the Board of Supervisors passed a motion requiring validation of the findings and reallocation of resulting funds to prevention, split equally among community-based mental health and substance abuse treatment and victims' services.[141]

LAYING A FOUNDATION FOR SHARED SAFETY

THE GOAL OF ADVANCING ADDITIONAL CRIMINAL JUSTICE REFORMS in California should be to both reduce continued over-incarceration and reduce over-spending on imprisonment. Saving $1.5 billion in state prison costs opens a big opportunity to rebalance public safety investments to support the communities that have been most harmed and least helped, and go much further to prevent crime from happening in the first place. Financial savings from reduced incarceration should be invested in cost effective, proven approaches that address root causes of crime.

Most Harmed and Least Helped: Shared Safety Begins with Protecting the Unprotected

There is no more important function of our safety and justice systems than protecting crime victims and those who are at-risk of becoming a victim of crime. Despite this foundational goal, few crime policy debates are informed by a comprehensive examination of the experiences of the state's diverse crime survivors.

California, like every other state in the nation, does not have enough data on victimization patterns, victims' experiences or victims' perspectives. This is a profound gap, particularly considering the amount of money the state spends on public safety.

While crime and violence impacts people of all walks of life, the strongest predictor of victimization is having previously been a victim of crime.[142] People who have survived a violent crime are more than four times as likely to be victimized four or more times.[143] According to state and national data, people of color, young people, people living in poverty or homelessness, people with disabilities, and people with mental health disorders are most frequently survivors of crime.[144] These community members are more vulnerable to both being a victim of crime and then being a repeat victim of crime.

What types of strategies could California fund with $1.5 billion annually?

Any of the following:

Treat **150,000** patients with severe mental health challenges;

Treat **150,000** patients with substance use disorders;

House **50,000** individuals with complex physical and behavioral health needs;

Support crime survivors through **1,000** trauma recovery centers;

Hold over **a million** restorative justice dialogues;

Put **300,000** people with convictions on the path to employment through workforce development programs;

Create over **3,000** "clean slate" services programs across the state.

The traumatic impacts of being a victim can have a lifetime of consequences. The impacts extend to individuals' personal, familial and professional lives, and, left unaddressed, can have severe and long-term impacts on survivors' well-being and stability. Two in three California crime survivors report experiencing anxiety, stress, difficulty sleeping, and strain in relationships and at work for extended periods after the incident.[145]

The negative impact of a lack of support for survivors on future stability is particularly acute for young people. Youth and young adults are especially vulnerable to long-term impacts of unaddressed trauma, such as difficulty with school, work, relationships and poor physical health. They are also the most at-risk for later becoming involved in criminal activity if their needs go unmet.

Despite the profound and debilitating impacts of crime and violence on survivors, most crime victims do not gain access to recovery supports. Less than half of all crime is ever reported to police, leaving most crime survivors without any recourse or access to services to help them cope with the aftermath of the crime.[146]

> **"While such tragedies rock families, too many communities in California just "live" with crime—violent acts but also burglaries, drug dealing, vandalism and more. These communities feel abandoned by lawmakers, law enforcement and the media. Even though these communities experience the lion's share of crime, they do not receive the lion's share of attention or resources."**
>
> **David Guizar,** Crime Survivors for Safety and Justice Los Angeles Chapter Coordinator, *Victims' Voices*, 2013.

STOCKTON POLICE CHIEF ERIC JONES: **LAW ENFORCEMENT LEADERSHIP PUTTING COMMUNITY PARTNERSHIP FIRST**

A LOT IS CHANGING IN STOCKTON, CALIFORNIA AND POLICE CHIEF ERIC JONES IS A BIG PART OF THE CHANGE. Under his leadership, crime in Stockton has declined and community relationships with the police department have improved. Chief Jones is ushering in new approaches to public safety that start with understanding and addressing community needs first.

It wasn't always this way. Five years ago, amidst the city's fiscal challenges and resulting cuts to policing, the police department emphasized "command" and "control" approaches. Residents reported feeling over-policed and a lack of trust and empathy for the victims of violence.

A grandmother lamented to Chief Jones at how poorly her family had been treated when her grandson was shot and the stress police interactions caused her family, when they were also dealing with the trauma of the crime.

In response, Chief Jones reached out to her grandson directly to listen to the concerns he felt. That honest dialogue between two people who deeply love Stockton exemplifies Chief Jones' efforts to move away from enforcement alone toward building community trust and partnership. Along with the Stockton City Manager, Jones conducted a listening tour to hear directly from the neighborhoods most impacted by crime. These conversations—from kitchen tables, town hall meetings, and one-on-ones—while difficult, revealed how critical reconciliation is to improve public safety.

Chief Jones joined the department in 1993 and began his tenure as chief in 2012. He had been with the city through its highs and lows. And when he became chief, having learned the hard way about what works and what doesn't work, he knew that shared safety starts with community trust. "This process starts with an acknowledgment that traditional policing in our minority communities often created barriers to trust. And without trust, we cannot work well together to reduce crime," said Jones last year. "Sometimes having this conversation [between law enforcement and the community] is like reopening a wound that never healed. It causes pain today but promotes healing tomorrow."

An Ounce of Prevention: **Balanced Investments Tackle Signs and Symptoms—Before a Crime Occurs**

Understanding who victims are and what victims need to recover from crime and trauma should be data that drives public safety investments. Additional data that should determine the pathway for public spending to achieve safety is looking at the signs and symptoms of trouble, and making investments that help stop the cycle of crime before it starts.

Many of the drivers of crime are knowable—and preventable. While there is scant evidence that dramatic increases in incarceration rates deter crime, there is a large body of evidence identifying the linkages between behavioral health needs and increased risks that individuals and communities face to becoming victims or perpetrators of crime. Addressing factors such as addiction, mental health challenges and chronic exposure to trauma, especially when combined with economic instability, at scale will reap much greater returns on investment than lengthy prison sentences.

People Experiencing Economic Instability Are Vulnerable to Crime

When cost of living is factored in, California has the highest poverty rate in the nation.[147] One in five Californians is unable to make ends meet.[148] Widespread economic hardship is linked to crime and vulnerability.[149] Poor health and low socioeconomic status increase individuals' vulnerability to cycles of crime.[150] People that commit crime are also likely to be living in poverty.[151] About one in three individuals in jail expects to go to homeless shelters upon their release.[152]

People that Struggle with Mental Health Challenges Are Vulnerable to Crime

Nearly 1 in 4 Californians has experienced anxiety, depression, or another mental health issue that affects their wellbeing and stability and nearly 1 in 6 adults in California need mental health services.[153]

About 1 in 20 Californians has a severe mental health diagnosis.[154] Yet, at least 43% of the 4.5 million adults in California who needed and sought treatment related to their mental health in 2014 did not receive it.[155] Roughly estimated, 1.9 million Californians struggle with severe mental health challenges but only about 56% receive some kind of service. Over 30% of the adults in state prison have severe mental health challenges.[156]

California, like most states, cannot meet its behavioral health needs. **California has a shortage of health care professionals in primary care, mental health and substance use fields, especially in rural areas.**[157] National projections suggest that this shortage will continue to grow due to increased demand for family physicians, psychiatrists, nurses, social workers, school counselors, clinical psychologists and family therapists.[158]

People Who Struggle with Substance Abuse Are Vulnerable to Crime

Nearly 1 in 12 Californians has had substance abuse or addiction issues, including alcohol, prescription medication, or other drugs. By 2015, the age-adjusted rate of overdose deaths in California had increased by about 30% since 2002.[159] This problem is especially acute in northern rural areas, which have opioid prescription death rates that are two and three times higher than the national average.[160]

Only about 6% of people who need drug treatment for addiction receive it.[161]

Due to the inadequacies of California's safety infrastructure, California prisons and jails are now the major warehouses of people with mental health challenges, substance use needs and chronic health issues. More than half (53%) of people with a felony convictions self-report that mental health or substance abuse issues was either the top factor or a major factor in leading to their involvement in crime. In 2016, 47% of misdemeanor arrests in California were either alcohol- or drug-related.[162]

Individuals who are incarcerated have higher rates of addiction and mental health diagnoses, chronic health conditions, such as asthma, diabetes and hypertension, and infectious diseases such as tuberculosis and hepatitis, than the general population.[163, 164]

People Who Experience Chronic Trauma Are Vulnerable to Crime

About two out of three survivors of violent crime have experienced four or more lifetime traumas, including childhood abuse and neglect, witnessing domestic violence or having an incarcerated parent.[165] On average, 62% of Californian adults have experienced at least one trauma during childhood. The more exposed an individual is to trauma without receiving adequate recovery support, the more quickly their health and safety outcomes decline. Individuals who experienced six or more childhood traumas die nearly 20 years earlier on average than individuals who experienced none.[166]

People Facing Legal Barriers to Stability Are Vulnerable to Crime

The collateral impacts of over-incarceration policies go far beyond bloated prisons and racially disparate incarceration rates. In addition to an explosion of tough sentencing policies that drove populations up, California, like most states, also expanded the legal barriers to successful reentry for people leaving the criminal justice system.

THE COLLATERAL IMPACTS OF OVER-INCARCERATION POLICIES GO FAR BEYOND BLOATED PRISONS AND RACIALLY DISPARATE INCARCERATION RATES.

In California today, there are more than 4,800 post-release restrictions facing people with conviction records. These include restrictions on specific types of employment, professional trades, housing, loans, and more. While a small number of these post-release restrictions may have a reasonable nexus to the crime committed, the vast majority of these restrictions are unnecessary and contrary to the goal of public safety.

THE 2017 SURVEY OF CALIFORNIA CRIME VICTIMS AND POPULATIONS AFFECTED BY MENTAL HEALTH, SUBSTANCE ISSUES AND CONVICTIONS

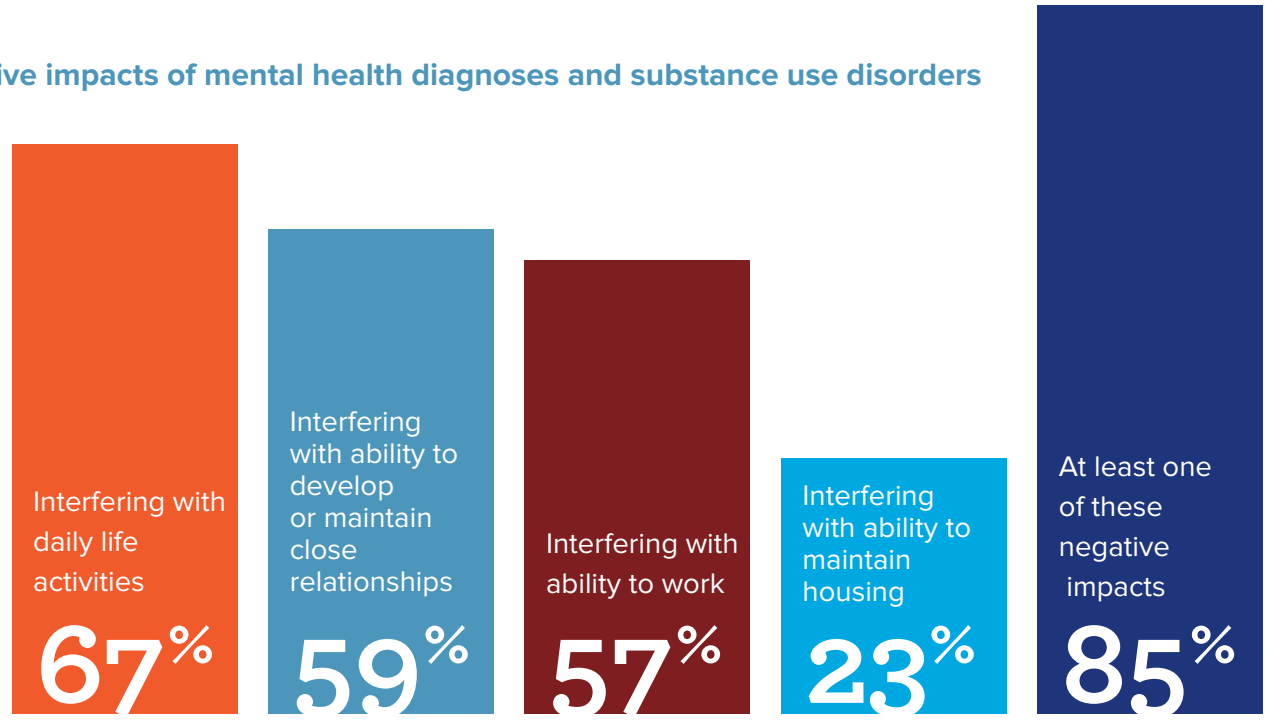
TO FILL THE GAP IN INFORMATION about the impact of crime, mental health, substance use and convictions on Californians and their families, Californians for Safety and Justice commissioned the first-of-its-kind *Survey of California Victims and Populations Affected by Mental Health, Substance Abuse Issues and Convictions* in September 2017. David Binder Research conducted interviews with more than 2,000 Californians and found significant unmet behavioral health needs among state residents and widespread negative impacts. According to the survey results:

- **Nearly 1 in 4 (23%) Californians has had anxiety, depression, or another mental health issue that affected their wellbeing.**
- **Nearly 1 in 12 (8%) Californians has had substance abuse or addiction issues, including alcohol, prescription medication, or other drugs.**

Negative impacts of unmet mental health and substance abuse needs

Failing to address these widespread risk factors, and address the economic instability they create for families, increases victimization and greatly affects our communities. Mental health and substance abuse issues impact the ability of people to engage in daily life activities and interfere with their ability to maintain close relationships, jobs, and stable housing.

