

ANNUAL REPORT AND RECOMMENDATIONS

# Committee on Revision of the Penal Code



2022

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## Executive Summary

The Committee on Revision of the Penal Code was established by the Legislature and the Governor to study all aspects of criminal law and procedure and make recommendations that would simplify and rationalize the law. The Committee's goals remain finding ways to improve public safety, reduce unnecessary incarceration, improve equity, and address racial disparities in the criminal legal system.

This is the Committee's third Annual Report fulfilling its mandate. The 10 recommendations in this Report are unanimously recommended by the Committee. They range from how technical traffic infractions are enforced to how people with serious mental health conditions are treated in California's competency to stand trial system. This Report also contains a lengthy list of offenses that have not resulted in a conviction in the last 3, 5, or 10 years, which the Legislature can use to delete obsolete or unneeded sections from the Penal Code. The Committee also devoted special attention this year to studying California's bail and pretrial process and recommends significant reforms required by the California Supreme Court's *In re Humphrey* decision.

The Committee's recommendations are based on testimony from more than 50 witnesses, extensive public comment, thorough staff research, and deliberations of Committee members over the course of 6 public meetings. The recommendations are supported by legal analysis, empirical research, experience from other jurisdictions, and new data specially provided to the Committee by the California Department of Corrections and Rehabilitation and the California Department of Justice, among other entities.

As described in detail below, the recommendations are:

1. Establish a State-Funded Restitution System for Crime Victims
2. Create a Victim Right to Restorative Justice
3. Expand Victim Right to Civil Compromise
4. Prohibit Stops for Technical Traffic Infractions
5. Limit Consent Searches During Traffic Stops
6. Ensure Public Defense Counsel Before Arraignment
7. Modernize the Competency to Stand Trial System
8. Encourage Data Sharing to Address Frequent Utilizers
9. Update Pretrial Procedures
10. Codify *Humphrey's* Elimination of Wealth-Based Detention

# Introduction

When Governor Gavin Newsom addressed the Committee on Revision of the Penal Code at its inaugural meeting in January 2020, he urged the Committee to examine the “jaw-dropping” racial disparities and the “deep socioeconomic overlays that often determine the fate of so many in our [criminal legal] system.”<sup>1</sup> The Governor’s direction is consistent with Government Code section 8290.5, which instructs this Committee to recommend legislative reforms that address sentence disparities, promote rehabilitation and alternatives to incarceration, reconsider sentence lengths, improve parole, and enhance public safety.

To date, 12 recommendations by the Committee have become law, including significant funding commitments for reentry programs, fundamental changes to how sentencing enhancements are applied, and prioritizing treatment over incarceration for people with serious mental health conditions.

The unanimous recommendations in this Report continue to follow the priorities set by the Governor and Legislature. The Committee’s recommendations are driven by data, expert testimony, and lived experience. As with this Committee’s prior recommendations, this Report aims to address policies that have contributed to California’s high level of incarceration with no corollary improvement in public safety, as well as racial disparities in sentencing and length of time served.

California has enacted a number of statutory changes over the last decade to address these issues and has recently closed one prison with plans to shut more.<sup>2</sup> But the state’s prison population has increased after reaching a 30-year low during the early days of the COVID-19 pandemic and now stands at more than 95,000 people.<sup>3</sup> Similarly, with the end of emergency bail orders across the state, county jail populations have begun to increase. In Los Angeles, the pretrial jail population is almost 7,000 people, up from 5,000 during the pandemic, and conditions at the Los Angeles County jails, as well as other jails across the state, remain unacceptable.<sup>4</sup> Furthermore, new studies continue to reveal racial disparities throughout California’s criminal legal system.<sup>5</sup>

1 Committee on Revision of the Penal Code, Meeting on January 24, 2020, 0:01:12–0:02:00.

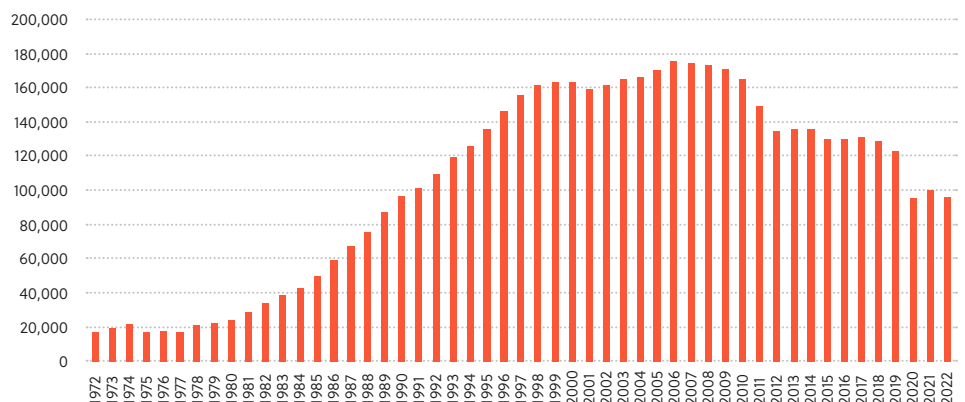
2 See Bob Egelko, *California Announces Plan to Close More Prisons, Including Its Last Private Facility*, San Francisco Chronicle, December 6, 2022.

3 On February 3, 2021, CDCR’s population was 94,306, the lowest population since sometime in 1989, and 46% of the population at CDCR’s peak of 173,643 on October 20, 2006. See CDCR, *Weekly Report of Population, As of Midnight, February 3, 2021*, and December 14, 2022; CDCR Office of Research, *Offender Data Points — Offender Demographics For The 24-Month Period Ending June 2019*, Figure 1.2 (October 2020) (historical population data).

4 Vera Institute, *Care First L.A. — Tracking Jail Decarceration* (historical LA jail population data); Gregory Yee, *Federal Judge Imposes Limits on L.A. County Jail After ACLU Sues Over ‘Barbaric’ Conditions*, Los Angeles Times, September 16, 2022; United States Department of Justice, Civil Rights Division, *Investigation of Alameda County, John George Psychiatric Hospital, and Santa Rita Jail*, 21–36, April 22, 2021; Alameda County Grand Jury, *2021–2022 Alameda County Grand Jury Final Report*, 77–112; California Department of Justice, *Attorney General Bonta Opens Civil Rights Investigation into Santa Clara County Sheriff’s Office*, January 19, 2022.

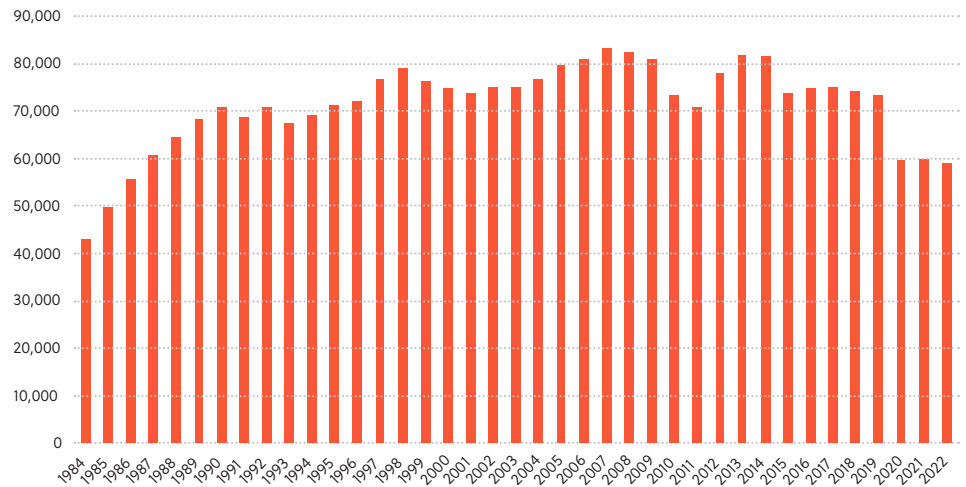
5 See Chauncey Smith et al., *Reimagining Community Safety in California: From Deadly and Expensive Sheriffs to Equity and Care-Centered Wellbeing*, Catalyst California and ACLU SoCal (October 2022); Magnus Lofstrom et al., *Racial Disparities in Law Enforcement Stops*, Public Policy Institute of California (October 2021); Alyssa C. Mooney, Alissa Skog, & Amy E. Lerman, *Racial Equity in Eligibility for a Clean Slate Under Automatic Criminal Record Relief Laws*, Law and Society Review, Vol. 56, Issue 3 (August 2022) (examining California record relief laws); Emily Widra & Felicia Gomez, *Where People in Prison Come From: The Geography of Mass Incarceration in California*, Prison Policy Initiative and Essie Justice Group (August 2022).

## CALIFORNIA PRISON POPULATION (1972–2022)



Source: Patrick A. Langan, et al., *Historical Statistics on Prisoners in State and Federal Institutions Yearend 1925–1986*, Bureau of Justice Statistics (May 1988); Bureau of Justice Statistics, *Corrections Statistical Analysis Tool (CSAT) - Prisoners (for 1978–2019)*; CDCR, *Weekly Report of Population, As of Midnight, December 31, 2020 and 2021*, and November 30, 2022.

### CALIFORNIA JAIL POPULATION (1984–2022)



Source: California Jail Profile Surveys, 1985–2022. 2022 Data is as of June 2022. All data available at the California Board of State and Community Corrections.

At the same time, public safety and crime also remain an increasingly significant concern for California residents.<sup>6</sup> Although crime rates remain at or near historic lows, it is undeniable that certain crimes, most alarmingly homicides, increased during the pandemic.<sup>7</sup>

This year, the Committee approached California’s criminal legal system at the “front end.” Many criminal cases begin with a victim, and the Committee began its research with a thorough examination of victims’ rights, from the role of restitution orders to a victim’s role in deciding how cases are resolved.

We also considered how the system should address people charged with crimes whose mental health conditions mean they are not competent to stand trial. California’s current system for competency to stand trial relies on an antiquated process that does little to address people’s long-term mental health needs and nothing to improve public safety.

We then moved to examine how traffic laws are enforced, the surprising public safety value in early appointment of public defenders, and how California must reform its pretrial practices to comply with precedent from our Supreme Court.

Leaders from across California and the country addressed the Committee to offer their solutions. Ralph Diaz, a former Secretary of the California Department of Corrections and Rehabilitation, spoke about the need to make crime victims’ rights more meaningful, and Yolo County District Attorney Jeff Reisig proposed expanding restorative justice programs to do so.<sup>8</sup> District Attorney Reisig explained that his own office’s program resulted in an impressive 90% victim satisfaction rate and a 37% reduction in recidivism.<sup>9</sup> Rachel Michelin, President of the California Retailers Association, advocated for both offering alternatives to incarceration to people who

<sup>6</sup> Dean Bonner, *Solid Majorities of Californians View Crime as a Problem*, Public Policy Institute of California, September 27, 2002.

<sup>7</sup> Magnus Lofstrom & Brandon Martin, *Crime Trends in California*, Public Policy Institute of California (October 2022).

<sup>8</sup> Committee on Revision of the Penal Code, Meeting on February 23, 2022, Part 1, 0:27:00–0:31:40 & Part 3, 0:30:30–0:32:30.

<sup>9</sup> *Id.* at Part 3, 0:31:30–0:32:00.

shoplift and dismantling organized retail crime rings.<sup>10</sup> Dr. Katherine Warburton, Statewide Medical Director of California’s Department of State Hospitals, explained the state’s complex and troubled competency to stand trial system while Teresa Pasquini, whose adult son has experienced almost every aspect of California’s mental health system, described it from a personal perspective.<sup>11</sup> Los Angeles Superior Court Judge James Bianco, a mental health specialist, recommended community treatment for many with mental health conditions who are charged with serious felonies.<sup>12</sup>

Professor Erwin Chemerinsky, Dean of UC Berkeley School of Law, cataloged the failures in implementing the California Supreme Court’s decision in *In re Humphrey*.<sup>13</sup> Mariano-Florentino Cuéllar, who authored *Humphrey*, explained the important role of the Legislature in clarifying and continuing the Court’s work, particularly around how trial courts consider a person’s ability to pay cash bail.<sup>14</sup> Sonoma County Chief Probation Officer David Koch told the Committee that pretrial release programs are an important part of effectively implementing *Humphrey* and that the experience of probation agencies throughout the pandemic indicated that more people could be released without increased rates of criminal activity or failure to appear in court.<sup>15</sup> And Stuart Rabner, Chief Justice of the New Jersey Supreme Court, discussed how New Jersey was able to achieve safe and meaningful bail reform.<sup>16</sup>

In all, the Committee heard from 56 witnesses during public hearings. Committee staff also consulted with dozens of other stakeholders, practitioners, and directly impacted people from across the state. Each of the recommendations in this Report is informed by these conversations and also relies on recent data and empirical research on these topics. All of the recommendations can be achieved with a majority vote in the Legislature. And while some require funding to be successful – particularly those to better address the needs of crime victims – others would result in long-term savings to the state, cities, and counties while improving public safety.

The Committee also continued its work with the California Policy Lab and produced a report on California’s Three Strikes law, which last year the Committee recommended repealing. The report with the California Policy Lab gave an exhaustive analysis of how the law has been used and concluded that California’s famous Three Strikes law did not improve public safety in the state and had a heavily disproportionate impact on Black people. Other work with the California Policy Lab also produced a list included with this Report of more than 100 offenses that have not resulted in a conviction in the last 3 years – a compilation of potentially obsolete or unneeded laws that could be used to reduce the length and complexity of the Penal Code. In addition, the Committee’s research and analysis of California’s criminal legal system has been relied on by courts throughout the state.<sup>17</sup>

The need for the Committee’s work continues. California still incarcerates too many people for too long without benefit to public safety and without sufficient consideration for the needs of crime victims. The recommendations in this Report are necessary reforms to address these needs and to meet the Committee’s goals to maximize public safety, ensure equal justice and racial equity, reduce needless and counter-productive incarceration, and improve public safety throughout California.

<sup>10</sup> *Id.* at Part 1, 0:16:34–0:22:15.

<sup>11</sup> Committee on Revision of the Penal Code, Meeting on May 17, 2022, Part 1, 0:04:00–0:42:20 & 1:09:10–1:14:22.

<sup>12</sup> *Id.* at Part 2, 0:00:50–0:01:45.

<sup>13</sup> Committee on Revision of the Penal Code, Meeting on October 11, 2022, Part 1, 0:35:05–0:41:36.

<sup>14</sup> Committee on Revision of the Penal Code, Meeting on November 29, 2022, Part 1, 0:22:13–0:24:15.

<sup>15</sup> Committee on Revision of the Penal Code, Meeting on October 11, 2022, Part 3, 0:28:10–0:20:50.

<sup>16</sup> *Id.* at 0:29:10–0:34:40.

<sup>17</sup> See, e.g., *People v. Hardin*, 2022 WL 10272623 (Second Appellate District 2022); *People v. Montano*, 80 Cal.App.5th 82 (Fifth Appellate District 2022); *People v. Perez*, 2022 WL 1537851 (Fifth Appellate District 2022); *People v. Ramos*, 77 Cal.App.5th 1116 (Fifth Appellate District 2022); *People v. Burgos*, 77 Cal.App.5th 550 (Sixth Appellate District 2022) (dissenting opinion); *People v. Butler*, 2022 WL 892009 (Third Appellate District 2022); *People v. Moore*, 2022 WL 883811 (Third Appellate District 2022).

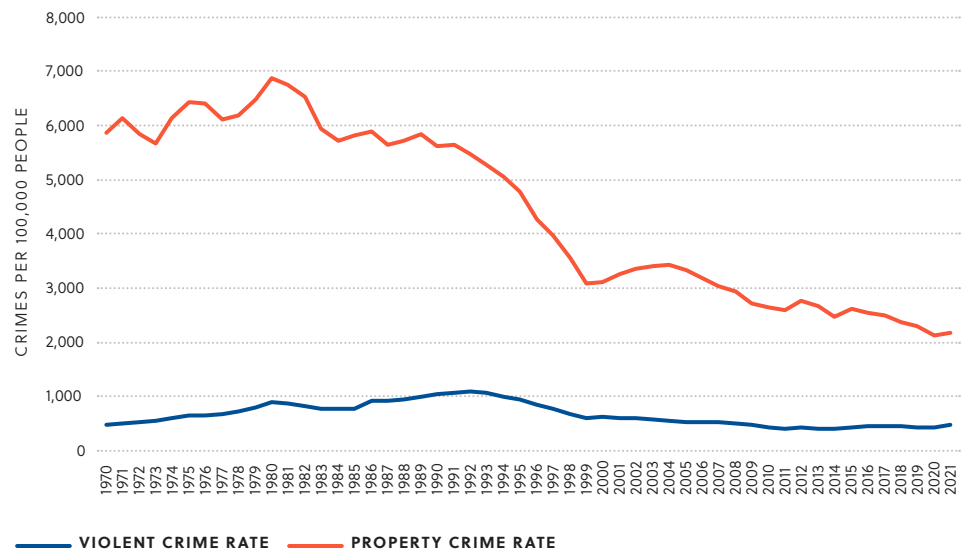
# Prefatory Notes

## CRIME RATES

As it has in its previous Reports, the Committee presents the most recently available information about crime rates in California.

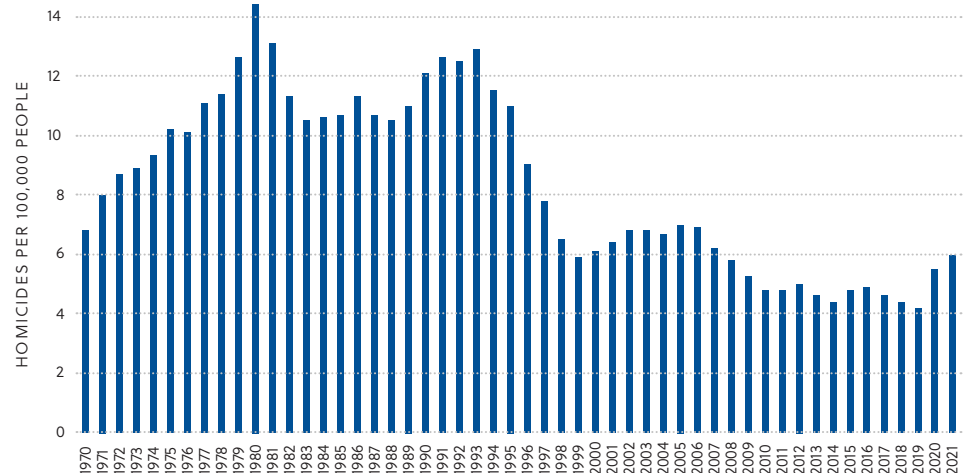
In 2021, the overall violent crime rate increased by 7% and the overall property crime rate increased by 3% compared to 2020.<sup>18</sup>

### CALIFORNIA CRIME RATES (1970–2021)



Source: California Department of Justice, *Crime in California 2021*, Table 1.

### CALIFORNIA HOMICIDE RATE (1970–2021)



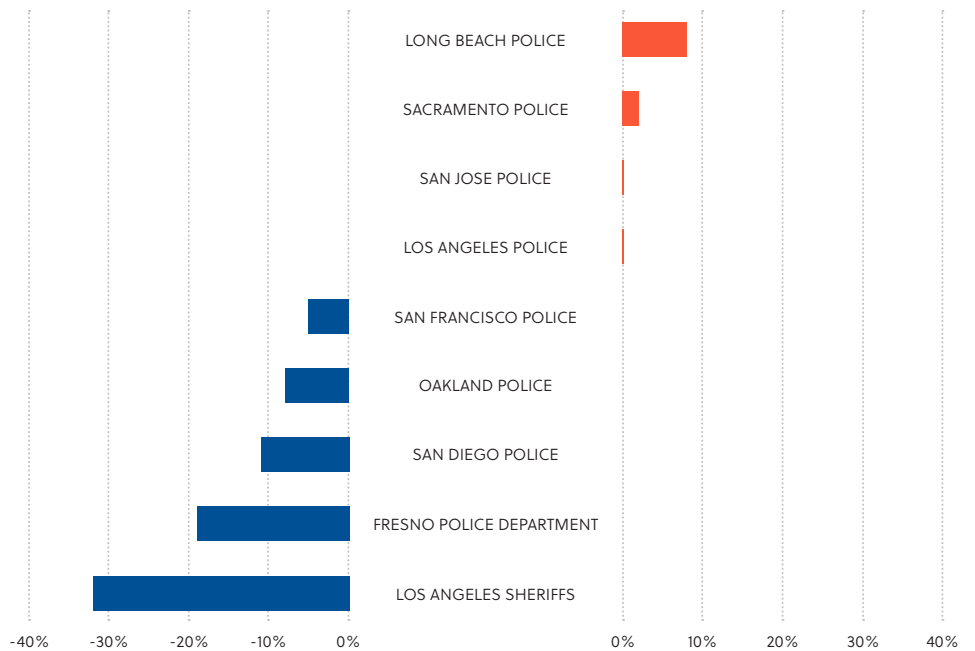
Source: California Department of Justice, *Crime in California 2021*, Table 1.

<sup>18</sup> California Department of Justice, *Crime in California 2021*, Table 1.

Despite increases in some categories of offenses – most notably homicide – crime rates across California continue to be at record lows. In 2021, California’s violent crime rate was 58% below the peak violent crime rate recorded in 1992, and the property crime rate was 68% below the peak rate from 1980.<sup>19</sup>

And there is some potential good news on the horizon: data compiled by the Major Cities Chiefs Association from the 8 largest cities in California and the areas patrolled by the Los Angeles County Sheriff’s Department show homicides trending downward by 11% for 2022 through September.<sup>20</sup> Only 2 of the cities – Sacramento and Long Beach – have more homicides than during the same time in 2021, while the others are flat or show decreases, including a 19% decline in Fresno.<sup>21</sup> In addition, the Los Angeles County Sheriff’s Department – which covers significant portions of Los Angeles County – showed a 32% decrease in homicides.<sup>22</sup>

**CHANGE IN HOMICIDES REPORTED, JANUARY TO SEPTEMBER, 2021 v. 2022**



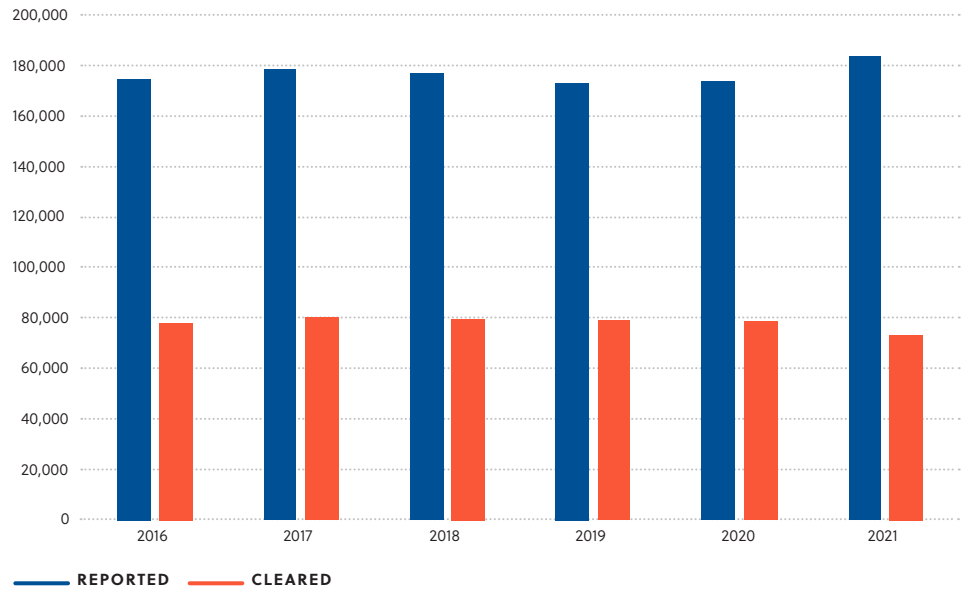
Source: Major Cities Chiefs Association, *Violent Crime Survey – National Totals*, November 2, 2022.