Negative impacts of mental health diagnoses and substance use disorders



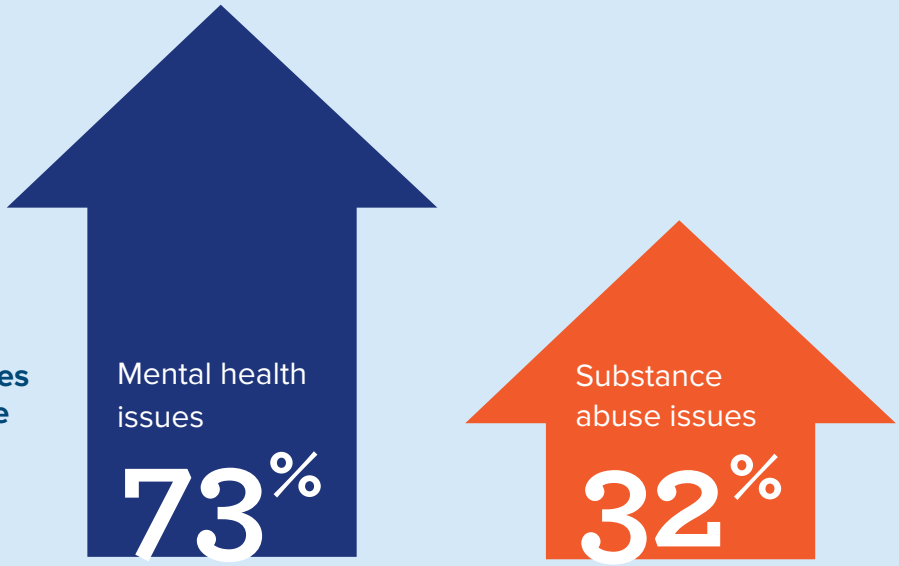
Negative impacts from mental health issues

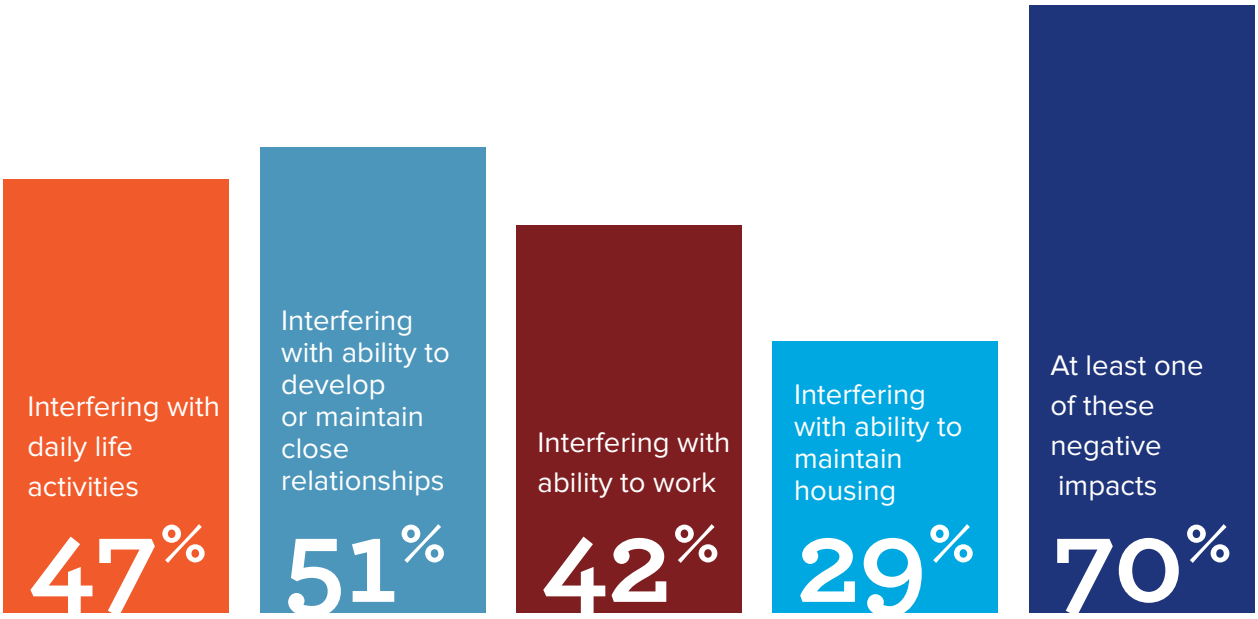
Disportionate impact on low-income communities

Nearly every family has been touched by mental health or substance abuse issues. However, there are communities that bear a disproportionate burden and experience far greater needs. The lack of mental health services and substance abuse treatment is particularly acute in low-income communities.

According to survey results, people with household incomes less than $25,000 are far more likely to experience mental health and substance abuse issues than people with household incomes greater than $75,000. Whereas 23% of respondents report experiencing a mental health issue, one-third (32%) of respondents with household incomes less than $25,000 and only 18% of respondents with household incomes greater than $75,000 have dealt with that challenge.

Increased risk of mental health and substance abuse issues for low-income people





Negative impacts from substance abuse issues

According to the *Survey of California Victims and Populations Affected by Mental Health, Substance Issues and Convictions* 8 out of every 10 people with a criminal conviction (76%) report that their stability has been affected by the conviction. Among the negative impacts that people experience from a felony convictions are difficulty finding a job (46%), struggling to pay fines or fees (45%), trouble sleeping or other health issues (40%), difficulty obtaining an occupational license (35%), and difficulty finding housing (24%).

The survey also found that negative impacts of a felony conviction disproportionately impact people of color, people living in urban areas, people without a college degree and people who are low income. The largest disparities relate to finding a job or housing. People of color are 29% and 61% more likely, respectively, than white people to report difficulty finding a job or housing. Respondents with household incomes less than $25,000 are twice as likely (98%) and three times (202%) more likely, respectively, than people with household incomes greater than $75,000 to report difficulty finding a job or housing.

"Hundreds of thousands of Californians have been marginalized by harsh felony convictions for relatively low-level crimes, often drug possessions for which they were sentenced decades ago. Many have been living well below their potential or aloof from law-abiding society because their records prevented them from getting decent-paying jobs, university degrees, professional licenses and in some cases custody of their own children... such foolish policies virtually guaranteed that many [formerly incarcerated people] would suffer deteriorating mental health, find solace in substance abuse or return to crime."

***Los Angeles Times* Editorial Board,** June, 6, 2017

New Safety Solutions: **Key Investments Needed Now**

When we examine data on victims and vulnerability, the pathway to stop—and prevent—cycles of crime becomes clear. The most effective public safety strategies are not those that revolve around increased arrests, prosecutions or lengthy incarceration. At best, these strategies can react to some crime incidents and incapacitate some individuals committing crimes. At worst, an over-emphasis on these strategies actually contributes to the cycle of crime and deeply harms public safety.

A sound set of public safety investments are those that are data-driven and balanced. There is ample evidence identifying who is vulnerable to becoming a victim of crime, and the conditions that contribute to the cycle of crime. The fact that this evidence does not drive crime policy priorities should shock the conscience of every taxpayer.

Immediate steps can and must be taken to refocus our public safety policy and budgetary attention away from purely punitive crime responses to protecting vulnerable community members and reducing the community and individual risk factors that give rise to the cycle of crime. The following investments are smart—and urgently needed.

What are Adverse Childhood Experiences and How can we Address Them?

Adverse Childhood Experiences or ACEs is a phrase that refers to ten life experiences that can cause significant trauma when they occur in a person's formative childhood years: physical abuse; sexual abuse; verbal abuse; witnessing a parent being abused; a household member was a problem drinker or alcoholic or a household member used drugs; a household member was depressed or suffered from mental illness or a household member attempted suicide; parental separation or divorce; a household member went to prison; emotional neglect; and physical neglect[167].

When ACEs go unaddressed they can cause lasting trauma and contribute to poor health outcomes like impaired cognitive development, increased risk of mental disorders, chronic diseases such as cancer and heart disease, unintended pregnancy, substance use, self-harm, contracting a sexually transmitted disease and being a victim of violence and early death.[168]

There are strategies to overcome the impacts of ACEs and improve the wellbeing of people that have ACEs. Protective factors include close relationships with caregivers and concrete support for parents and families, communities and social systems that support health and development.[169]

Build a Shared Safety Infrastructure

Shared safety means improving community well-being and giving all Californians a fair chance at health, protection, stability and empowerment. There are challenges to achieving this, but with the smart reallocation of resources, California can make substantial inroads in realizing this vision.

There are dozens of important strategies the state could expand with additional resources to build a shared safety infrastructure that improves community wellbeing, especially for California's low-income populations, from family support programs to early childhood education or afterschool programming, to employment assistance programs or support for low-income seniors and more. All of those investments are important and worthy of consideration. The factors that contribute to the cycle of crime often overlap, compound and intensify vulnerability to harm. Coordinated partnerships across California's public systems are critical to structurally address the root causes of community instability over time.

When specifically looking at the acute problems that are actively contributing to crime and immediate criminal justice system challenges and burdens, we see three specific strategies that could be prioritized to lay the foundation for a shared safety infrastructure: 1) expanding mental health treatment to address severe mental health challenges; 2) expanding substance abuse treatment to address addiction and drug-related crime; and 3) expanding diversion and housing programs for chronically homeless populations involved in crime.

Mental Health Needs and Substance Use Disorders are often "Co-Occurring," Integrated Treatment Is Important and Leverageable

For people vulnerable to the cycle of crime, mental health challenges and substance use disorders are often combined. They are "co-occurring"—meaning the person experiences both simultaneously.[175] Evidence supports providing integrated treatment in these cases.[176] These kinds of investments would provide a pathway to address severe mental health diagnoses outside jail and prisons that are ill-equipped to manage these issues.

It is also an investment that can be leveraged. Federal funding streams can bolster state behavioral health investments and allow the money to stretch further. The Affordable Care Act and Medi-Cal expansion in states like California provide federal funding for previously uninsured low-income individuals. Expanded behavioral health benefits, including substance abuse treatment can now be covered by Medi-Cal in California. Other funding streams, like Proposition 63, provide additional opportunities to address mental health issues and further reduce people's criminal justice involvement.

1. Expand Mental Health Treatment for Vulnerable Populations

Looking at data on vulnerability and crime, a top safety priority should be to maximize access to mental health treatment, to address health problems such as substance use disorders as well as depression, anxiety, post-traumatic stress disorder, bipolar disorder, schizophrenia or other mental health challenges that interfere with daily life functioning, especially when experienced by people struggling with economic instability.

Although cost estimates vary depending on individual circumstances, treating a person with a severe mental health diagnosis costs around $10,000 per year on average, and over $75,000 per year for the top 5% of patients with the most intensive treatment needs—roughly 18,000 people.[170]

Even at the high end of the cost spectrum, $1.5 billion could provide intensive treatment to the top 5% of patients with severe mental health diagnoses. At an average cost, it could fund treatment for 150,000 patients.[171]

2. Expand Substance Use Disorder Treatment for Vulnerable Populations

Research shows that people cycling in and out of the justice system who receive effective treatment for substance use disorder are less likely to be arrested again than those that do not receive treatment.[172]

Treating a person with a substance use disorder costs, roughly estimated, around $10,000 per year on average, and over $150,000 per year for the top 5% of people with the most intensive substance abuse treatment needs—roughly 1,000 people.[173]

At an average cost, $1.5 billion could fund drug treatment for 150,000 individuals with substance use disorders.[174]

3. Stop the Cycle of Chronic Homelessness, Behavioral Health Needs and Crime

There are an estimated 118,000 homeless individuals in California; 11,000 are unaccompanied youth, 9,600 are veterans and almost 30,000 are chronically homeless. Fresno, Los Angeles, San Jose, Long Beach, and San Francisco have the highest rates of homelessness in the state.[177]

Investment in affordable and supportive housing can result in public cost savings, improved health status, crime prevention, and reduced involvement in the criminal justice system.[178] In addition, housing is a necessary, stabilizing step to effectively treat individuals with physical, mental or substance use disorders.[179]

Most experts agree that "Housing First" models that prioritize permanent supportive housing are the most effective approach to addressing chronic homelessness.[180] Individuals receive housing and services without preconditions and are directed to housing tailored to their individual needs through coordinated entry systems that make efficient use of housing resources. Housing First recognizes that housing a person experiencing homelessness is a key step to improving public health, treating mental health and addiction and reducing the risk of victimization or criminal justice system involvement. These types of programs could be introduced and/or expanded and in high-need communities to begin to address chronic homelessness.