Finally, we note that while these statistics are important, they do not present a full picture of crime rates in the state. Nationwide, most crime is unreported.<sup>23</sup> The specific offenses that make up the violent and property crime rates reported by the Department of Justice leave a lot out, including simple assault crimes, most white collar offenses, drug crimes, and other economic crimes such as wage theft.<sup>24</sup> And in California, the clearance rates – the rate at which law enforcement arrests a perpetrator – is between 40 and 45% for violent offenses and around 10% for property crimes.<sup>25</sup>

<sup>19</sup> *Id.*  
<sup>20</sup> Major Cities Chiefs Association, *Violent Crime Survey – National Totals*, November 2, 2022.  
<sup>21</sup> *Id.*  
<sup>22</sup> *Id.*  
<sup>23</sup> Rachel E. Morgan & Alexandra Thompson, *Criminal Victimization 2020*, U.S. Department of Justice, Bureau of Justice Statistics, Table 4 (November 2021).  
<sup>24</sup> See, e.g., Sandhya Dirks, *Rising Crime Statistics Are Not All That They Seem*, NPR, November 3, 2022.  
<sup>25</sup> California Department of Justice, *Crime in California 2021*, Table 15.

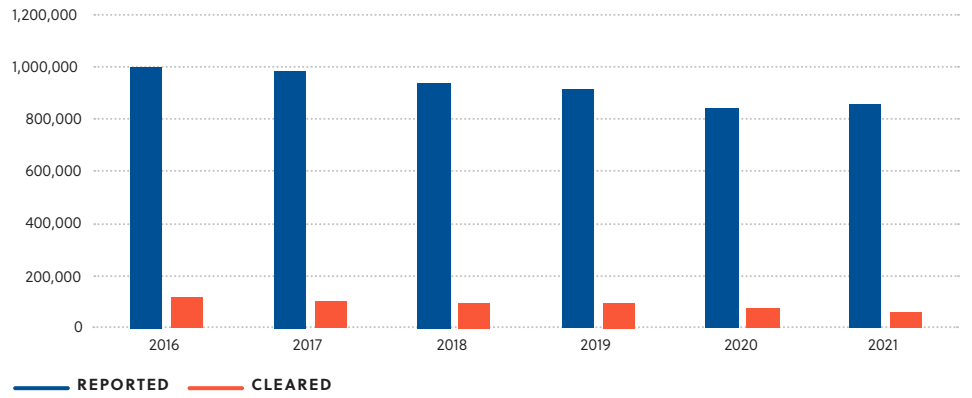


### CALIFORNIA VIOLENT CRIME CLEARANCES



Source: California Department of Justice, *Crime in California 2021*, Table 15.

### CALIFORNIA PROPERTY CRIME CLEARANCES



Source: California Department of Justice, *Crime in California 2021*, Table 15.

## LEGISLATIVE UPDATE

In 2022, 6 new bills passed by the Legislature and signed by the Governor implemented recommendations that were originated or supported by the Committee in previous reports. The chart below provides information on the bills that passed.

COMMITTEE RECOMMENDATION	BILL
Strengthen the Mental Health Diversion Law	SB 1223 (Becker)
Encourage Alternatives to Incarceration	AB 2167 (Kalra)
Expand CDCR's Existing Reentry Programs	Led by Senator Skinner, \$40 million for expansion in the 2022–23 Budget, AB 178, Sec. 166.
Create a Process to Remove the Permanently Incompetent from Death Row	AB 2657 (Stone)
Amend the Racial Justice Act of 2020 to Give it Retroactive Application	AB 256 (Kalra)
Eliminate Incarceration and Reduce Fines and Fees for Certain Traffic Offenses	AB 2746 (Friedman)

Shortly after the budget action to provide additional funding for CDCR's existing reentry programs, CDCR began taking steps to expand the program in up to 8 counties.<sup>26</sup>

Committee member Senator Nancy Skinner also led successful efforts to expand the scope of victims compensation through the budget process, consistent with the Committee's study of this topic.<sup>27</sup>

Finally, the Chair of the Committee was also designated a member of the Prosecutorial Transparency Advisory Board, a new entity created by AB 2418 (Kalra), that will help guide the collection and analysis of prosecutorial data.

<sup>26</sup> CDCR, *Request for Information: Male Community Reentry Program*, August 31, 2022.

<sup>27</sup> AB 160 (Committee on Budget).

## UNUSED OFFENSES

California's laws contain more than 1,400 felony offenses – a significant increase from less than 400 enumerated crimes when the Uniform Determinate Sentencing Act was passed in 1976.<sup>28</sup> The Committee asked the California Policy Lab to research which non-wobbler felony offenses in the Penal Code have not resulted in either an arrest, conviction, or an arrest-but-no-conviction in the last 3, 5, or 10 years. The results of that research are included in an Appendix to this Report and show that almost 30% of the offenses studied – 88 of 299 – have not resulted in a conviction in the last 5 years.

Given the large number of offenses that have been added to the law in the last 40 years, the Legislature should consider whether it may be appropriate to repeal any of the offenses listed here because they are obsolete or rendered unnecessary by other statutes. Some of these offenses, such as possession of an explosive on public transit,<sup>29</sup> may be appropriate to retain, but others, such as bribing a telegraph agent,<sup>30</sup> may be suitable for removal with little effect on the administration of justice and public safety.

UNUSED PENAL CODE FELONY OFFENSES (NON-WOBBLERS)			
	No arrest	Arrest without conviction	No conviction
10 years (2012–2021)	6%	16%	22%
5 years (2017–2021)	10%	20%	29%
3 years (2019–2021)	13%	23%	35%

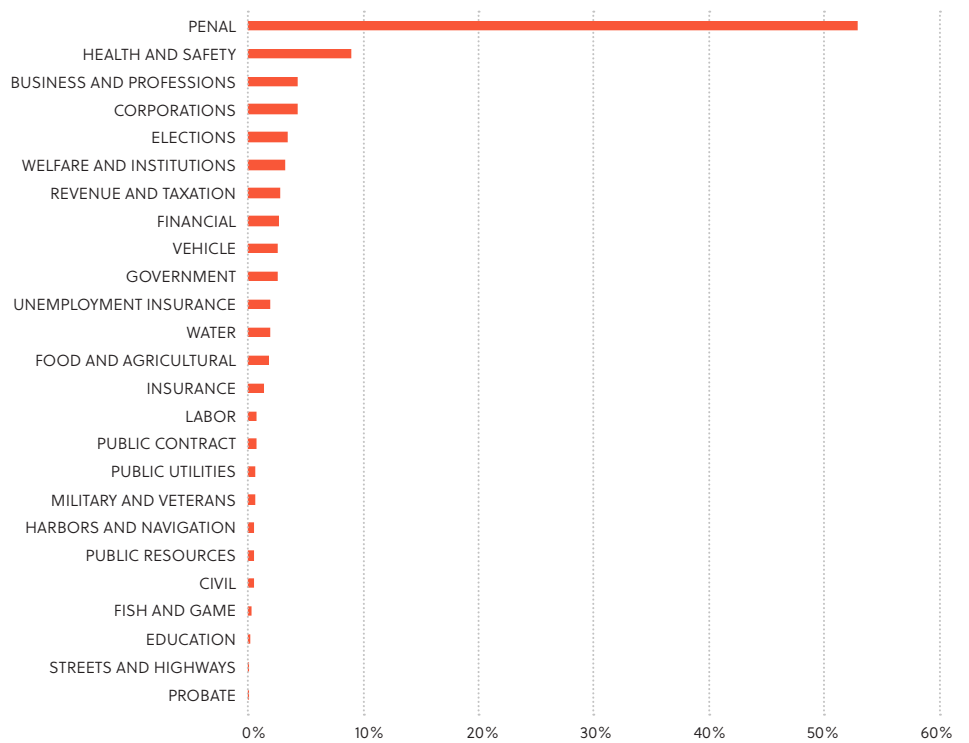
<sup>28</sup> See 1976 Cal. Stat. ch. 1139. The list of 1,400 felony offenses is taken from the California Center for Judicial Education and Research (CJER) *Felony Sentencing Handbook*, a resource prepared by the California court system and relied on by judges and practitioners throughout the state.

<sup>29</sup> Penal Code § 18715(a)(4).

<sup>30</sup> Penal Code § 641.

This project will be ongoing and future analysis will focus on additional offenses, including wobblers (offenses that can be charged as a misdemeanor or felony), misdemeanors, and offenses not contained in the Penal Code (which contains only about half of all felony offenses in California law), as well as offenses that are used infrequently or only in certain counties.

### DISTRIBUTION OF CALIFORNIA FELONY OFFENSES BY CODE



Source: Analysis of California Center for Judicial Education and Research (CJER), *Felony Sentencing Handbook*.

## **DATA COLLECTION AND ANALYSIS**

Since its inception, the Committee has prioritized the use of empirical research and data to inform its recommendations. The Legislature vested special authority in the Committee to gather the wide variety of criminal justice data collected by various state agencies.<sup>31</sup>

For the past 3 years, the Committee has been compiling one of the largest collections of criminal legal system administrative data in the country, and this Report relies on the latest data provided by the California Department of Corrections and Rehabilitation and the California Department of Justice, among others. Data collected by the Committee was analyzed with the help of the California Policy Lab, a policy-focused research lab at the University of California, Berkeley, and the University of California, Los Angeles.

This year, the Legislature also took significant steps to assist in this effort. Funding was allocated in the 2022–23 Budget to support continuing collaboration with the California Policy Lab over the next 3 years.<sup>32</sup> Additionally, the Committee’s data-gathering authority was extended to local government agencies, which will allow the Committee to fill gaps in statewide information with data gathered at the county level.<sup>33</sup>

## **LANGUAGE AND TERMINOLOGY USED THROUGHOUT THIS REPORT**

As in previous reports, this Report avoids using the term “inmate,” “prisoner,” or “offender.” Instead, the Report uses “incarcerated person” and similar “person-first” language. Other official bodies have made similar choices about language,<sup>34</sup> and the Committee encourages stakeholders – including those drafting legislation – to consider doing the same.