Although costs vary widely by geography, even at an annual high-end estimate of $50,000 per person, with $1.5 billion dollars, the state could provide ongoing housing assistance and services for 30,000 chronically homeless individuals.

Housing Individuals with High Needs to Stop Crime Cycles

Housing for Health (HFH) in Los Angeles

About 47,000 people in Los Angeles County are homeless; 14,000 are chronically homeless.[181] The Los Angeles Department of Health Services (LADHS) established a Housing for Health (HFH) program in 2012, in partnership with community-based organizations and property owners. HFH provides permanent housing and linkages to intensive case management services for people with complex behavioral health needs who are frequent users of county services, through various housing subsidies. About 3,400 clients have attained housing through the program since it was established in 2012[182] at a per capita cost of $20,000 per year.[183] About 79% of individuals served through HFH were chronically homeless and 97% of all clients retained housing after 12 months.[184]

Veterans Housing and Homelessness Prevention Program

California is home to the largest veteran population in the nation, and nearly 26% of the nation's homeless veterans. In 2014, voters approved Proposition 41, converting $600 million of self-financing loans from the **CalVet Farm and Home Program** into statewide general obligation bonds for the acquisition, construction, and rehabilitation of affordable housing for veterans. Administered as grants over five years, the goal is to fund stable and affordable housing for veterans and their families, serving approximately 7,000 people in total. This includes 4,800 new veteran housing units; at least 1,200 of which will be for chronically homeless veterans.[185]

Tinisch Hollins (right), with Christi Ketchum, Anna Cho Fenley, and David Guizar

TINISCH HOLLINS: **TURNING HEALING INTO ACTION FOR CHANGE**

GROWING UP IN SAN FRANCISCO'S HUNTER'S POINT NEIGHBORHOOD, Tinisch Hollins has experienced the devastating impacts of an unabated cycle of crime from an early age. She has lost more than 20 neighborhood friends and family members to gun violence. The victims included a little boy in foster care who lived with Tinisch's grandmother who was killed in a drive-by shooting when Tinisch was 10-years-old, and her own brother and cousin, lost to gun violence within months of each other this past year.

In middle school, Tinisch's family moved out of the neighborhood to a suburb south of San Francisco and her home became a refuge for family members needing help. They supported family and friends experiencing trauma from violence or trying to rebuild their lives after prison—a place to escape from chaos and crime.

From those years as a young teen to the present, Tinisch has been motivated to take action and advocate for change. She has worked in youth violence prevention, neighborhood safety and human services, both inside and outside government in San Francisco. In every role, she has seen the impact of trauma on families and communities. Even in comparatively resource-rich San Francisco, too few families struggling with poverty and living in communities with concentrated crime have access to the kind of support needed to stop the cycle.

When her brother became the second homicide victim in San Francisco of 2017, Tinisch's world crumbled—the chaos and trauma of losing her brother was nothing like she had experienced. After years of helping others try to navigate complicated public systems to get help recovering from crime, she was now navigating those same systems herself. Even with all of her experience, she and her family felt ill-equipped to manage the relocation process or engage with victim services and law enforcement while also dealing with the traumatic loss. "We need trauma-informed systems, for crime survivors and communities in need. From foster care to victim services, people are hurting and not being seen. They fall through the cracks and the cycle continues."

Tinisch is now healing through action with other survivors—this year she became the Bay Area Chapter Coordinator of Crime Survivors for Safety and Justice. Through this network, Tinisch and leaders across the state are working to heal communities and promote policies that help communities most harmed by crime and violence. "We need to design systems that humanize every interaction, systems that understand trauma and understand that hurt people, hurt people."

Support Survivors to Recover from Harm

Many California crime survivors experience stress and trauma after the crime—and endure a long period of recovery. Yet most do not receive support from victims services programs.[186] This is particularly true for victims from vulnerable populations—youth (especially youth of color), low-income communities, immigrant populations and people with disabilities.

1. Expand Crime Survivor Access to Trauma Recovery

Access to trauma recovery services can make a transformative difference for survivors of crime on the pathway to recovery and stability. California has begun expanding trauma recovery services for crime survivors across the state. In the last five years the number of trauma recovery centers has expanded from just one to eleven operating in five counties. Still, to scale these services up to meet the needs of California crime victims, the state has a long way to go.

The Trauma Recovery Center model provides a combination of behavioral health, financial and social services for underserved survivors of violence. Trauma Recovery Center services cost 34% less than traditional services, making it a more cost effective model for service provision. For example, the San Francisco Trauma Recovery Center, for example, has an annual budget of about $1 million and serves about 750 patients a year.[187]

With $1.5 billion California could fully fund over 1,000 trauma recovery centers across the state.

2. Provide Opportunities for Using Restorative Justice

Restorative Justice is a strategy to resolve crime incidents. Instead of traditional courtroom prosecution, Restorative Justice repairs the harm caused by crime, including the harm to the victim and to the community, and addresses the underlying drivers of crime for the person who caused the harm. Restorative Justice processes engage all parties—victim, perpetrator and community—in collaboratively determining how to repair the harm. The model pays equal attention to the crime survivor, accountability, community safety, and redirecting the individual who committed the crime to address underlying issues and become a more productive member of society.[188]

There are a number of different types of programs that engage in a Restorative Justice approach by bringing together survivors and individuals who committed the crime (or, when this is not safe or feasible, individuals who can represent either group) so that each can begin the process of healing and making amends.

These models often provide a more sustainable way to address community safety and maintain community cohesion. Positive outcomes associated with restorative justice models include increased crime survivor satisfaction, reduced recidivism and increased restitution compliance.[189]

Programs such as Healing Circles, Victim Offender Dialogues, or Victim Offender Encounter Groups create opportunities for survivors to ask questions that no one else can answer and for the individuals who committed the crime to fully understand the impact of the harm they caused. A recent meta-analysis of the effectiveness of programs that include victim/offender dialogues showed that such programs are likely to reduce future crime and increase victim satisfaction with their cases.[190]

While the types of Restorative Justice vary widely, and local jurisdictions will have a wide range of needs in establishing and scaling Restorative Justice, the estimated cost of Restorative Justice dialogues is about $1,110 per participant.[191]

With $1.5 billion, California could fund over a million restorative justice dialogues.

Make Second Chances Real

When individuals with prior convictions are unable to support themselves financially or obtain safe housing, it can fuel persistent poverty.[192] The U.S. lost the equivalent of 1.7 to 1.9 million workers, or almost a 1% drop in the overall employment rate in 2014 due to the impact of conviction records, resulting in an estimated $87 billion loss in annual GDP.[193] Individuals who are able to clean their records experience a 10% increase in employment rate.[194]

There can also be severe health consequences. Individuals in the criminal justice system experience higher rates of chronic health conditions and infectious diseases.[195] Barriers to employment and housing exacerbate these health needs by perpetuating unhealthy living conditions and limiting access to necessary care.[196] These health consequences are felt by children too, who exhibit higher rates of learning disabilities, behavioral problems and developmental delays when faced with extreme familial and financial instability.[197]

For the vast majority of criminal convictions, the consequences of that conviction after the person has completed the sentence should not last a lifetime. If a person remains crime free after completing the sentence, reintegration into society is better for communities, better for the economy and better for public safety.

1. Expand Jobs for People with Convictions

Workforce development is a set of solutions that matches a community's employment needs with training programs for workers. These services can be tailored and targeted toward people with conviction records to eliminate the number one barrier people with convictions face.[198] The Center for Employment Opportunities (CEO) provides one such model: a highly structured program of life skills education, paid transitional employment, full-time job placement and follow up services.[199] Evaluations of CEO show that the program reduces recidivism by 16% to 22% and improves employment outcomes over time.[200]

While local needs and capacity vary widely, rough estimates suggest that workforce development programs for people with convictions can cost about $5,000 to $7,000 per participant.[201]

Although participant costs vary depending on the size of the program, individual barriers and existing resources, $1.5 billion could fund workforce development assistance for roughly 300,000 people.

TERRANCE STEWART: OVERCOMING THE ODDS AND ADVOCATING FOR SECOND CHANCES FOR ALL

TERRANCE PREFERS "FORMALLY INCARCERATED" AS OPPOSED TO "FORMERLY INCARCERATED." For Terrance, and so many people returning to our communities after incarceration, there's a "second prison," as he calls it, where the legal barriers to rejoining society are so great, it feels like the incarceration did not stop. Legal barriers to jobs, housing, support services and more, make successful reentry near impossible for many to achieve.

Terrance has accomplished a tremendous amount. He is a father of two children. A husband. And a hard working, passionate advocate and community organizer. He's received numerous awards and possesses three degrees, including a Masters in Education.

Terrance overcame the odds to succeed. At 22,, he was a victim of gun violence, and shortly after became the third generation in his family to go to prison. While in prison Terrance met "lifers", men who would never see the outside of the prison walls. They encouraged him to cultivate a healthy mind, body and spirit and get out and go to college. After his release, Terrance did just that, and more, becoming the first in his family to go to college.

Yet, for every accolade Terrance has received, there is a corresponding experience of barriers as a result of his now 20-year-old criminal conviction. Terrance has been denied jobs and he and his family has been forced to live in motels and even been homeless because of an inability to find a place that would rent to someone with a prior conviction. Most recently, Terrance was even denied the ability to adopt his nephew.

These experiences have not dissuaded him from advocating for second chances and the rights of the many thousands of people coming home from serving time in the justice system. He engaged in community outreach to support criminal justice reforms such as Proposition 47 and Proposition 57 and he now educates lawmakers about how the restrictions on people with convictions can make it difficult for people to achieve economic and family stability.

At a recent community forum aimed at identifying solutions to reduce barriers for people with convictions, Terrance said "Making a mistake should not mark you for life, and it should not punish innocent children. We must look to remove the obstacles that exist for people who are trying to get their lives back on track."

Terrance Stewart is a Community Organizer at Inland Congregations United for Change, helping others heal from generational trauma and incarceration.

ADELA BARAJAS: **HEALING THE TRAUMA FROM ONE GENERATION TO THE NEXT**

ADELA BARAJAS IS A CO-FOUNDING MEMBER of the Crime Survivors for Safety and Justice network and a long-time leader working to stop violence in her community. She is an advocate and a leader—and knows first-hand that, left without support, trauma from violence can impact generations.

Ten years ago, Adela's sister-in-law Laura was killed in a drive by shooting. The pain and trauma from Laura's murder has had a profound and long-term impact on the entire family, especially Laura's young children.

Laura's children needed intensive support—support that Adela knew was lacking in the schools or community. The boys struggled with ongoing trauma and grief.

One son, Joey, was 17 years old at the time of his mother's death. He blamed himself. Joey was a witness and relived the incident every time he was in court. As he got older, the impacts worsened. Unable to cope, he cycled in and out of the justice system for low-level crimes. After seeing his father in tears, Joey committed to turn his life around. With help from his family, he is working and getting certified as an auto mechanic. Once he completes probation, he will be eligible for record change under Proposition 47.

Another son, Brian, was only 5 when his mother died. He would wake up at night calling for his mother.

Adela enrolled him in different activities and got him into counseling, anything to keep him busy. He loved to run—when Brian ran, he could clear his mind. Brian is now 15 years old. He is in sports year round—baseball, football and basketball. He visits his mother at the cemetery frequently. He still wakes up in the middle of the night missing his mother and texts Adela as a way to release his grief. Adela is teaching him that life is what you make of it.

Today, Adela honors Laura not just by supporting her nephews but also through helping families who are going through unthinkable loss. She wants more families to share their stories. "By sharing my story, I am helping individuals, families and communities heal. And through healing, we can take action."

2. Expand "Clean Slate" Programs to Reduce Barriers to Reentry

California state law includes over 4,800 legal restrictions on people with criminal records—after they have completed their sentence. These legal barriers operate as barriers to full participation in society, including prohibitions on employment, housing, professional trade association certification and more.[202] These barriers prevent stability, hurt families and contribute to the cycle of crime.

In California, some legal remedies are available to help "clean up" an old conviction record. These legal remedies include applying to expunge old convictions for some crimes, which allows the person to apply for certain jobs and other opportunities. Public defenders offices, self-help centers and nonprofit legal service providers assist individuals applying for these remedies. These are often called "clean slate" programs.

For roughly $400,000 per year, for example, the Contra Costa Public Defender's Office's clean slate program is staffed by one public defender, two legal assistants and three clerks. With that investment, the program processed about 1,100 expungements last year in addition to assisting with other clean slate relief like applications to terminate probation early.[203]

Without "clean slate" services, the majority of people with convictions are not aware of, or able to access, legal remedies to reduce the barriers they face in reentry. These critical services are available in a very limited fashion.

Time To Sunset Criminal Convictions

When people have served their time and paid their dues for committing a crime, it's unfair—and bad for public safety—to prevent them from becoming stable and productive members of our communities again. The extreme collateral consequences facing people with convictions can last a lifetime and operate as a "Scarlet Letter F," keeping people isolated, without dignity and a fair chance.

California can do much more to reduce these unfair barriers. Beyond reducing restrictions, the state can also reduce the number of convictions themselves. To improve safety and the economy, California should create a "sunset" date for criminal convictions—a date by which a person no longer has a criminal record if they have completed their sentence and remained crime free.

Removing legal barriers to stability for people with convictions can improve economic and health outcomes for individuals, families and communities—and reduce the likelihood individuals will reoffend.[204] If the state eliminated prior misdemeanor convictions within three years of crime free living post-sentence and within seven years of crime free living for most felony sentences,[205] a rough estimate suggests that about **six million people could remove old conviction records in California.**[206]

They are not in every county and they are not scaled up to meet the needs of people re-entering from the justice system. They are also not evenly dispersed geographically or available to the majority of people living with convictions.

While local capacity and needs vary widely, based on the Contra Costa cost estimates, with $1.5 billion dedicated to cleaning up conviction histories to reduce legal barriers to stability, California could create over 3,000 clean slate programs across the state.

Californians Support **Far Reaching Reforms**

At the ballot and in public opinion surveys, Californians have demonstrated widespread support for criminal justice reform and a strong desire to push further in the years ahead. Voters passed Proposition 47 and Proposition 57 with more than 60% of the vote and large bipartisan majorities from liberal and conservative, urban and rural, and diverse counties approved of those measures.

Public opinion research has also shown significant support for a more balanced approach to public safety. Importantly, there is particularly broad bipartisan support for reform among crime survivors. Contrary to the common portrayal of victims by the media, crime survivors overwhelmingly prefer approaches that prioritize rehabilitation to punishment and support shortening prison sentences to pay for investments in mental health and substance abuse treatment, education, trauma recovery services, and other public safety priorities.

The first-of-its-kind survey of California crime victims was conducted in 2013 by Californians for Safety and Justice.[207] This groundbreaking research revealed widespread support for reforming California's prison system among crime survivors.

Among the findings:

- By a 2 to 1 margin, crime survivors think that California should focus more on providing supervised probation and rehabilitation programs than sending people to jail and prison.
- By a 7 to 1 margin, crime survivors think that California should invest more in health services like mental health and drug and alcohol treatment than invest more in jails and prisons.
- Most crime survivors believe the state sends too many people to prison and think prisons make people better at committing crimes.
- Nearly two-thirds (65%) supported Public Safety Realignment (AB 109) that shifted responsibility for low-level felonies from the state prison system to local jails, dramatically reducing the state imprisonment rate.

Vulnerable populations and those dealing with the challenges of our current system—including victims of crime—also feel strongly that California needs a new approach. According to the *Survey of California Victims and Populations Affected by Mental Health, Substance Abuse and Convictions,* overwhelming majorities want less incarceration and more investments in the services and programs shown to stop the cycle of crime.

Among the survey results:

- Nearly 8 in 10 (78%) Californians surveyed think rehabilitation, drug treatment, and mental health treatment are better ways to prevent future crimes than punishment through incarceration.
- Nearly 7 in 10 (68%) prefer holding people accountable for their crimes by requiring alternatives to prison such as mental health treatment, drug treatment, or community supervision. Only 16% prefer putting them in prison.
- **More than half of Californians surveyed (55%) support closing state prisons to fund local mental health treatment and substance abuse treatment.**
- 6 in 10 (61%) oppose laws that restrict employment and housing options for people with felony convictions, after they complete their sentence.
- **Nearly 7 in 10 (69%) support clearing the records of people who complete their entire sentence if they remain crime free for seven years.**

For each of the statements above, there is majority or plurality support across demographic groups, including age, gender, race and ethnicity, and area (e.g., urban, rural, suburban).

Conclusion: the time is now

BY RESTRUCTURING BUDGET ALLOCATIONS, state and local governments can build a strong, inclusive safety framework for all Californians. Thoughtful budget allocation with an eye towards prevention, healing and redemption is the key to building safe neighborhoods and stopping cycles of crime.

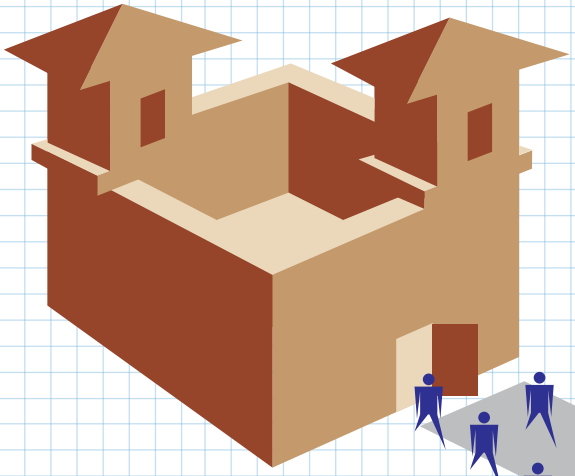
There has never been a more important time to achieve this vision.

Incarceration rates are declining—but much more is needed to finally begin reducing excessive prison expenditures, repairing the harm caused by the "tough on crime era" and bringing stability and dignity to communities in need.

As long as the state continues to overspend on prisons, the unresolved drivers of crime will continue to plague vulnerable communities. Concrete and bold steps must be taken over the next five years to build out new safety priorities rooted in community health and wellbeing.

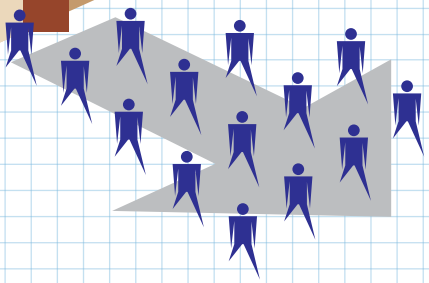
The needs are prevalent and knowable. The solutions are emerging and scaleable. The public is ready and deserving.

The time is now.



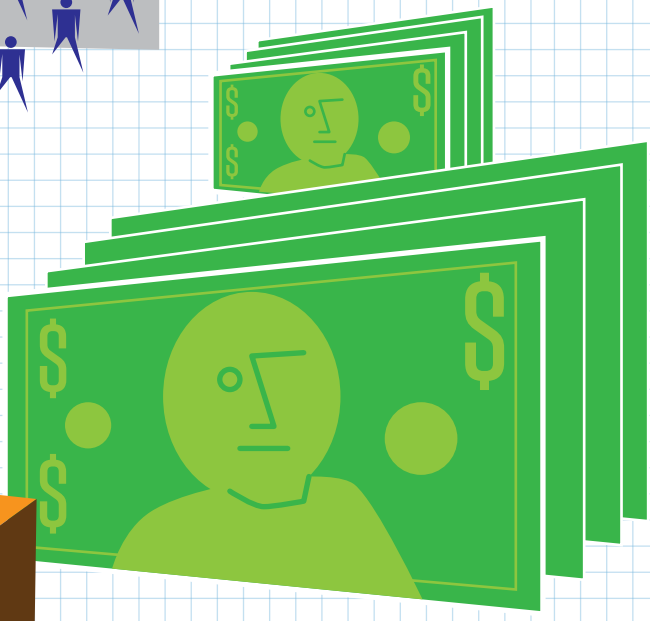
REDUCE

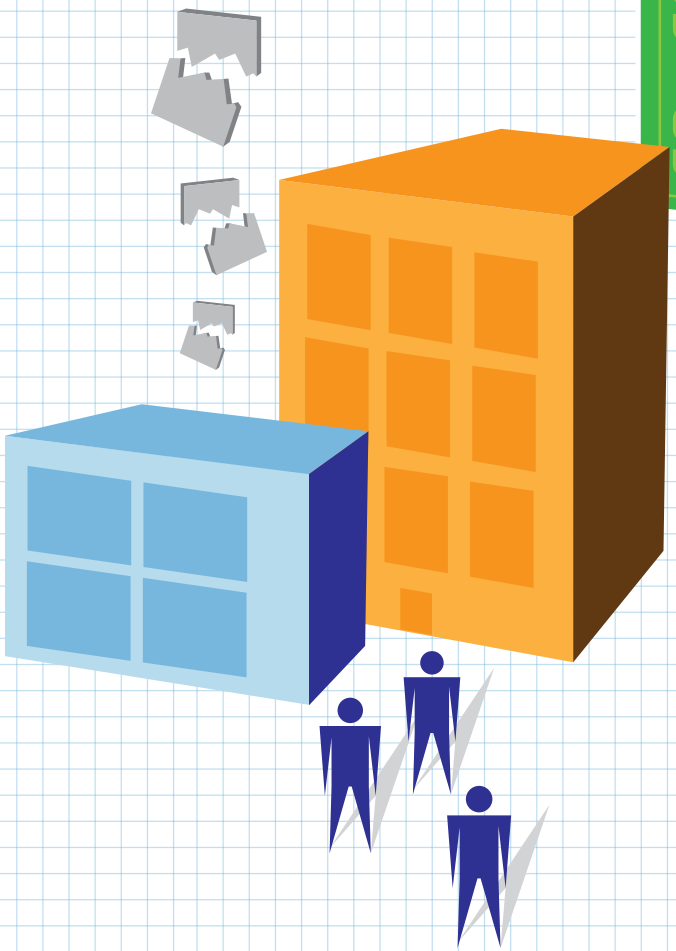
STATE INCARCERATION BY 30,000 PEOPLE



SAVE

$1.5 BILLION IN STATE FUNDS





INVEST

in any of the following

TREAT **150,000** PATIENTS WITH SEVERE MENTAL HEALTH DIAGNOSES;

TREAT **150,000** PATIENTS WITH SUBSTANCE USE DISORDERS;

HOUSE **50,000** INDIVIDUALS STRUGGLING WITH CHRONIC HOMELESSNESS;

ESTABLISH OVER **1,000** TRAUMA RECOVERY CENTERS;

CONVENE OVER **A MILLION** RESTORATIVE JUSTICE DIALOGUES;

PUT **300,000** PEOPLE WITH CONVICTIONS ON THE PATH TO EMPLOYMENT; OR

CREATE OVER **3,000** CLEAN SLATE PROGRAMS.