<sup>31</sup> Government Code § 8286.

<sup>32</sup> See SB 154 (Budget Act of 2022), Item 8830-001-0001.

<sup>33</sup> Government Code § 8286.5.

<sup>34</sup> See, e.g., Alexandra Cox, *The Language of Incarceration*, *Incarceration*, 1(1), 3–4 (July 2020); Nancy G. LaVigne, *People First: Changing the Way We Talk About Those Touched by the Criminal Justice System*, Urban Institute, April 4, 2016; John E. Wetzl, *Pennsylvania Dept. of Corrections to Discard Terms ‘Offender,’ ‘Felon’ in Describing Ex-prisoners*, *Washington Post*, May 26, 2016; Karol Mason, *Guest Post: Justice Dept. Agency to Alter Its Terminology for Released Convicts, to Ease Reentry*, *Washington Post*, May 4, 2016; Morgan Godvin & Charlotte West, *The Words Journalists Use Often Reduce Humans to the Crimes They Commit. But That’s Changing*, *Poynter*, January 4, 2021.

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# 1. Establish a State-Funded Restitution System for Crime Victims

## Establish a State-Funded Restitution System for Crime Victims

### RECOMMENDATION

Crime victims have a constitutional right to recover monetary restitution from the person convicted of the crime, but many restitution orders go unpaid in California's current system.

The Committee therefore recommends the following:

- Create a state-funded system for immediate payment of restitution orders.
- Specify that corporations, insurance companies, and government agencies that likely have other means to recover financial losses are excluded.

### RELEVANT STATUTES

Cal. Const. Art. I, § 28(a)(13)

Penal Code § 1202.4(f)

### BACKGROUND AND ANALYSIS

Victims of crime often suffer significant financial losses including lost wages, medical expenses, and damaged property.<sup>35</sup> In 1982, California established a “Victims’ Bill of Rights” that, among other provisions, gave victims a constitutional right to recover the full amount of their losses from the person convicted of the crime.<sup>36</sup> Today, direct restitution – court orders requiring convicted persons to pay victims for their financial losses – are the primary approach used to restore victims’ financial losses.<sup>37</sup>

Court orders for restitution are only issued after a person is convicted of a crime but can be issued for any type of offense that results in financial loss.<sup>38</sup> Judges must order the full amount of loss, based on the amount of loss shown by the victim.<sup>39</sup>

California also uses a separate but related system of “victim compensation” to provide financial assistance to victims of violent crime through state-funded reimbursements for specified expenses.<sup>40</sup> Victim compensation is administered by the California Victim Compensation Board, not by the courts. Unlike restitution, victim compensation is limited to victims who suffer physical injury,<sup>41</sup> payments are limited to certain amounts,<sup>42</sup> and can be provided even when the person who committed the crime is not identified or prosecuted.<sup>43</sup> When a person is convicted of a crime, in addition to ordering payment of restitution, courts are required to impose a separate “restitution fine,” which helps fund the victim compensation program.<sup>44</sup>

Unfortunately, crime victims in California often do not receive the financial compensation promised by these processes. Research has shown that providing social and financial support to victims, especially in the immediate aftermath of victimization, can help people develop a sense of safety and security and more readily engage in mental health treatment to address their trauma.<sup>45</sup>

At the February 2022 Committee meeting, experts and practitioners in the field of victims’ rights and services explained how California’s array of restitution systems are

<sup>35</sup> See Douglas F. Zatzick et al., *Strengthening the Patient-Provider Relationship in the Aftermath of Physical Trauma Through Understanding of the Nature and Severity of Posttraumatic Concerns*, *Psychiatry*, 70:3, 260–73 (2007). See also Alicia Boccellari et al., *Characteristics and Psychosocial Needs of Victims of Violent Crime Identified at a Public-Sector Hospital: Data from a Large Clinical Trial*, *General Hospital Psychiatry*, 29, 234–236 (2007).

<sup>36</sup> *California Ballot Pamphlet, Primary Election, June 8, 1982*. See also Cal. Const. Art. I § 28(b).

<sup>37</sup> Cal. Const. Art. I, Sec. 28(a)(13). See also Penal Code § 1202.4(f).

<sup>38</sup> Penal Code § 1202.4(a).

<sup>39</sup> Penal Code § 1202.4(f).

<sup>40</sup> See Government Code §§ 13955, 13957.

<sup>41</sup> Government Code § 13955(f). Compensation can also be provided to victims who suffered emotional injury accompanied with a threat of physical injury, or which resulted from specified sex offenses.

<sup>42</sup> Government Code §§ 13957, 13957.2, 13957.5, 13957.7.

<sup>43</sup> See Government Code § 13955 (eligibility requirements).

<sup>44</sup> Penal Code § 1202.4.

<sup>45</sup> Vanessa G. Kelly et al., *Outreach, Engagement, and Practical Assistance: Essential Aspects of PTSD Care for Urban Victims of Violent Crime*, *Trauma Violence, & Abuse* 11(3), 152 (2010). See also Stacey Wiggall & Alicia Boccellari, *Trauma Recovery Center Manual: A Model for Removing Barriers to Care and Transforming Services for Survivors of Violent Crime*, University of California, San Francisco Trauma Recovery Center (2017).

failing to meet the needs of crime victims and urged the Committee to recommend reforms to ensure crime victims receive financial assistance sooner.

Former Secretary of CDCR and President of Stand up for Victims, Ralph Diaz explained that small restitution payments only serve as a reminder of prior victimization and do not provide victims any real financial assistance.<sup>46</sup> He suggested that California develop a system that allows the government to provide victims the financial assistance they need sooner.<sup>47</sup> Dr. Gena Castro Rodriguez, Director of Survivor Policy at the Prosecutors Alliance of California, and former Chief of the San Francisco District Attorney's Office Victim Services Division, told the Committee that despite the millions of dollars ordered in restitution each year, crime victims rarely receive restitution payments, and what payments come are often in very low amounts.<sup>48</sup>

The Committee recommends that California follow the model for victim compensation pioneered by Vermont, which almost 20 years ago created a restitution system which directed the state to pay restitution orders directly to victims, in amounts up to \$5,000.<sup>49</sup> Vermont continues efforts to collect payments from people convicted of crimes, but the slow and uncertain collection process no longer impacts victims.<sup>50</sup>

California should adopt a similar model in order to recognize the harm that victims have suffered and improve public safety by providing financial assistance more quickly than the traditional restitution system. Though victims in California have the right to recover restitution directly from the people convicted of the crime, they could waive that right in order to receive prompt payment directly from the state.<sup>51</sup> To help manage costs, California should follow Vermont's model in setting a cap on the amount it will pay towards individual restitution orders. As explained further below, data analysis conducted for this report indicates that a \$4,000 cap would cover 75% of all restitution orders issued in the state.

Adopting a state-funded restitution model would allow the state to continue its efforts to reduce the impact of criminal fines and fees on convicted persons. In recent years, the Legislature and Governor have acknowledged the counter-productive financial hardships created by excessive criminal fines and fees and have begun to take steps to provide relief to those ordered to pay, including committing in the most recent budget to end the imposition of restitution fines contingent on ongoing support from the General Fund.<sup>52</sup>

The recent reforms have yet to be extended to the direct restitution system, in which people convicted of crimes can be ordered to pay restitution in any amount, regardless of their ability to pay,<sup>53</sup> and collection practices include garnishing wages, tax refunds, and money deposited into the accounts of incarcerated people.<sup>54</sup>

California's restitution laws also apply in all types of cases, including in juvenile court, where victims have the right to restitution without consideration of the child's ability to pay.<sup>55</sup> Parents of children ordered to pay restitution are presumed to be jointly liable for making restitution payments.<sup>56</sup>

46 Committee on Revision of the Penal Code, Meeting on February 23, 2022, Part 1, 0:27:04–0:28:43.

47 *Id.*

48 *Id.* at 0:26:05–0:26:21.

49 The establishment of the new system was based on a 2001 Special Report to the Vermont Legislature that found that an average of \$.13 cents of every dollar owed to victims had been collected and repaid in the preceding 10 years. See Judy Rex & Elaine Boyce, *The Vermont Model: A Victim-Centered Approach to Restitution*, Vermont Center for Crime Victim Services, 38 (2011). See also 13 V.S.A. § 5353.

50 *Id.*

51 Cal. Const. Art. I, Sec. 28(a)(13)(A).

52 See *California State Budget 2022–23*, 119. See also Penal Code § 1202.4(e).

53 Penal Code § 1202.4(f)–(g).

54 See *Restitution Basics for Victims of Crimes by Adults*, Judicial Council of California, Administrative Office of the Courts (2012).

55 Welfare & Institutions Code § 730.6.

56 Welfare & Institutions Code § 730.7(a).



Under a state-paid restitution model, the state would have more flexibility to decide how or whether to pursue payments from people convicted of crimes including through methods not allowed under current law, such as considering a defendant's indigence and ability to pay restitution.<sup>57</sup> According to the authors of the Model Penal Code, public safety considerations support allowing judges to take the defendant's financial circumstances into account when deciding whether and in what amount to order restitution.<sup>58</sup> And several other states, including New York, Texas, and Washington, grant sentencing courts discretion whether and in what amount to order defendants to pay restitution.<sup>59</sup>

Under California's current restitution system, victims of crime do not have to be individual people to receive restitution – corporations and government agencies have the right to receive restitution when the entity is a direct victim of a crime.<sup>60</sup> But as explained to the Committee by Delaney Green of the Berkeley Policy Advocacy Clinic, corporations, insurance companies, and government entities are compensated for losses through collection of premiums and tax dollars, and state resources should be directed towards people who do not receive these benefits.<sup>61</sup>

Victims of crime need financial assistance to recover from their victimization but relying on indigent defendants to pay restitution has been ineffective. The state should take a greater role in supporting victims of crime by funding restitution payments.

## EMPIRICAL RESEARCH

There is very limited data on the amount of victim restitution ordered and collected in the state each year.<sup>62</sup> But the data is clear that the majority of restitution is not paid to crime victims: a conservative estimate using available data indicates that at least \$150 million is ordered in restitution each year<sup>63</sup> – with the actual number likely far higher – but that in Fiscal Year 2020–21 only \$55 million was collected.<sup>64</sup>

Data from 6 counties about individual restitution orders shows that 75% of all victim restitution orders were less than \$4,000, and 50% of all orders were less than \$1,200.<sup>65</sup> In other words, if the state were to establish a state-funded restitution model, even a \$4,000 cap on payments to victims would allow 75% of all restitution orders to be paid in full.

Unpaid restitution is not just a problem in California and many states and the federal government collect much less restitution than ordered.<sup>66</sup> Researchers have explained that the low collection rate is due to the fact that restitution orders are overwhelmingly issued to a population uniquely unable to pay – indigent defendants, many of whom are unemployed, have unstable housing, mental health and substance abuse issues, and are presently or recently incarcerated.<sup>67</sup> A report by the United States Government Accountability Office confirmed that the federal government's low (8%) restitution collection rate between 2014 and 2016 was due to defendants' inability to pay.

<sup>57</sup> Penal Code § 1202.4(g).

<sup>58</sup> Model Penal Code: Sentencing (Am. Law Inst. Prepublication Draft, 2021), § 6.07 comment c.

<sup>59</sup> See New York Penal Law § 65.10(2), Tex. Crim. Proc. Code, Art. 42.037(a), and Wash. Code § 9.94A.750(5).

<sup>60</sup> See Penal Code § 1204(k).

<sup>61</sup> See also Lindsey E. Smith et al., *Reimagining Restitution: New Approaches to Support Youth and Communities*, Juvenile Law Center, 10 (2022).

<sup>62</sup> The Judicial Council collects data related to court-ordered debt from each county, but data specific to victim restitution does not answer basic questions like the number of cases in which victim restitution was ordered, the amount ordered, or the amount still owed. *Report on Statewide Collection of Court-Ordered Debt for 2021–21*, Judicial Council of California (December 2021).

<sup>63</sup> This data, covering 2010 to 2020, was obtained via Public Records Act requests by Delaney Green, a Clinical Teaching Fellow at the Berkeley Policy Advocacy Clinic. Using data from the 6 counties that provided the most comprehensive information – Del Norte, Fresno, Sacramento, San Joaquin, Santa Cruz, and Tuolumne – researchers at the California Policy Lab calculated the median amount of restitution ordered per person from 2018 to 2020. The median amount ordered was then multiplied by the number of people ordered to pay restitution statewide, as reflected in disposition data from the Department of Justice.

<sup>64</sup> Counties collected \$35 million and the California Department of Corrections and Rehabilitation collected \$22 million. Data provided by Judicial Council of California and CDCR Office of Victims' Services.

<sup>65</sup> This analysis was performed using the data provided by Delaney Green. The six counties were Del Norte, Fresno, Sacramento, San Joaquin, Santa Cruz, and Tuolumne.

<sup>66</sup> Dana A. Waterman, *A Defendant's Ability to Pay: The Key to Unlocking the Door of Restitution Debt*, 106 Iowa Law Review 455, 470 (2020).

<sup>67</sup> Alicia Bannon, Mitali Nagregca, G. Rebekah Diller, *Criminal Justice Debt: A Barrier to Reentry*, Brennan Center for Justice, 4 (2010).

## **INSIGHTS FROM OTHER JURISDICTIONS**

Vermont pays crime victims restitution. Instead of the victim having to wait for the convicted person to pay restitution, the state Restitution Unit issues advance payment up to \$5,000.<sup>68</sup> Businesses and corporate victims are ineligible.<sup>69</sup> After making advance payments to victims, the Restitution Unit serves as a centralized collection agency to collect restitution from those convicted of crimes.<sup>70</sup> Using this model, the majority of crime victims in Vermont receive all of the restitution ordered to them.<sup>71</sup>

<sup>68</sup> 13 V.S.A. § 5353. See also Judy Rex & Elaine Boyce, *The Vermont Model: A Victim-Centered Approach to Restitution*, Vermont Center for Crime Victim Services (2011).

<sup>69</sup> Rex and Boyce, *The Vermont Model* at 37.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 43.

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## 2. Create a Victim Right to Restorative Justice

## Create a Victim Right to Restorative Justice

### **RECOMMENDATION**

Research shows that, in many cases, crime victims prefer an opportunity for restorative justice conferencing: mediations between crime victims and the person who caused them harm. Studies also show that these restorative justice interventions lower recidivism. Yet California law makes no provision for restorative justice processes in the adult criminal legal system.

The Committee therefore recommends the following:

Establish a victims' right to be informed of and participate in county-approved restorative justice programs. The programs should prioritize victim needs, be administered by independent community-based organizations, occur in confidential settings, apply to a wide variety of offenses, and result in the dismissal or non-filing of charges if successful to all parties.

### **RELEVANT STATUTES**

Cal. Const. Art. I, § 28(a)  
Penal Code §§ 17.2, 679.02, 1170(a)(1)

### **BACKGROUND AND ANALYSIS**

At the February 2022 Committee meeting, law enforcement officials described the benefits of restorative justice programs.

Thomas Morgan, a former sheriff's deputy who was nearly killed after being shot in the neck while on duty, described the healing he and his wife were able to achieve through participation in a post-conviction restorative justice program. For Mr. Morgan, speaking directly to the man that shot him helped him to recover from trauma that was unaddressed in the traditional court process.<sup>72</sup>

Yolo County District Attorney and then-President of the California District Attorneys Association Jeff Reisig testified about the benefits of restorative justice programs that occur much earlier in the criminal legal process. District Attorney Reisig told the Committee about a restorative justice program for adults created by his office, which has handled over 2,500 cases.<sup>73</sup> District Attorney Reisig highlighted data indicating lower recidivism rates for those who participated in the program and a 90% victim satisfaction rate.<sup>74</sup>

Professor Stephen Raphael of the UC Berkeley Goldman School of Public Policy presented compelling data from a randomized controlled study of a restorative justice program for youth arrested for serious felonies in San Francisco.<sup>75</sup> Youth diverted into the program were required to conference with the victim of the offense in order to understand the impact of the crime, to take accountability for their actions, and to develop and complete a plan to restore the harm done. Professor Raphael explained that the youth who participated in the program had transformative experiences that led to a significant reduction in recidivism.<sup>76</sup>

<sup>72</sup> Committee on Revision of the Penal Code, Meeting on February 23, Part 3, 0:46:34–0:56:33.

<sup>73</sup> *Id.* at 0:30:20–0:30:33.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 0:01:05–0:14:40. See also Yotam Shem-Tov, Steven Raphael, & Alissa Skog, *The Impacts of the Make-it-Right Program on Recidivism*, California Policy Lab (January 2022).

<sup>76</sup> Committee on Revision of the Penal Code, Meeting on February 23, 2022, Part 3, 0:12:50–0:13:04.

There are a variety of approaches to restorative justice, but elements common to all models include a trained facilitator who leads a conference between a victim and the person who caused harm, with the goal of developing a voluntary agreement designed to acknowledge and repair the harm.<sup>77</sup> In the criminal legal context, restorative justice typically results in the dismissal of charges.

California's Penal Code does not currently provide a clear path for using restorative justice to resolve adult criminal cases.<sup>78</sup> While most states have not established procedural laws related to restorative justice, Colorado requires victims to be informed of the availability of restorative justice programs.<sup>79</sup> When District Attorney Reisig appeared before the Committee, he urged it to recommend that restorative justice be established as a victims' right.<sup>80</sup>

California has been a leader in establishing rights for crime victims. In 1982, California became one of the first states to create a "Victims' Bill of Rights" through the passage of Proposition 8.<sup>81</sup> And in 2008, Californians reaffirmed the rights of victims with the passage of Proposition 9, also known as "Marsy's Law."<sup>82</sup> But the rights and protections extended to victims through these laws have primarily focused on granting victims greater access to the court process,<sup>83</sup> which for some victims is unsatisfying and retraumatizing.<sup>84</sup>

According to a recent national survey of crime victims conducted by the Alliance for Safety and Justice, 70% of crime victims report experiencing at least one symptom of trauma after their victimization, and nearly 75% did not receive counseling or mental health treatment to help them recover.<sup>85</sup> Restorative justice can meet the needs of victims that the traditional criminal legal system has not, such as the need for information from the responsible party, the need to feel heard by the person, and the need for more of a role in determining what the person must do to right the wrong.<sup>86</sup>

Practitioners of restorative justice stress the importance of the programs being developed and led by community-based organizations that are independent from law enforcement.<sup>87</sup> The Committee's recommendation adheres to the community-based model while allowing county supervisors, District Attorneys, and/or the Presiding Judge discretion to approve acceptable programs in their county.

## EMPIRICAL RESEARCH

Restorative justice programs have been shown to result in a reduction of future criminal activity. In San Francisco, the Make-It-Right program provided restorative justice services for juveniles facing serious charges such as burglary and assault and showed a 44% reduction in rearrests within 6 months compared against a control group.<sup>88</sup> In Alameda County, Community Works West's Restorative Community Conferencing program, which also addressed juveniles facing serious charges, showed a 48% reduction in new juvenile adjudications within 12 months where the original offense involved a crime against a person.<sup>89</sup>

And in Yolo County, people who completed the Neighborhood Courts Program, which focused on adults facing lower-level charges, were 37% less likely to recidivate than similarly-situated people whose cases were resolved through other means.<sup>90</sup>

<sup>77</sup> See, e.g., Reese Frederickson, Alissa Marque Heydari, Chloe Marmet, *Restorative Justice: A Best Practice Guide for Prosecutors in Smaller Jurisdictions*, Institute for Innovation in Prosecution, 3–6 (January 2022); American Bar Association, Resolution 106A, adopted August 2020; Impact Justice, *Restorative Justice Project Diversion Toolkit for Communities*, 4 (June 2019).

<sup>78</sup> For juvenile cases, Welfare and Institutions Code § 202(f) specifically authorizes restorative justice as an appropriate resolution of some cases. The Penal Code contains general acknowledgement and encouragement of restorative justice programs. Penal Code §§ 17.5(a)(8)(E), 3450 (b)(8)(E) (encouraging the use of "community-based punishment," including "[r]estorative justice programs such as mandatory victim restitution and victim-offender reconciliation"); Penal Code § 1170(a)(1) ("The Legislature finds and declares that the purpose of sentencing is public safety achieved through punishment, rehabilitation, and restorative justice.");

<sup>79</sup> See Thalia González, *The State of Restorative Justice in American Criminal Law*, Wisconsin Law Review, Issue 6, 1158 (2020) (Colorado has "the highest level of legalization of restorative justice across all jurisdictions"). See also Colorado Rev. Stat. 24-41.303(1)(g).

<sup>80</sup> Committee on Revision of the Penal Code, Meeting on February 23, Part 3, 32:00–32:26. See also Written Submission of District Attorney Jeff Reisig to Committee on Revision of the Penal Code for the Meeting on February 23, 2022.

<sup>81</sup> Office for Victims of Crime, *Landmarks in Victims' Rights and Services*, United States Department of Justice (2021).

<sup>82</sup> The measure was passed after Marsalee (Marsy) Ann Nicholas was killed by an ex-boyfriend. Shortly after her killer was arrested, Marsy's mother encountered him at a grocery store because she hadn't been notified of his release on bail. See *California Official Voter Information Guide, General Election, November 4, 2008*, 129 (Proposition 9 § 2, ¶ 7).

<sup>83</sup> Victims' rights in California include the right to be notified of sentencing and parole hearings, and the right to give statements at those hearings. Penal Code §§ 1191.1, 3043. See also *California Ballot Pamphlet, Primary Election, June 8, 1982*, at 32–35, 54–56.

<sup>84</sup> See, e.g., Lara Bazelon & Bruce A. Green, *Victims' Rights from a Restorative Perspective*, Ohio State Journal of Criminal Law 293, 308 (2020).

<sup>85</sup> Alliance for Safety and Justice, *Crime Survivors Speak 2022: National Survey of Victims' Views on Safety and Justice*, 13 (2022).

<sup>86</sup> Lynn S. Branham, *The Overlooked Victim Right: According Victim-Survivors a Right of Access to Restorative Justice*, 98 Denver Law Review Forum 1, 11–13 (August 2021).

<sup>87</sup> See also Written Submission of Cymone Fuller to Committee on Revision of the Penal Code for the Meeting on February 23, 2022.