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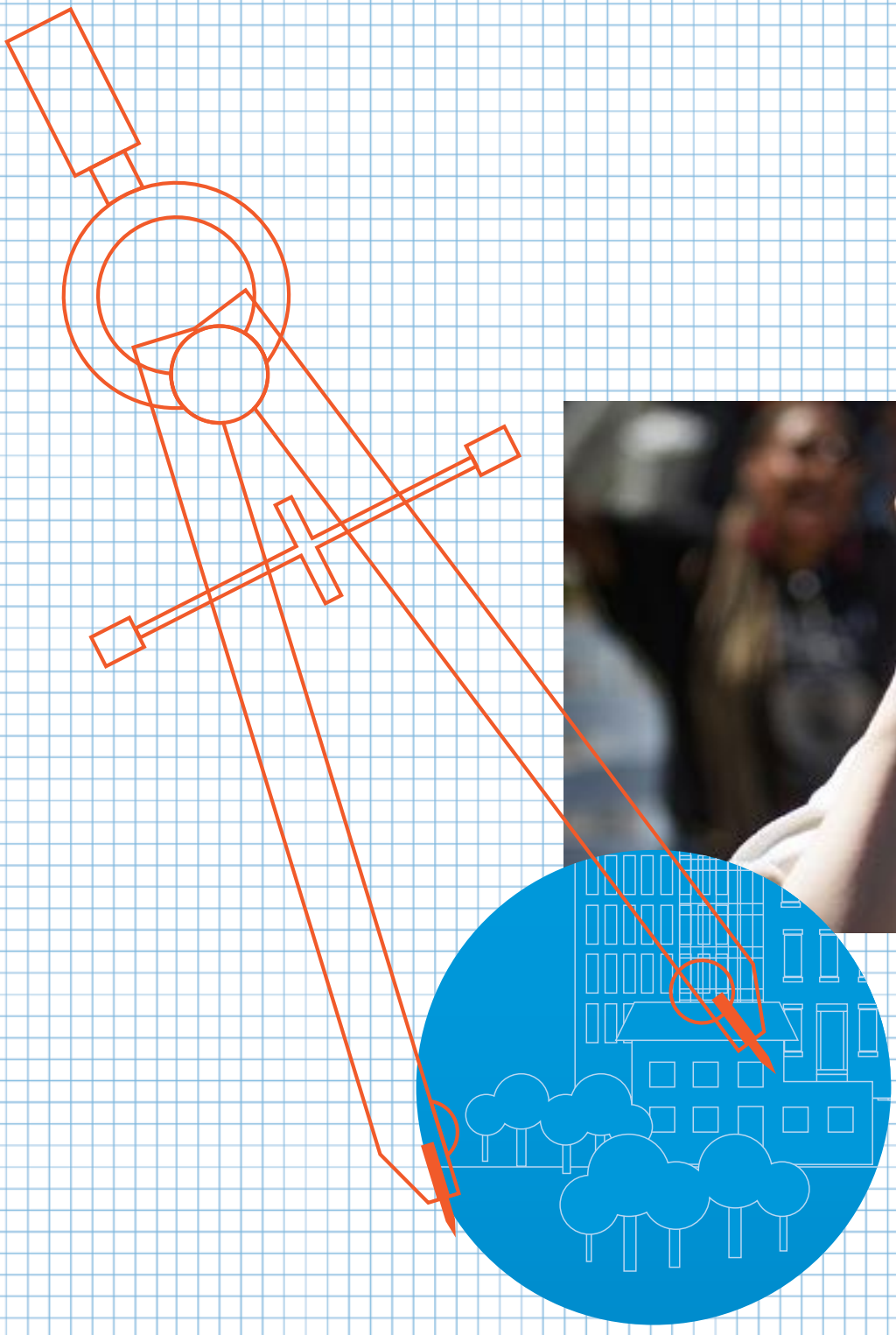


CALIFORNIA CRIME SURVIVORS SPEAK

A STATEWIDE SURVEY OF CALIFORNIA VICTIMS' VIEWS ON SAFETY AND JUSTICE

CRIME SURVIVORS FOR SAFETY AND JUSTICE

CALIFORNIANS FOR SAFETY AND JUSTICE

TABLE OF CONTENTS

OVERVIEW AND BACKGROUND

Protecting victims of crime and promoting public safety is the most important function of the California criminal justice system. It is therefore essential to consider the experiences and perspectives of crime survivors when determining safety and justice policy.

To fill the gap in knowledge of victims' experiences and needs, Californians for Safety and Justice conducted the first-ever research survey of California crime victims in 2013. The statewide survey revealed that the majority of crime victims in California do not gain access to support to recover from harm, and it also found that most strongly prefer investments into education, mental health treatment, and rehabilitation — over incarceration.[1]

Since 2013, California voters and state leaders have ushered in a wide range of criminal justice reforms that have led to a decline in incarceration and increased investments in rehabilitation. To renew our efforts to ensure California's safety and justice systems are driven by the experiences and needs of crime survivors, Californians for Safety and Justice updated the statewide research and recently conducted a new survey, the second study of its kind in California.

The 2019 *California Crime Survivors Speak* survey found remarkably similar findings to the 2013 research, as well as new information about survivor policy preferences that point the way to additional reforms. Most crime victims in California continue to lack access to victims services in the aftermath of crime. While victims remain underserved, strong majorities of California crime victims also continue to see the need for public safety solutions that emphasize prevention, treatment, and rehabilitation over incarceration. The 2019 survey specifically found that victims 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.

Conducted in March 2019 by David Binder Research, the *California Crime Survivors Speak* survey highlights the myriad ways in which crime survivors are impacted by crime, what victims need from the criminal justice system to recover and heal, and how state policy can better align with survivors' safety priorities. The results provide critical and perhaps surprising insight regarding victims' views on safety and justice policy.

SUMMARY FINDINGS

Despite the immediate and long-lasting impact of trauma on crime victims' lives, the survey found that most victims in California do not receive the help or the support they need to recover. Key findings on victims' experiences and the impact of crime on California communities include:

- **About one in three Californians** have been a victim of a crime in the last ten years. Of those victims, less than one in five report receiving financial assistance, counseling, medical assistance, and other types of healing services that can help someone recover from the trauma of a crime and stabilize; and
- **Only 14 percent of crime victims** felt "very supported" by the criminal justice system after they experienced a crime.

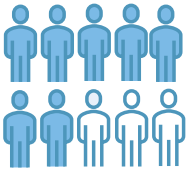
California Crime Survivors Speak also found that, contrary to what many would expect to be the position of victims of crime, strong majorities of California crime survivors support changes to the justice system that would increase rehabilitation and reduce mandated sentences. Survivors also support reduced spending on corrections in favor of increased spending on treatment. Key findings on victims' views on safety and justice policy include:

- **By a nearly five to one margin, victims** say that prison either makes it more likely someone will commit crimes or has no public safety impact at all. Only a small percentage believe that prisons help rehabilitate people;
- **More than eight out of ten victims** want people with mental illness placed in mental health courts, mental health treatment, and other alternatives to traditional criminal courts and jails;
- **For people convicted of serious or violent crime, victims prefer, by a two to one margin,** authorizing judges to determine the length of the sentence that is most appropriate based on individual circumstances and best practices, instead of mandatory requirements for certain sentence lengths;
- **More than eight out of ten victims** support using 10 percent of the state's $12 billion prisons budget to fund mental health treatment, substance abuse treatment, and trauma recovery services; and
- **Seventy-five percent of victims** favor reducing sentence lengths by 20 percent for people in prison who are assessed as low risk to public safety and do not have life sentences, and utilizing the savings to fund crime prevention and rehabilitation.

These findings can help policymakers develop public safety solutions that better align with victims' views and invest in what they know works to prevent crime and support victims recovery.

More than

7 IN 10



victims support reducing prison terms by 20% for people in prison that are a low risk to public safety and do not have life sentences.

VICTIMS' EXPERIENCES
AND THE IMPACT OF CRIME

Crime impacts people from all walks of life in California. *California Crime Survivors Speak* found that one in three (34 percent) state residents have been victimized in the past ten years, including one in five (20 percent) who have been victims of violent crime.

YOUNG, LOW-INCOME PEOPLE OF COLOR ARE MORE LIKELY TO EXPERIENCE VICTIMIZATION.

While victimization affects every demographic group, national research has repeatedly demonstrated that violence and crime are also concentrated with an unequal impact on different demographic groups. Communities most harmed by concentrated cycles of crime are also often the least supported by the criminal justice system.[2]

The national annual survey, the National Crime Victimization Survey, conducted by the US Department of Justice Bureau of Justice Statistics, has found disparities in victimization for people of color.[3] The Alliance for Safety and Justice also found, in a 2017 national survey of crime survivors, disparities based on race, age, and economic background. The 2017 crime survivor survey found:

- **People of color** are 15 percent more likely to be victims of crime.[4]
- **People who describe themselves as poor** are more likely to be victims of crime.[5]
- **The largest disparities in victimization relate to a person's age.** People under the age of 40 and people living in urban areas are more likely to be victims of crime.[6]

PEOPLE THAT HAVE EXPERIENCED VIOLENT CRIME ARE AT GREATER RISK OF BEING REPEAT CRIME VICTIMS.

California Crime Survivors Speak found that repeat victimization is more common among victims of violent crime. About half of violent crime victims have been victimized four or more times.

ONLY 14 PERCENT OF VICTIMS FELT "VERY SUPPORTED" BY THE CRIMINAL JUSTICE SYSTEM.

Victimization takes a heavy toll on crime survivors and is a traumatic experience for most victims. The effects of trauma can be devastating, and research shows that unaddressed trauma increases the risk for mental health issues, substance abuse, and other challenges that can ultimately lead to unemployment, housing, and income insecurity.[7]

Given the impact, there is no more important role of our justice system than protecting victims of crime and facilitating victims' medical, emotional, and financial recovery. Yet most victims in California indicate that the criminal justice system provided little support in their time of need.

According to survey results, 32 percent of crime survivors felt "not at all supported" by the criminal justice system and only 14 percent felt "very supported."[8] Twenty seven percent of victims felt "somewhat" supported, and 20 percent slightly

supported, by the criminal justice system after they experienced a crime.

LESS THAN ONE IN FIVE VICTIMS RECEIVED COUNSELING, MEDICAL ASSISTANCE, AND FINANCIAL SUPPORT.

Less than one in five California crime victims report receiving financial assistance, counseling, medical assistance, and other types of healing services that can help someone recover and stabilize.

There was a large gap between victims' needs and access to support. *Among those supports survivors would have wanted, but never received, were:*

- **Fifty-nine percent** of victims wanted financial assistance to help with damaged property and monetary losses;
- **Fifty-two percent** of victims wanted help understanding the legal system;
- **Forty-nine percent** of victims wanted financial assistance with medical costs;
- **Forty-nine percent** wanted information on available support services;
- **Forty-two percent** wanted medical assistance, or physical therapy;
- **Forty-one percent** wanted counseling or other mental health support.

	Percent of victims that received	Percent of victims that said they never received, but would have wanted
Financial assistance to help with damaged property or monetary losses	11%	59%
Financial assistance to help with medical costs	12%	49%
Medical assistance, or physical therapy	18%	42%
Counseling or other mental health support	12%	41%
Help understanding the courts and legal system	15%	52%
Emergency or temporary housing	6%	42%
Information about available support services	20%	49%

SIX IN TEN VICTIMS DID NOT REPORT THE CRIME TO LAW ENFORCEMENT.

If a crime is not reported to law enforcement, it can have a significant implications on whether a victim receives the help and support they need to recover and heal. National data indicates that victims frequently do not report crime to the authorities: about half of violent crimes go unreported (54 percent).[9]

Six in ten victims say they haven't always reported crimes to police when they have been a victim.

Among those who haven't always reported a crime, *nearly half say they have not reported the crime because they didn't think the police or courts would help (48 percent).*

CRIME VICTIMS WHO ARE YOUNG, LOW INCOME, AND FROM COMMUNITIES OF COLOR ARE LESS LIKELY TO REPORT CRIMES.

Two in three victims under age 45 (67 percent) and victims who describe themselves as poor or lower middle class (66 percent) say they don't always report crimes. People of color with incomes below $50,000 are also among the most likely to say they don't always report crimes.

The reasons for low reporting rates are varied and complex. Experts attribute low crime reporting rates to factors such as: potential complicated or familiar relationships that exist between the victim and person that caused the harm; a lack of faith that the justice system will intervene or have the capacity to resolve the issue; and/or.trust gaps between communities experiencing concentrated crime and the criminal justice system, especially for communities of color that have experienced a long history of disparate treatment in the justice system.[10]

Low crime reporting contributes to barriers victims face accessing help. Because many victims services are accessed at the point of reporting or prosecution, many victims of unreported crime lack support in recovering from trauma and harm.

In summary, despite one in three Californians having been a victim of crime in the last ten years, for most victims, basic needs such as medical or financial assistance, temporary housing, and help understanding the courts and legal system are unmet.

VICTIMS' VIEWS

ON SAFETY AND JUSTICE POLICY

In the public safety debate, victims of crime are often assumed to be a constituency that wants tough sentencing mandates and lengthy prison sentences for people convicted of crimes.

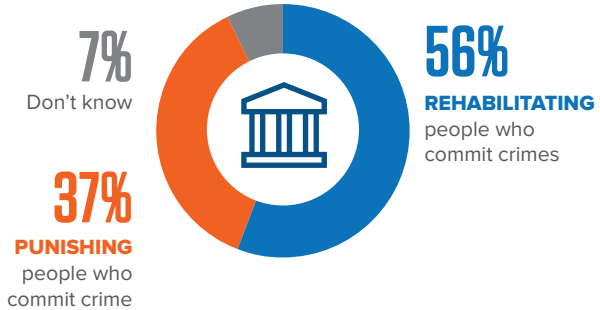
California Crime Survivors Speak provides details on a comprehensive and representative group of crime victims. The results demonstrate that most crime survivors want a more balanced approach to public safety and prefer investing more in rehabilitation.

A MAJORITY OF VICTIMS PRIORITIZE REHABILITATION OVER PUNISHMENT.

The majority of crime survivors believe we rely too heavily on incarceration and want policymakers to invest in new safety priorities that better protect victims and help them recover from the crimes committed against them.

A majority of California victims (56 percent) say the state should be more focused on rehabilitating people who commit crimes, versus punishing people who commit crimes (37 percent).

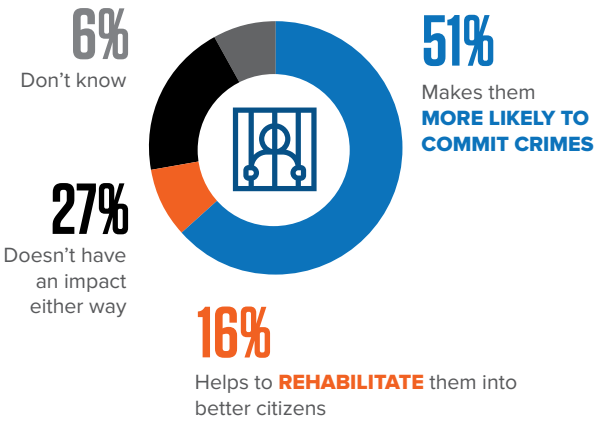
Do you think California should be more focused on...



BY ABOUT A FIVE TO ONE MARGIN, VICTIMS SAY SENDING PEOPLE TO PRISON WILL LEAD TO MORE CRIMES, OR HAVE NO IMPACT EITHER WAY.

By about a five to one margin, victims say that sending people to prison makes it more likely someone will commit crimes (51 percent), or does not have an impact either way (27 percent). A little more than one in ten victims said sending people to prison will help rehabilitate them to be better citizens (16 percent).

Thinking about people who go to prison – do you think that prison...



The "tough on crime era" was bolstered by a perception that lengthy mandatory sentencing laws work best to protect public safety. Decades of research has demonstrated that this approach to public safety grows incarceration rates and corrections budgets but does not impact crime trends.[11] These mandatory laws, largely enacted by state legislatures across the country,

have stripped judges and corrections experts of the ability to individually analyze each case and consider the circumstances of the crime, the individual, and the input of the victim in fashioning the most appropriate sentence to ensure accountability, reduce recidivism, and repair the harm caused.

For example, under California's current Three Strikes Law, the sentence length is automatically doubled for everyone convicted of a felony with a prior conviction for a serious or violent crime. About a quarter of California's prison population are serving a sentence that was automatically doubled under this law, representing 33,918 people — a population that taxpayers spend $3 billion each year to incarcerate.[12] With roughly half of the California prison population currently assessed by the corrections system to be at low risk of committing a new crime, this means that there are likely tens of thousands of people serving years longer behind bars despite data that shows they could be safely released.

Throughout the survey, victims demonstrated support for mechanisms to replace mandatory sentencing requirements with increased judicial discretion to allow for the consideration of individual circumstances and to save money for prevention and treatment.

VICTIMS SUPPORT OPTIONS BEYOND LONG SENTENCES, INCLUDING FOR PEOPLE CONVICTED OF VIOLENT CRIMES.

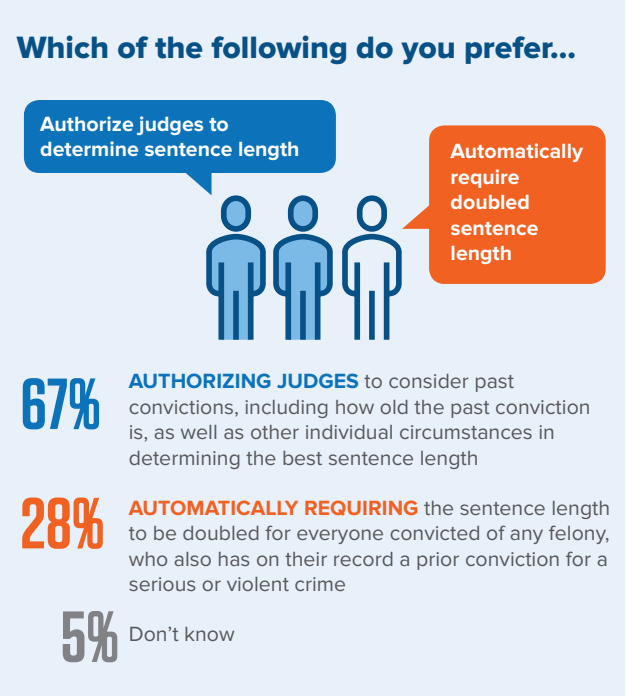
That fact that crime survivors prioritize rehabilitation over punishment and prison is consistent with research Californians for Safety and Justice conducted in 2013. At that time, six in ten victims supported the 2011 Public Safety Realignment law that shifted responsibility and funding for people convicted of nonviolent, non-serious offenses from the state to counties.[13]

Since that time, California voters have enacted major sentencing and criminal justice reforms through Proposition 47 in 2014, and Proposition 57 in 2016, and dozens of additional justice reform measures have passed in the legislature and been signed into law.

California Crime Survivors Speak finds that crime victims continue to support rehabilitation over punishment, including a range of options beyond very long sentences for people convicted of serious or violent crime, to allow for more balanced investments into prevention and rehabilitation and to keep communities safe. These findings, detailed below, should be instructive for state leaders as the state continues to grapple with prison crowding and continually growing corrections budgets.

BY A TWO TO ONE MARGIN, VICTIMS WANT TO AUTHORIZE JUDGES TO CONSIDER INDIVIDUAL CIRCUMSTANCES IN SENTENCING.

Victims support judges considering individual circumstances in sentencing (67 percent), instead of automatically requiring the sentence length to be doubled for everyone convicted of any felony who also has a prior conviction for a serious or violent crime on their record (28 percent).



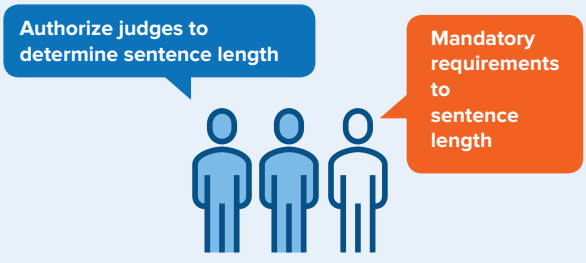
BY A MARGIN OF

2 TO 1

crime survivors prefer giving judges the ability to consider individual circumstances in determining the best sentence length to automatic requirements the sentence length be doubled.

When it comes to people convicted of serious or violent crimes, victims prefer authorizing judges to determine the length of their sentences based on individual circumstances and best practices (64 percent). Again, victims prefer judges considering individual circumstances and best practices by a two to one margin over mandatory sentence requirements (31 percent). These findings hold true for all crime victims, including those that have been victims of serious crime. About as many violent crime victims (64 percent), and serious violent crime victims (65 percent) as victims overall support giving judges the ability to determine the length of sentence that is most appropriate.

Thinking about people convicted of serious or violent crimes that are not eligible for life sentences, **who will eventually be released, which would you prefer?**



64% **AUTHORIZING JUDGES** to determine the length of the sentence that is most appropriate based on individual circumstances and best practices

31% **MANDATORY REQUIREMENTS** to certain sentence lengths that are the same regardless of the judge's assessment

5% Don't know

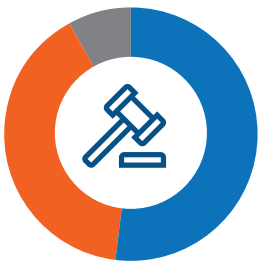
A MAJORITY OF CRIME VICTIMS WANT SHORTER SENTENCES FOR SOMEONE DEEMED TO BE LOW RISK OF COMMITTING A NEW CRIME.

When it comes to people serving long sentences for serious or violent crimes, a majority of crime victims (52 percent) prefer authorizing the prison system to review and issue shorter sentences when those individuals are deemed to be a low risk to public safety, instead of requiring them to be in prison for their full sentence (40 percent). The preference for shorter sentences when appropriate holds true for all crime victims including those that have been victims of violent or serious crimes. A similar proportion of violent crime victims (54 percent) and serious violent crime victims (54 percent) as victims overall would prefer authorizing officials corrections to review and issue shorter sentences, versus requiring someone to serve their full sentence.

Thinking about people who are serving long sentences for serious or violent crimes but are not serving life sentences, who will eventually be released:

If they are deemed to be a low risk to public safety, which would you prefer?

8% Don't know



52% **AUTHORIZE THE DEPARTMENT OF CORRECTIONS** to review and issue shorter sentences

40% **REQUIRE THEM TO BE KEPT IN PRISON** for their full sentence

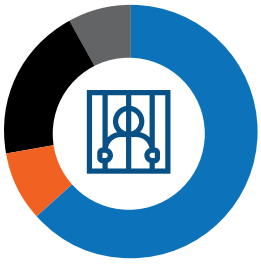
STRONG MAJORITIES OF CRIME VICTIMS PREFER MENTAL HEALTH TREATMENT OVER INCARCERATION FOR PEOPLE WITH MENTAL ILLNESS.

Beyond lengthy sentence mandates, California's justice system faces an additional challenge in addressing the treatment needs of people that commit crimes because of an unmet mental health need.

About one in three individuals (approximately 38,000 people) in California have a documented mental health issue — a 150 percent increase since 2000.[14] National studies show only a third of people assessed to have a treatment need get treatment while in prison.[15] Data collected at the local level also shows the scale of the mental health challenge facing our counties and cities: In Sacramento, one in four people were receiving psychotropic medication and in San Diego, more than one in four people had a mental illness.[16]

When focusing specifically on people that commit crimes as a result of mental illness, *seven times as many victims believe prisons and jails will make someone more of a public safety risk and worsen their mental illness (64 percent), versus rehabilitating them and remedying their illness.*

Thinking specifically about people that commit crimes as a result of mental illness – **do you think that prisons and jails...**



8% Don't know

20% **DOESN'T HAVE AN IMPACT** either way

64% **WORSEN THEIR MENTAL ILLNESS** and makes them more of a public safety risk

9% **HELP TO REMEDY THEIR MENTAL ILLNESS** and rehabilitate them

More than eight out of ten victims prefer that people with mental illness are placed in mental health courts, mental health treatment, and other alternatives to traditional criminal courts and jails.

Place people with mental illness into mental health courts, mental health treatment, and other alternatives to traditional criminal courts and jails.

MORE THAN EIGHT OUT OF TEN VICTIMS WANT TO MOVE MONEY FROM PRISONS TO TREATMENT, REHABILITATION, AND PREVENTION.

Survivors of crime believe we send too many people to prison, for too long, and that our current incarceration policies make people more — not less likely to commit another crime. Instead of more spending on prisons and jails, victims prefer a wide range of investments and new safety investments.

Substantial majorities of victims back policies that would reallocate resources from the California prison system to treatment by reforming the criminal justice system. California's prison population has dropped by more than 40,000 people in the past decade. However, the prison budget in this state is still projected to be at a near record high of more than $12 billion in spending this year.

Victims believe some of California's multi-billion dollar prison budget needs to be shifted to other safety priorities. *Eight three percent of victims support using 10 percent of the state's $12 billion dollar prison budget to fund mental health treatment, substance abuse treatment, and trauma recovery services.*

Use 10% of the state's $12 billion dollar prisons budget to fund mental health treatment, substance abuse treatment, and trauma recovery services

Victims prefer reducing sentence lengths if someone is assessed to be at low risk of committing a new crime, and shifting dollars spent on prisons to other ways of making the community safer.

Seventy five percent of victims favor reducing sentence lengths by 20 percent for people in prison that are assessed as low risk to public safety, and do not have life sentences, and to use the savings to fund crime prevention and rehabilitation.

Reduce sentence lengths by 20% for people in prison that are assessed as low risk to public safety, and do not have life sentences, and use the savings to fund crime prevention and rehabilitation

MORE THAN SEVEN OUT OF TEN VICTIMS SUPPORT REDUCING SENTENCE LENGTHS.