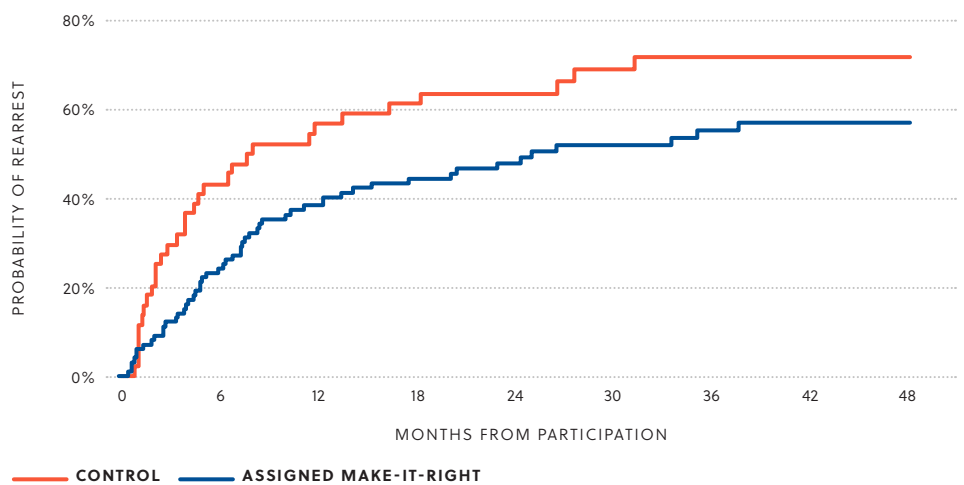
<sup>88</sup> Yotam Shem-Tov, Steven Raphael, & Alissa Skog, *The Impacts of the Make-it-Right Program on Recidivism*, California Policy Lab, 18 (January 2022).

<sup>89</sup> sujatha baliga, Sia Henry, & Georgia Valentin, *Restorative Justice Conferencing: A Study of Community Works West's Restorative Justice Youth Diversion Program in Alameda County*, Impact Justice, 6, 8 (Summer 2017).

<sup>90</sup> Written Submission of Nicole Kirkaldy, Program Coordinator for the Yolo County District Attorney's Office's Neighborhood Courts Program, to Committee on Revision of the Penal Code for the Meeting on April 23, 2020.

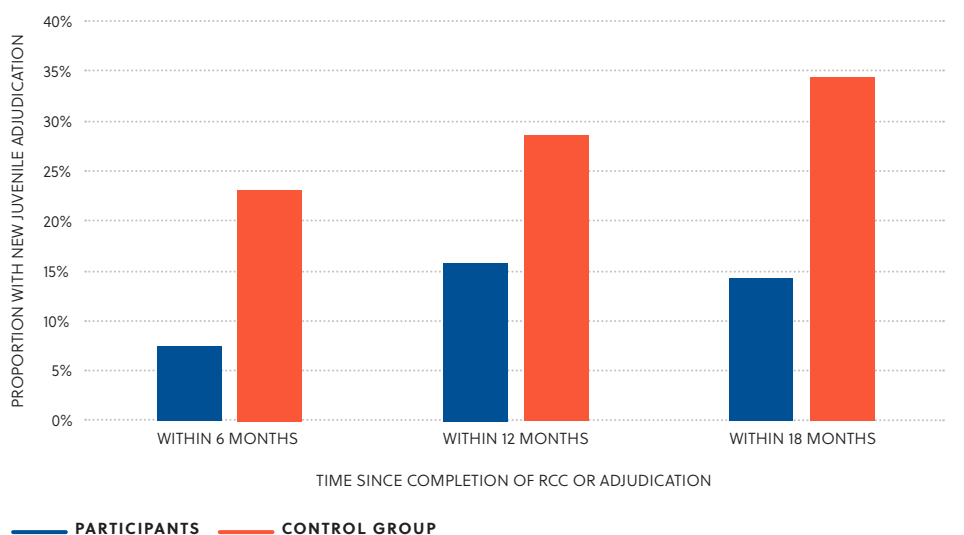
Restorative justice programs also have high participant satisfaction across various jurisdictions and types of offenses.<sup>91</sup> In Alameda County’s Community Works West’s Restorative Community Conferencing program, more than 90% of victim-participants said they would participate in another conference or recommend the process to a friend.<sup>92</sup>

**PROBABILITY OF REARREST AFTER PARTICIPATION IN MAKE-IT-RIGHT PROGRAM**



Source: Yotam Shem-Tov, Steven Raphael & Alissa Skog, Policy Brief: The Impacts of the Make-It-Right Program on Recidivism, California Policy Lab, 4, Figure 2 (January 2022).

**RESTORATIVE COMMUNITY CONFERENCING PARTICIPANT RESULTS**



Source: sujatha baliga, Sia Henry, & Georgia Valentine, Restorative Justice Conferencing: A Study of Community Works West’s Restorative Justice Youth Diversion Program in Alameda County, Impact Justice, 8, Figure 4 (2017).

91 See, e.g., Mark S. Umbreit, Robert B. Coates, & Betty Vos, *The Impact of Victim-Offender Mediation: Two Decades of Research*, 65 Federal Probation 29, 30 (December 2001); Mary P. Koss, *The Restore Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcome*, Journal of Interpersonal Violence, Vol. 29(0), 1647 (2013) (90% of participants were satisfied with restorative justice program in Arizona that handled sex crimes); American Bar Association, Resolution 106A, adopted August 2020, Report at 2 (reporting data from a program in Washington DC); Lynn S. Branham, *The Overlooked Victim Right: According Victim-Survivors a Right of Access to Restorative Justice*, 98 Denver Law Review Forum 1, 15 (August 2021) (collecting studies).

92 sujatha baliga, Sia Henry, & Georgia Valentine, *Restorative Justice Conferencing: A Study of Community Works West’s Restorative Justice Youth Diversion Program in Alameda County*, Impact Justice, 8 (Summer 2017).

## INSIGHTS FROM OTHER JURISDICTIONS

A number of states incorporate restorative justice into their laws.<sup>93</sup> Colorado has the highest level of incorporation and requires prosecutors to notify all crime victims of the “availability of restorative justice practices.”<sup>94</sup> Colorado law also establishes a state restorative justice council to advance restorative justice principles and practices.<sup>95</sup> Vermont has a statute directing that “principles of restorative justice be included in shaping how the criminal justice system responds to persons charged with or convicted of criminal offenses”<sup>96</sup> and a series of “community justice centers” to administer restorative justice programs.<sup>97</sup> Minnesota authorizes the creation of community-based restorative justice programs.<sup>98</sup> In Massachusetts, many offenses are eligible for resolution with restorative justice, if both the victim and prosecutor consent.<sup>99</sup>

93 For example, several states fund or direct agencies to direct restorative justice programs, and some states require victims to be informed of restorative justice programs when they are available. See Shannon M. Silva & Carolyn G. Lambert, *Restorative Justice Legislation in the American States: A Statutory Analysis of Emerging Legal Doctrine*, *Journal of Policy Practice*, 14:77–95 (2015).

94 Colorado Rev. Stat. 24-4.1.303(1)(g). See also Thalia González, *The State of Restorative Justice in American Criminal Law*, 2020 *Wisc. Law Rev.* 1147, 1175 footnote 185 (2020).

95 See Colorado Rev. Stat. 19-2-213.

96 28 V.S.A. § 2a(a).

97 24 V.S.A. § 1961(3). See also Community Justice Network of Vermont, [cjvt.org](http://cjvt.org).

98 Minnesota Stat. § 611A.775.

99 Mass. Gen. Laws Ch. 276B § 2. Sex offenses, certain domestic offenses, and any offense “resulting in serious bodily injury or death” are ineligible for restorative justice. Mass. Gen. Laws ch. 276B § 3.

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# 3. Expand Victim Right to Civil Compromise



## Expand Victim Right to Civil Compromise

### RECOMMENDATION

California law allows courts to dismiss cases if victims of certain misdemeanor offenses indicate that they have received “satisfaction” from the defendant. Expanding the type of offenses that are eligible for this “civil compromise” process and the scope of appropriate resolutions would empower victims, encourage alternatives to incarceration, and save court costs.

The Committee therefore recommends the following:

- Modernize the scope of civil compromises to apply to nonviolent, non-sex offense felony charges.
- Clarify the definition of “satisfaction” to include non-monetary resolutions, like cleanup and repair work, or community service.
- Require that victims of eligible offenses be notified of the availability of a civil compromise by the district attorney.

### RELEVANT STATUTES

Penal Code §§ 1377–1379

### BACKGROUND AND ANALYSIS

A concept closely related to restorative justice – civil compromise – has long existed in California’s Penal Code. California’s civil compromise statute dates back to 1872 and allows courts to dismiss most misdemeanor cases if a victim “acknowledges that they have received satisfaction.”<sup>100</sup> Civil compromises typically involve payment to the crime victim from the defendant for damage to property. When a victim agrees to a civil compromise, the judge must decide whether the case is appropriate for dismissal.<sup>101</sup>

Like restorative justice resolutions, civil compromises center a victim’s needs by giving them agency to determine what must be done to repair the harm done. Civil compromises also preserve the historical role of crime victims in the prosecution of criminal offenses. In the early years of the United States’ court system, victims of crime would hire private prosecutors to bring charges against accused persons, often seeking money damages, and move to dismiss when those claims were satisfied.<sup>102</sup> While the private prosecution system had many flaws and was replaced by the state-led prosecution system we have today, courts have long recognized the public policy benefits of checking, rather than encouraging, criminal prosecutions when an offense is between private individuals, and civil compromises are one way to do so.<sup>103</sup>

Expanding the reach of California’s civil compromise laws has the potential to produce some of the same benefits as a traditional restorative justice process by placing a victim in control of tailoring a resolution. The streamlined process allowed by civil compromise may be more attractive to some victims who do not have the resources or interest in engaging in the more involved restorative justice process.

<sup>100</sup> Penal Code §§ 1377–1379.

<sup>101</sup> Penal Code § 1378.

<sup>102</sup> See Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, *Crime & Delinquency*, Vol. 30, No. 4, 568–92 (1984).

<sup>103</sup> See *People v. Moulton*, 131 Cal.App.3d Supp. 10, 17–21 (Appellate Department, Los Angeles County 1982) (citing a 1849 treatise which explained New York’s civil compromise laws).

Currently, civil compromise resolutions are limited to misdemeanor offenses.<sup>104</sup> But there are many nonviolent, non-sex offense felonies that could be resolved through civil compromise without damaging public safety including offenses such as vandalism,<sup>105</sup> bicycle theft,<sup>106</sup> car break-ins,<sup>107</sup> and welfare fraud.<sup>108</sup>

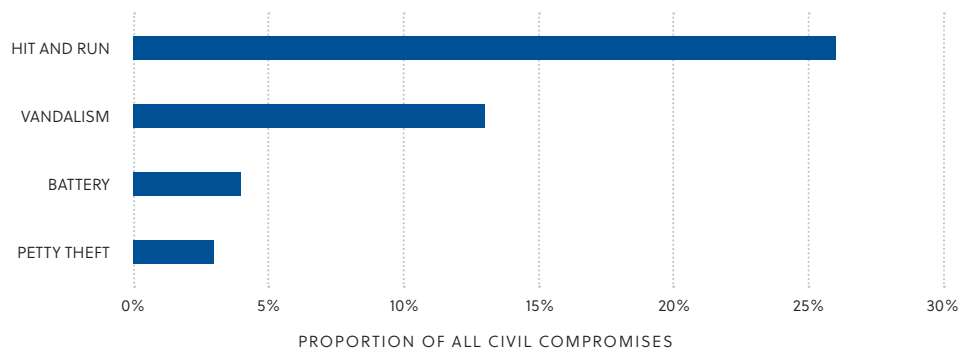
Similar to restorative justice, in order for victims of crime to have access to this benefit, they should be informed of its availability early in the process.