While California's prison population has declined in the past decade, the amount of time people serve in prison on a sentence for crimes is still much higher today than decades ago.[17]

The vast majority of people in prison will eventually return to the community. When steps are taken to ensure someone leaving prison is connected to housing, treatment, and employment upon their release and prepared to return to their community, the likelihood that someone will commit a new crime is reduced.[18]

Seventy six percent of victims support placing people with less than two years remaining on their prison sentence into halfway houses with reentry support to help them prepare for release.

Place people with less than two years remaining on their prison sentence into halfway houses with reentry support to help them prepare for release

In summary, survivors of crime prefer a wide range of investments and new safety priorities including more spending on mental health treatment, prevention, and healing services for victims. Importantly, the majority of victims, including the majority of victims of violent or serious crime support reducing sentence lengths to free up resources for these investments.

RECOMMENDATIONS

The survey data point to a few policy recommendations.

1

MORE DATA AND RESEARCH ON CALIFORNIA CRIME VICTIMS IS NEEDED.

To formulate effective justice policy that is responsive to victims' experiences, we need more data to better understand the scale of the challenge facing California victims. The topics of repeat victimization, reporting, and outreach and accessibility of victims services (among other topics) are areas where more data can inform smart justice strategies. It is clear that community and demographic differences impact all three of these topics. Effective policy solutions will require a deeper and more nuanced qualitative understanding of the diversity of victimization experiences.

2

THERE IS A STRONG NEED FOR ADDITIONAL COMMUNITY OUTREACH ABOUT VICTIMS SERVICES.

Many victims in California experience a long road to recovery, suffering from anxiety and depression, among other difficulties, yet they are unaware of services that could help them. This can be addressed, in part, by devoting additional resources to both broad-based and targeted outreach to better inform victims and the public.

3

CALIFORNIA NEEDS TO STREAMLINE VICTIMS SERVICES AND REMOVE OBSTACLES TO HEALING.

There are legislative and administrative efforts underway in California that could address findings in the survey that show the difficulty many victims experienced when accessing services. California should review the obstacles to accessing services and design supports that are easier for victims and survivors to use. Reducing barriers to victims' access includes considerations such as location — or co-location — of services, language barriers, proximity of different types of services, cultural competency of the services providers, and more.

4

ADVANCE PUBLIC POLICY THAT MORE CLOSELY ALIGNS WITH VICTIMS' PRIORITIES.

The notion that California crime victims oppose reforms that reduce reliance on incarceration in favor of treatment, crime prevention, and rehabilitation is false. In fact, victims strongly support a shift in priorities. Lawmakers should consider how their stances on public safety policy priorities can better reflect victims' preferences for investments in rehabilitation programs, crime prevention, and substance abuse treatment. For example, victims support law changes that would divert people with mental illness from the justice system to appropriate treatment. Lawmakers need to pay particular heed to victims' support for replacing mandatory sentence requirements with increased judicial discretion, and victims' support for alternatives to long sentences that only increase taxpayer costs, without having a commensurate impact on recidivism or public safety.

CONCLUSION

California Crime Survivors Speak is an important step forward in understanding who victims are and what they need to recover from crime. These results paint a different picture than some common assumptions about victims, their views, and what they want from the criminal justice system.

Crime is a traumatic experience for most victims, yet few are supported by the criminal justice system. Only 14 percent of crime victims felt very supported by the criminal justice system after they experienced crime, and only one out of five victims received counseling, medical assistance, and financial support following the incident.

California victims also believe our state sends too many people to prison, for too long, and that our current incarceration policies make people more — not less — likely to commit another crime.

Instead of more spending on prisons and jails, victims prefer a wide range of investments and new safety priorities including more spending on mental health treatment, prevention, and healing services for victims. Importantly, victims support reducing sentence lengths to pay for these investments.

Perhaps to the surprise of some, victims of violent crime also share these views and demonstrate strong support for shifting the focus of the criminal justice system from punishment to rehabilitation. These views are not always accurately reflected in the media or in Sacramento and should be considered in policy debates around criminal justice.

METHODOLOGY

Californians for Safety and Justice commissioned this survey to help policymakers better understand who crime victims are, what their experiences are with the criminal justice system, and their views on public policy.

David Binder Research conducted the survey in English and Spanish in March 2019. The poll was administered both by telephone — landlines and mobile phones — and online. Respondents self-identified as victims and provided the types of crimes they have experienced in the past ten years.

Californians of all ages 18+, all racial and ethnic groups, and all geographic locations are represented in these findings. The overall margin of error for the *California Crime Survivors Speak* is 2.2 percent, while the margin of error for crime victims is 3.8 percent.

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CRIME SURVIVORS FOR
SAFETY AND **JUSTICE**

CALIFORNIANS
FOR **SAFETY** AND **JUSTICE**

HOW CALIFORNIA CAN CUT PRISON SPENDING, PROTECT HEALTH AND EDUCATION SPENDING, AND IMPROVE PUBLIC SAFETY.

July 2020

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BACKGROUND

California is at a crossroads. The state, in the midst of an unprecedented public health crisis, faces looming massive deficits, and new calls for lawmakers to design a more racially equitable justice system. "Despite substantial reforms enacted over the past decade, the prison population has still grown by more than 400 percent, and spending on prisons has increased by more than 800 percent since the 1980s. Prison spending is expected to hit an all-time high of $13 billion this year. Now more than ever, policymakers must take bold steps to reverse the decades-old trend of over- incarceration.

California can reduce the prison budget, and help protect funding for local public safety programs, schools, health care and health services. These policies will enhance public safety by reducing the negative impact of overly long sentences, will protect vital education and health services that are key to maintaining safe communities, and allow resources to be reallocated from corrections to local programs that address the core drivers of crime.

Key policy options to reduce prison spending include:

1) Reducing incarceration for people sentenced to prison determined to be low risk;
2) Reviewing the sentences of individuals convicted of crimes who are elderly or medically frail;
3) Revising or eliminating the Three Strikes Law to reduce extreme sentencing;
4) Requiring wider use of alternatives to incarceration to strengthen local public safety programs;
5) Creating a task force required to reduce the prison budget that would consider a range of sentencing changes.

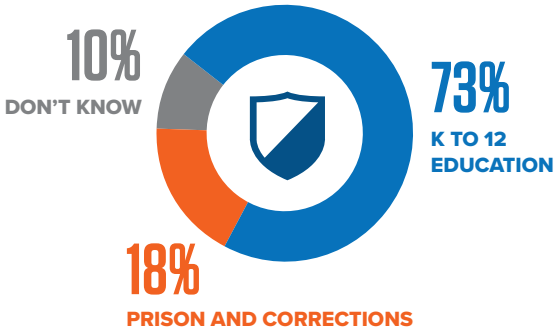
Overall, California voters support these policies to protect schools, health care and health funding over protecting prisons and corrections spending *by a 4 to 1 margin.*

SUMMARY

POLICY OPTIONS FOR REDUCING PRISON SPENDING.

- **Assess what proportion of people sentenced to prison for crimes that are currently assessed to be of low risk** to public safety could be released, resentenced and see their prison sentences reduced.
- **Review for release people sentenced to prison for crimes who are elderly and have served at least 10 years of their current sentence.** Review people sentenced for crimes who are medically frail or who have chronic health conditions and assess if they can be released.
- **Lawmakers could pass legislation to refer to voters' changes to revise or eliminate the Three Strikes Law.** This change could also allow people currently sentenced to prison for these crimes with sentencing enhancements to petition for release. Changes to the Three Strikes Law could ensure that judges can rule on these petitions to take into consideration public safety risk.
- **Develop a statewide protocol for people with mental illness entering the justice system** that requires local jurisdictions to exhaust all options prior to incarceration. The protocol should guide local jurisdictions on how to quickly scale up mental health crisis responders and mental health courts to manage these populations more effectively without incarceration.
- **Lawmakers could impanel a short-term, multi-agency task force or commission** to review sentence lengths and recommend law, policy and practice changes and emergency regulations to release people sentenced for crimes that are a low risk to public safety.

Which of the following would you prefer to protect from spending cuts?



PUBLIC SUPPORT FOR REDUCING PRISON SPENDING.

- **By more than a 2 to 1 margin, voters support reducing incarceration** for people determined to be low risk to public safety, in order to close prisons and reduce the prison budget by $1 billion.
- **Nearly 8 out of 10 voters authorize the review of sentences to allow for release** of people in prison who are elderly or frail and are determined to low risk to public safety, to reduce the prisons budget by $1 billion or more.
- **By a 3 to 1 margin, voters support revising the Three Strikes Law** to impose longer sentences only when a new conviction is serious or violent, and authorize resentencing of people in prison under the Three Strikes Law if the judge determines their release does not risk public safety, to reduce incarceration and reduce the prisons budget by $1 billion.

SUMMARY

- **More than 7 out of 10 voters support requiring the wider use of alternatives to incarceration** to reduce the prisons budget by at least $1 billion, with savings designated to protect schools and hospital funding.
- **By a 3 to 1 margin, California voters support creating a task force** that is required to reduce the state prisons budget by $2 billion, with savings designated to protect the public health and hospital budgets, and to protect the school budget.

Which of the following would you prefer to protect from spending cuts?

78% HEALTH CARE AND HEALTH SERVICES

16% PRISONS AND CORRECTIONS

7% DON'T KNOW

POLICIES THAT CAN REDUCE PRISON SPENDING AND INCREASE SAFETY

1) REDUCING INCARCERATION OF PEOPLE SENTENCED TO PRISON WHO ARE OF LOW RISK TO PUBLIC SAFETY.

Overly long sentences do not increase safety.[1] A body of research has shown that incarcerating people for crimes who are assessed to be low risk makes it more likely they will commit another crime.[2]

According to a risk assessment used by the California Department of Corrections and Rehabilitation (CDCR), 49 percent of the institutional population (63,000 people sentenced to prison for crimes) were assessed to be low risk to reoffend[3] for a violent crime.

POLICY OPTION:

Lawmakers should assess what proportion of people sentenced to prison for crimes who are currently assessed to be of low risk to public safety could be released, resentenced and see their prison sentences reduced.

BY A MARGIN OF MORE THAN

2 TO 1

voters support reducing incarceration for people determined to be low risk to public safety, in order to close prisons and reduce the prison budget by $1 billion people.

PUBLIC SUPPORT:

By more than a 2 to 1 margin, voters support reducing incarceration for people determined to be of low risk to public safety, in order to close prisons and reduce the prison budget by $1 billion.

More than 7 out of 10 voters authorize the review of sentences to allow for the release of people in prison who have already served more than 10 years, and are determined to be of low risk to public safety, to reduce the prison budget by $1 billion.

2) RESENTENCING OF INDIVIDUALS CONVICTED OF CRIMES WHO ARE ELDERLY OR MEDICALLY FRAIL.

In California, 19,000 people in prison (about 15 percent of the prison population) are aged 55 and over.[4] Research shows that the likelihood of someone sentenced to prison in that age group committing a new crime can be as low as 2 percent.[5] Because of the cost of their medical care and other services, it costs twice as much[6] to incarcerate older people, costing California taxpayers at least $160,000 a year per person incarcerated.

Older people sentenced to prison for crimes are more likely to be at a health risk due to the COVID-19 virus, because they are more likely to have types of chronic health conditions that put them at a higher risk of serious illness. National studies suggest that as many as 41 percent of the general prison population, and 73 percent of older individuals sentenced to prison for crimes have a current chronic illness.[7]

POLICIES THAT CAN REDUCE PRISON SPENDING AND INCREASE SAFETY

POLICY OPTION:

The state could immediately review for release people sentenced to prison for crimes who are elderly and have served at least 10 years of their current sentence.

The state could conduct an immediate systemwide review of people sentenced for crimes who are medically frail or who have chronic health conditions and assess if they can be released.

PUBLIC SUPPORT:

Nearly 8 out of 10 voters authorize the review of sentences to allow for release of people in prison who are elderly or frail and are determined to low risk to public safety, to reduce the prisons budget by $1 billion or more. More than 7 out of 10 voters authorize the review of sentences to allow for the release of people in prison who have already served more than 10 years, and are determined to be of low risk to public safety, to reduce the prison budget by $1 billion.

MORE THAN

7 OUT OF 10

voters authorize the review of sentences to allow for release of people in prison who have already served more than 10 years, and determined to be of low risk to public safety to reduce the prison budget by $1 billion.

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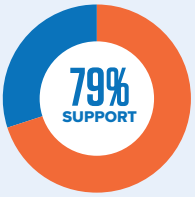


3) REVISING OR ELIMINATING THE THREE STRIKES LAW TO REDUCE EXTREME SENTENCING.

While Californian voters have made some changes to the Three Strikes Law by passing Proposition 36 in 2012, there are still significant sentencing enhancements associated with the law: If someone has been convicted of one eligible crime under the law and are later convicted of any other felony, they can receive double the normal maximum sentence for that crime.

The latest data show that there are 33,000 people sentenced to prison under the Three Strikes Law who were sentenced with an enhancement, 18,000 of whom were sentenced for a nonviolent offense.[8] There is no evidence that the Three Strikes Law is effective at reducing crime or recidivism, and California would save hundreds of millions of dollars through complete elimination of the sentencing enhancement.

POLICY OPTION:

Lawmakers could pass legislation or refer to voters changes or eliminate the Three Strikes Law. This change could also allow people currently sentenced to prison for crimes with such enhancements to petition for release. Changes to the Three Strikes Law could ensure that judges can rule on these petitions to take into consideration public safety risk.

POLICIES THAT CAN REDUCE PRISON SPENDING AND INCREASE SAFETY

BY A MARGIN OF

3 TO 1

voters support revising the Three Strikes Law to impose longer sentences only when new conviction is serious or violent, and authorize resentencing of people in prison under Three Strikes if the judge determines release does not risk public safety, to reduce incarceration and reduce the prisons budget by $1 billion.

PUBLIC SUPPORT:

By a 3 to 1 margin, voters support revising the Three Strikes Law to impose longer sentences only when a new conviction is serious or violent, and authorize resentencing of people in prison under the Three Strikes Law if the judge determines release does not risk public safety, to reduce incarceration and reduce the prisons budget by $1 billion.

4) REQUIRING WIDER USE OF ALTERNATIVES TO INCARCERATION TO STRENGTHEN LOCAL PUBLIC SAFETY SYSTEMS.

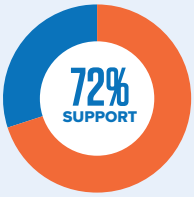
The latest data show that 37,000 people sentenced to prison for crimes have a mental health challenge.[9] Often these mental health challenges, along with related drug and addiction issues, are key contributors to such individuals being arrested, convicted and sentenced for crimes. At a cost of $80,000-plus per person sentenced to prison for a year, prison is one of the most expensive places someone can receive mental health services.

Cities, counties and the state need a range of options to address the mental health and treatment needs of people who are arrested for crimes, but local leaders repeatedly point to there being very few programs available to effectively address this challenge. To give a sense of the scale of the challenge, an estimated 400,000 calls for service in California (generally, a 911 call) involved a person in mental health crisis.[10] While innovative, evidence-based diversion programs have been instituted in some communities, these programs may serve, in total, a few thousand people a year.[11]

To address this local challenge, California communities need more:

- **Mental health and crisis intervention services.** Emergency services can be expanded to provide a first-response alternative to law enforcement that is mobile, accessible 24/7, and staffed by professionals trained in mental health and crisis intervention who can intervene and de-escalate situations without

More than 7 out of 10 voters support requiring the wider use of alternatives to incarceration, to reduce the prisons budget by at least $1 billion, with savings designated to protect schools and hospital funding.



POLICIES THAT CAN REDUCE PRISON SPENDING AND INCREASE SAFETY

making an arrest.

- **Crisis stabilization centers and detoxification centers.** As alternatives to jail, these centers can help stabilize people experiencing temporary crises and are operated by treatment experts, who are trauma-informed and accessible to law enforcement.
- **Law enforcement pre-booking diversion options.** Pre-booking diversion programs such as Law Enforcement Assisted Diversion (LEAD) sees police refer people committing low-level drug and prostitution crimes with underlying substance abuse or mental health issues to community-based health and social services rather than arrest them. LEAD is being pioneered in a half dozen California communities, but currently serve less than a few thousand people a year.

POLICY OPTIONS:

Lawmakers could develop a statewide protocol for people with mental illness entering the justice system that requires local jurisdictions to exhaust all options prior to incarceration. The protocol should guide local jurisdictions on how to quickly scale up mental health crisis responders and mental health courts to manage these populations more effectively without incarceration.

Some of the dollars saved by reducing the state confinement of individuals with mental health challenges could be reallocated to local treatment programs.

PUBLIC SUPPORT:

More than 7 out of 10 voters support requiring the wider use of alternatives to incarceration, to reduce the prisons budget by at least $1 billion, with savings designated to protect schools and hospital funding.

5) CREATING A TASK FORCE REQUIRED TO REDUCE PRISON SPENDING THAT WOULD CONSIDER MULTIPLE OPTIONS.

There are no shortage of options or ideas that the state could develop to expand sentencing options to reduce prison spending. Roughly 80 percent of people sentenced for crimes to state custody are subject to sentencing enhancements, and roughly 25 percent of people in state custody are serving sentences extended by three or more enhancements.

Examples of the types of policies that could be considered by a task force include:

- **Eliminating the five-year sentencing enhancement for serious felonies.** The state could build on SB 1393 by eliminating the five-year sentence enhancement by allowing people currently in state custody who have served their base term to petition for release. The process could include opportunities for judges to rule on the petition, taking into consideration public safety risk.

BY A MARGIN OF

3 TO 1

California voters support creating a task force that is required to reduce the state prisons budget by $2 billion, with savings designated to protect the public health and hospital budgets and to protect the school budget.

POLICIES THAT CAN REDUCE PRISON SPENDING AND INCREASE SAFETY

- **Limiting consecutive sentencing.** The state could require concurrent, rather than consecutive, sentencing in all cases where someone is convicted of multiple offenses or a base term is subject to one or more sentencing enhancements. California could allow people currently in state custody who have served their base term to petition for release based on the new law. The process could include opportunities for judges to rule on the petition, taking into consideration public safety risk.
- **Shortening felony probation and parole terms and ensuring more supervision success.** To reduce new arrest or revocations leading to imprisonment, the state could limit all felony probation terms to two years (and allow presumptive early termination after the first year of supervision if no public safety challenges present themselves), and limit parole terms to six months. Building off the success of SB 678, reductions in supervision terms and reductions in revocations and re-arrests could be linked to a reallocation of resources to build up local programs to bolster the success of the probation and parole system.
- **Expanding the use of sentence recall.** The state could build on efforts in AB 2942 to expand the ability of courts to revisit, recall, and modify old sentences by allowing people to petition for sentence recall on their own behalf.
- **Revising or eliminating the Three Strikes Law.** As noted above, there are still significant sentencing enhancements associated with the Three Strikes Law, and these changes could be considered by the taskforce, and potentially offered to legislators to refer to voters for change.

POLICY OPTIONS:

Lawmakers could empanel a short-term, multi-agency task force or commission to review sentence lengths and recommend law, policy and practice changes and emergency regulations to release people sentenced for crimes that are a low risk to public safety.

PUBLIC SUPPORT:

By a 3 to 1 margin, California voters support creating a task force that is required to reduce the state prisons budget by $2 billion, with savings designated to protect the public health and hospital budgets, and to protect the school budget.

CONCLUSION

VOTERS SUPPORT REDUCING PRISON SPENDING THAT WOULD SAVE BILLIONS OF DOLLARS.

By choosing these policies, state and local governments can sustain the resources to build a strong, inclusive safety framework for all Californians. A more thoughtful reallocation of resources with an eye towards prevention and healing is the key to building safe neighborhoods and stopping cycles of crime. There has never been a more important time to achieve this vision. Incarceration rates have declined—but much more is needed to finally begin reducing excessive prison expenditures, repairing the harm caused by the "tough on crime era" and bringing stability and dignity to communities in need.

As long as the state continues to overspend on prisons, the unresolved drivers of crime will continue to plague vulnerable communities. Concrete and bold steps must be taken to build out new safety priorities rooted in community health and well-being. The policy options are knowable. The solutions are emerging and scalable. The public is ready and deserving.

In a sign of how much support there is from voters for these policies, overall, California voters support these policies to protect vital public services over protecting prisons and corrections spending cuts by a 4 to 1 margin. When voters were specifically asked what they preferred to protect from spending cuts, 78 percent of voters preferred health care and health services, 73 percent preferred education be protected, and only 18 percent or less preferred prison and corrections be protected.

The sentencing policy options offered here would garner significant savings, even using the most conservative ways of estimating the costs of confinement.

For example, a conservative estimate is that 20,000 people sentenced for crimes who are 55 or older, medically frail, and have a mental health challenge could be impacted by these types of reforms. Using the most conservative[12] way of calculating the savings, 20,000 fewer people in prison for crimes would save $200 million in the first year.

Over time, billions could be saved, because declines in the prison population of this magnitude would make more facility closures more possible, allowing for more of the full costs of incarceration to be captured as savings.

Another example: If half the people sentenced to prison for crimes who are low risk were not in prison, that in itself would result in over 30,000 fewer people in prison. Currently, there is no facility in California with an institution population of more than 4,000 people. With more than $80,000 being spent per person sentenced to prison each year, keeping these low-risk people out of prison would reduce prison spending by over $2 billion.

California communities need policymakers to reallocate billions of dollars from prison spending to protect funding for education, health care and health services. California voters strongly support these policies. Policymakers should harness this popular support to enact these policies and help keep California communities safe, strong and healthy.

METHODOLOGY

Californians for Safety and Justice commissioned a voter survey to help policymakers better understand their views on public policy.

David Binder Research conducted the survey in English and Spanish in May 2020, among 600 voters likely to cast a ballot in November 2020. The survey was administered by telephone to landlines and mobile phones. The overall margin of error is 4 percent.

The data and information cited on California correctional issues comes directly from the California Department of Corrections public document, where they offer data and information on the institutional population. Where relevant, other field research was incorporated into this brief.

ABOUT CALIFORNIANS FOR SAFETY AND JUSTICE

Californians for Safety and Justice is an advocacy organization working to replace over-incarceration with new approaches to safety that work to stop the cycle of crime and improve community wellbeing. We engage in legislative advocacy, research and communications, and crime survivor organizing. We're working to change laws and systems to put the communities that have been most harmed and least helped at the center of public safety strategies and investments.

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[3] The California Static Risk Assessment utilizes an offender's demographic and criminal history data to predict a low, moderate, or high risk to reoffend. The California Static Risk Assessment scores range from one (1) at the lowest to five (5) at the highest. Offender Data Points: Offender Demographics for the 24-Month Period Ending December 2018. (p. 16). https://www.cdcr.ca.gov/research/wp-content/uploads/sites/174/2020/01/201812_DataPoints.pdft

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[9] California Department of Corrections and Rehabilitation. (2020). Offender Data Points: Offender Demographics for the 24-Month Period Ending December 2018 (p. 26).

[10] An estimated 10 percent of calls for service involved a person in a mental health crisis, and these figures were applied to the total California number of calls for services. Wood, J. D., Watson, A. C., Fulambarker, A. J. (2017). The "Gray Zone" of Police Work During Mental Health Encounters: Findings from an Observational Study in Chicago, 20(1), 81–105. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5342894/; Bureau of Justice Assistance.: Learn about the issues and facts related to Police-Mental Health.

[11] Six communities are now advancing Law Enforcement Assisted Diversion (LEAD), a pre-arrest diversion to treatment and housing support at first contact with law enforcement, and Los Angeles County has a fully funded Office of Diversion and Reentry, which is part of the Department of Health and Human Services. Both are an important advance in the types of alternatives needed statewide, but the LEAD programs in California and LA County's office of diversion and reentry may serve, in total, approximately 3,303 people a year. These figures are derived from Proposition 47 grant program two-year preliminary evaluations submitted to the BSCC for Contra Costa County's LEAD Program, which currently has an enrollment rate of 3.67 people a month, i.e., approximately 44 people annually, and the Los Angeles County Department of Health Services, Office of Diversion and Reentry, which served 3,259 clients under its Proposition 47 program from April 2018 to March 2019. See Bastomski, S., Cramer, L., & Reimal, E. (2020). *Evaluation of the Contra Costa County Law Enforcement Assisted Diversion Plus Program: Interim Evaluation Report* (p. 21). Urban Institute. Retrieved from http://www.bscc.ca.gov/wp-content/uploads/Contra-Costa-County-Health-Services-Department-1.pdf and Los Angeles County Department of Health Services, Office of Diversion and Reentry. (2019). *Proposition 47 Two Year Preliminary Report* (pp. 4, 12, 38). Los Angeles County Department of Health Services, Office of Diversion and Reentry. Retrieved from http://www.bscc.ca.gov/s_bsccprop47/

[12] Marginal costs are used to help develop estimates to show the absolute minimal savings that could accrue from an estimate. These marginal costs are based on 2016 amounts calculated by the California Budget and Policy Center and were converted using inflation estimates to 2020 values of $9,884 per person per year. For more information on how these estimates were derived, contact Californians for Safety and Justice.