California should expand the applicability of its civil compromise laws, while leaving in place current law that the final decision on whether to dismiss a case is made by a judge.

### EMPIRICAL RESEARCH

According to analysis of data provided to the Committee from the California Department of Justice, the most common offenses that are resolved with civil compromise involve property damage: hit-and-runs and vandalism.

#### MOST FREQUENTLY COMPROMISED MISDEMEANORS (2017–2021)



Source: Analysis of Automated Criminal History System.

While victims of non-serious felonies could benefit from participating in restorative justice programs, research has shown that restorative justice is more effective in repairing harm caused by crimes that are considered more severe.<sup>109</sup>

<sup>104</sup> Penal Code § 1377.

<sup>105</sup> Penal Code § 594.

<sup>106</sup> Penal Code § 487.

<sup>107</sup> Penal Code §§ 459, 460.

<sup>108</sup> Welfare & Institutions Code § 10980.

<sup>109</sup> Lindsey Pointer, *What is "Restorative Justice" and How Does it Impact Individuals Involved in Crime?*, Bureau of Justice Assistance, National Training and Assistance Center (2021).

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# 4. Prohibit Stops for Technical Traffic Infractions

## Prohibit Stops for Technical Traffic Infractions

### RECOMMENDATION

California law enforcement officers make more than 3 million traffic stops every year, with disturbing racial disparities in who is stopped. Law enforcement openly admit that many of these are “pretext stops” to investigate serious offenses – yet data show these traffic stops rarely result in the discovery of evidence of crime. Many traffic stops, including those for expired registration tags, do not relate to public safety, and prioritizing stops for offenses directly related to public safety may help reduce disparities and improve community trust in law enforcement. These types of technical infractions can continue to be enforced through other means, such as mailed citations or warnings.

The Committee therefore recommends the following:

Prohibit police officers from stopping people for technical, non-safety-related traffic offenses, including at a minimum offenses related to:

1. Vehicle or equipment registration<sup>110</sup>
2. Positioning or number of license plates<sup>111</sup>
3. Lighting equipment<sup>112</sup>
4. Window tints or obstructions<sup>113</sup>
5. Bicycle equipment and operation<sup>114</sup>

### RELEVANT STATUTES

Penal Code § 13519.4

### BACKGROUND AND ANALYSIS

California police officers reported making nearly 3 million traffic stops in 2020.<sup>115</sup> California’s extensive Vehicle Code covers all aspects of driving<sup>116</sup> and United States Supreme Court decisions allow police officers to stop almost anyone no matter how minor the violation,<sup>117</sup> such as excessive noise coming from a car’s exhaust or wearing glasses with a wide temple.<sup>118</sup> Indeed, most people break at least some traffic laws while driving.<sup>119</sup>

The wide discretion granted to law enforcement in traffic stops has resulted in racial disparities in traffic enforcement. According to California’s Racial and Identity Profiling Advisory (RIPA) Board, in 2020, Black and Hispanic people were stopped 112% and 9%, respectively, more frequently than expected based on their proportion of California’s residential population, while white people were stopped 7% less frequently than expected.<sup>120</sup> People of color are also more likely to be handcuffed, searched, and have force used against them during traffic stops than white people.<sup>121</sup>

<sup>110</sup> See, e.g., Vehicle Code §§ 4000, 5350.

<sup>111</sup> See, e.g., Vehicle Code §§ 5200, 5201, 5202, 5204.

<sup>112</sup> See, e.g., Vehicle Code §§ 24252, 24400, 24600, 24601.

<sup>113</sup> See, e.g., Vehicle Code §§ 26708, 26710.

<sup>114</sup> See, e.g., Vehicle Code §§ 21201, 21212.

<sup>115</sup> Racial & Identity Profiling Advisory Board, *Annual Report 2022*, 27, 32–34. The number of annual stops are likely higher — 3 more agencies submitted data in 2020 than did in 2019, but the total number of stops reported decreased by 26%. The RIPA Board attributes the decline in reported stops to the COVID-19 pandemic. *Id.* at 27.

<sup>116</sup> See Vehicle Code §§ 22348–22366 (speeding); 22100–22113 (stopping, turning, signaling); 24250–24953 (lighting equipment); 26700–26712 (windshields and mirrors).

<sup>117</sup> See, e.g., *Whren v. United States*, 517 U.S. 806 (1996).

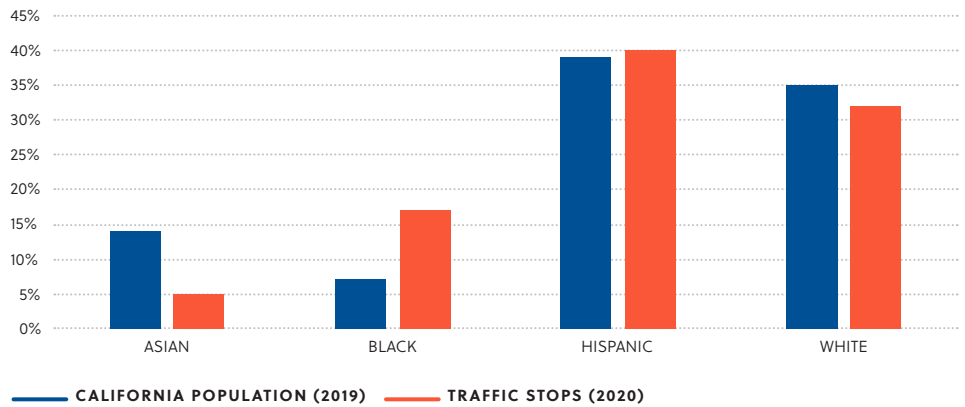
<sup>118</sup> See Vehicle Code §§ 21750, 23120, 27151.

<sup>119</sup> See, e.g., David A. Harris, “Driving While Black” and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 *Journal of Criminal Law & Criminology* 555, 599 (1997) (noting that “with the traffic code in hand, any officer can stop any driver at any time”).

<sup>120</sup> Racial & Identity Profiling Advisory Board, *Annual Report 2022*, 51.

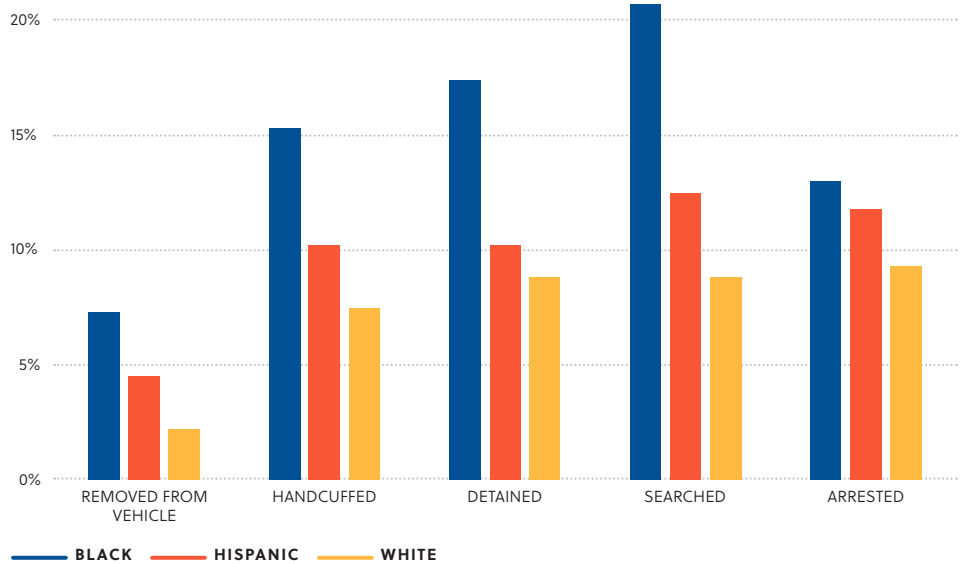
<sup>121</sup> California Racial & Identity Profiling Advisory Board, *Annual Report 2022 Appendices*, 14–15, 27, Tables A.7 & A.13. Officers can select up to 23 different actions and are supposed to indicate every action taken, not just the most intrusive.

### DEMOGRAPHICS OF TRAFFIC STOPS AND CALIFORNIA RESIDENTIAL POPULATION (2020)



Source: California Racial & Identity Profiling Advisory Board, *Annual Report 2022*, 51, Figure 21. Residential population demographics were weighted to show a distribution reflecting the areas served by the 18 agencies reporting RIPA data.

### ACTIONS TAKEN DURING STOPS BY RACE (2020)



Source: California Racial & Identity Profiling Advisory Board, *Annual Report 2022 Appendices*, 14-15, 27, Tables A.7 & A.13. Officers can select up to 23 different actions and are supposed to indicate every action taken, not just the most intrusive.

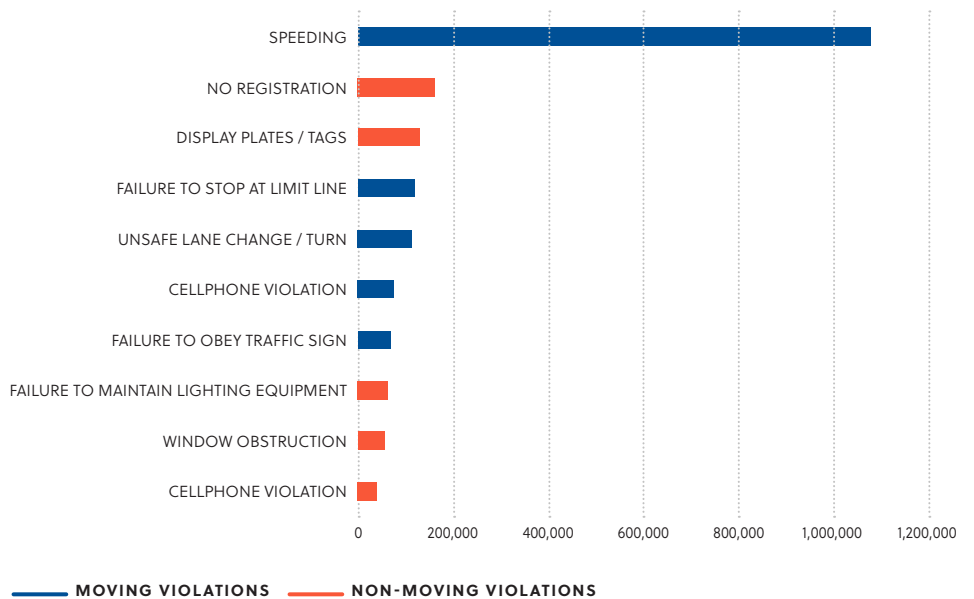
122 David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, *Supreme Court Review* 271, 272 (1997). See also Elizabeth Davis, Anthony Whyde, & Lynn Langton, *Contacts Between the Police and the Public*, 2015, Bureau of Justice Statistics at 16 (2018) (approximately 1 million of the nearly 53.5 million people who had contact with the police in the previous 12 months experienced nonfatal threats or use of force and only 1% of white civilians experienced the threats compared to 3% of Black and Hispanic civilians); Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 *Proceedings of the National Academy of Sciences* 16793, 16795-96 (2019) (noting that police use of force is one of the leading causes of death for young men of color, especially Black men).  
 123 David Kirkpatrick et. al., *Pulled Over: Why Many Police Traffic Stops Turn Deadly*, *New York Times*, October 31, 2021 (finding that in the preceding 5 years, police officers killed at least more than 400 unarmed drivers and passengers who were not under pursuit for a violent crime, while about 60 officers were killed by motorists who had been pulled over).

Traffic stops are not only inconvenient, but also frightening, humiliating, and even dangerous for both police officers and the person pulled over.<sup>122</sup> Recent high-profile killings of Black men during traffic stops further illustrate these concerns.<sup>123</sup> As Chancee Smith, Senior Manager of Criminal Justice at Catalyst California, explained to the Committee, research indicates that while traffic stops do not reduce the number of motor vehicle fatalities, disproportionate traffic policing can lead to

degraded health, trauma, and anxiety for stopped individuals.<sup>124</sup> As noted in a letter to the Committee from the Prosecutors Alliance of California, disproportionate traffic enforcement also impairs public safety because perceptions of unfair treatment and resulting distrust of law enforcement diminish a person’s likelihood to comply with laws or cooperate with the police.<sup>125</sup>

While most traffic stops conducted in California are for offenses that can endanger public safety – moving violations like speeding, or failure to stop at a limit line – a significant number of traffic stops are for more technical violations, such as expired registration or failure to display license plates or tags, that do not directly endanger public safety.<sup>126</sup>

**MOST FREQUENT REASONS FOR TRAFFIC STOP (2020)**



Source: California Racial & Identity Profiling Advisory Board, *Annual Report 2022 Appendices*, 47-50, Tables B.1.2 and 1.3. Cellphone violations are marked as moving and non-moving based on the stopping officer’s classification.

As reported to the Committee by RIPA Board Co-Chair Steven Raphael, local law enforcement agencies make stops for non-moving and equipment violations more frequently than the California Highway Patrol, and racial disparities are more pronounced in stops for these offenses than they are in stops for moving violations.<sup>127</sup>

124 Committee on Revision of the Penal Code, Meeting on September 2, 2022, Part 1, 0:52:59–0:54:22. See Justin Feldman, *Public Health and the Policing of Black Lives*, *Harvard Public Health Review* 7 (2015); RIPA Board Meeting Archives, *DRAFT 2023 RIPA Board Report*, 3 (July 28, 2022) (citing studies).

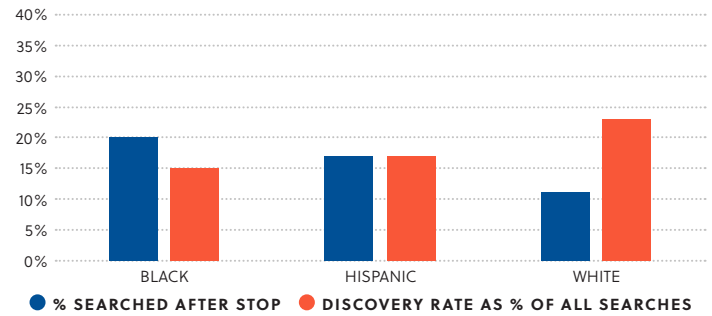
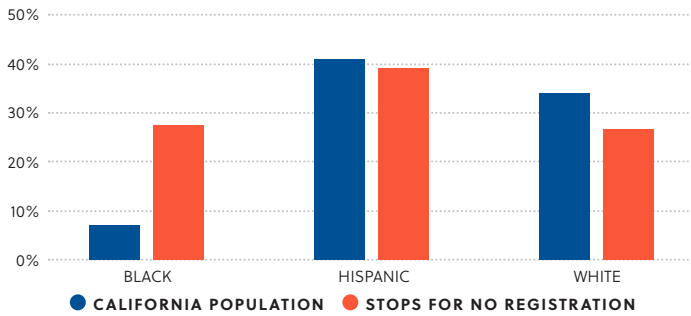
125 See Letter from Prosecutors Alliance of California to Committee on Revision of the Penal Code, January 6, 2022. See also Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 *Yale Law Journal* 778, 797 (2021) (citing studies). See also Matthew Desmond, Andrew V. Papachristos, & David S. Kirk, *Police Violence and Citizen Crime Reporting in the Black Community*, *American Sociological Review*, Vol. 81(5), 857–76, 867–68 (2016) (describing research conducted in Milwaukee that found that that a high-profile incident of police violence resulted in over 22,000 fewer calls for emergency services).

126 Racial & Identity Profiling Advisory Board, *Annual Report 2022 Appendices*, 47–50, Tables B 1.2, 1.3.

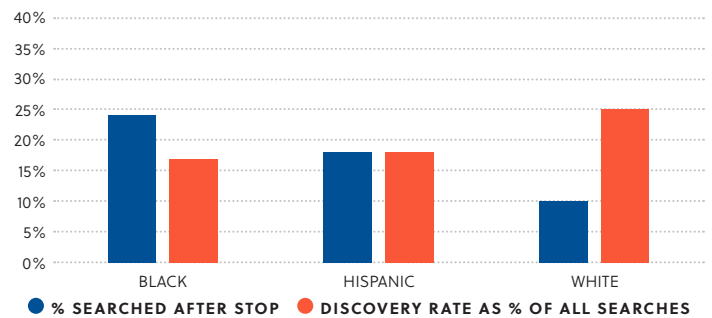
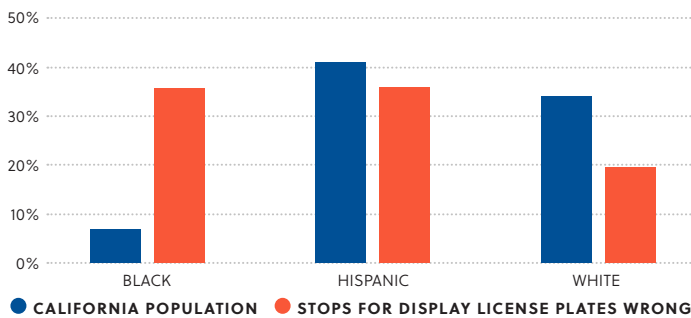
127 Committee on Revision of the Penal Code, Meeting on September 2, 2022, Part 1, 0:10:45–0:13:11. See also Racial & Identity Profiling Advisory Board, *Annual Report 2022*, 133, footnote 369.

**MOST COMMON TRAFFIC STOPS BY LOCAL POLICE DEPARTMENTS FOR NON-MOVING VIOLATIONS:  
DEMOGRAPHICS AND SEARCH AND DISCOVERY RATES**

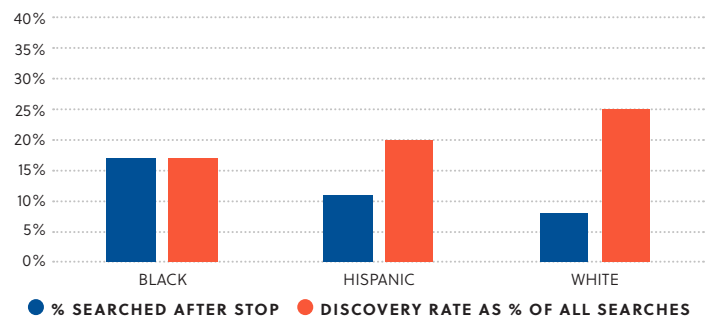
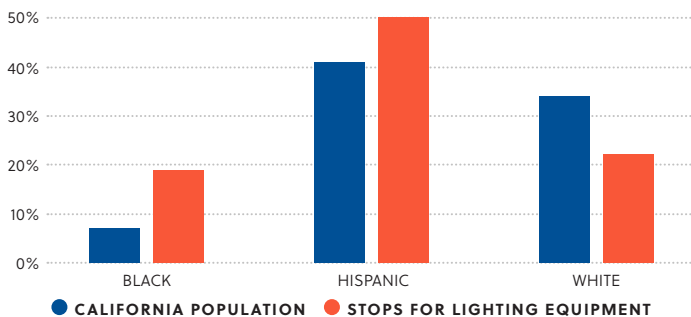
**NO REGISTRATION**



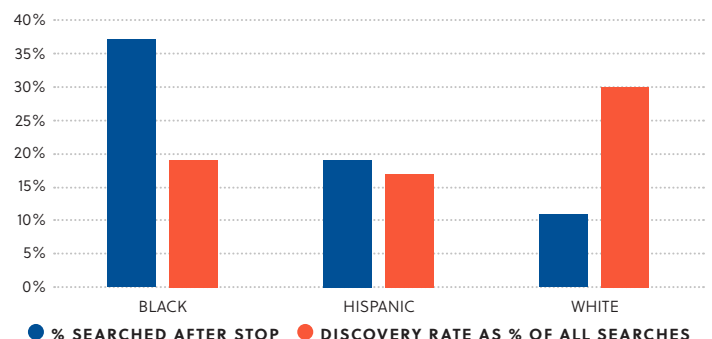
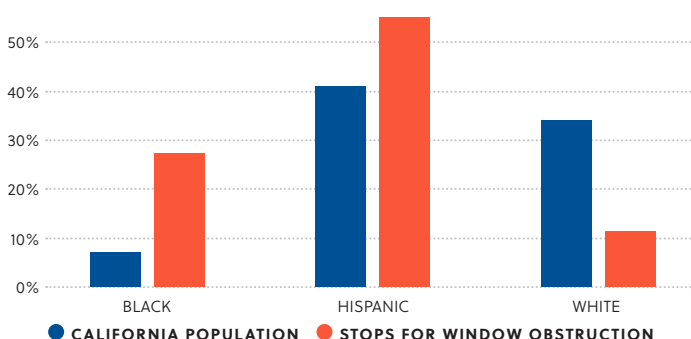
**DISPLAY LICENSE PLATES WRONG**



**LIGHTNING EQUIPMENT**



**WINDOW OBSTRUCTION**



Source: Analysis of 2019 RIPA data. Weighted population numbers are taken from California Racial & Identity Profiling Advisory Board, Annual Report 2020, 46.

Pretext stops – using a traffic stop as an excuse to conduct a more intrusive investigation than otherwise allowed – are a driver of racial disparities in stop rates in California. Pretext stops are permissible under the Fourth Amendment,<sup>128</sup> and police officers and agencies use them in an effort to deter crime, identify suspects, or seize contraband.<sup>129</sup> But pretext stops are ripe for racial profiling because stereotypes and implicit biases associating people of color, particularly Black people, with criminal behavior can influence who officers choose to target.<sup>130</sup>

A recent analysis by the *San Francisco Chronicle* of police stops in San Francisco over the past 4 years found that Black drivers were 4.4 times more likely to be stopped than white people for any traffic violation and 10.5 times more likely to be stopped for common pretextual traffic codes such as improper display of license plates and expired registration.<sup>131</sup>

Though not necessarily thought of as “traffic stops,” stops of bicyclists for violations related to bicycle equipment or operation also seem to be conducted for pretextual reasons, with poor results. A *Los Angeles Times* analysis of more than 44,000 bike stops by Los Angeles County Sheriff’s deputies found that 70% were of Latino cyclists.<sup>132</sup> The investigation found that deputies searched 85% of the people stopped, but that 92% of the searches found nothing illegal, less than 6% recovered illegal drugs, and less than 0.5% recovered weapons.<sup>133</sup>

Lizabeth Rhodes, Director of the Los Angeles Police Department Office of Constitutional Policing, told the Committee that pretext stops are a useful policing tool.<sup>134</sup> Nonetheless, the LAPD recently implemented a pretext stop policy that requires officers to have a public safety justification for stopping a person. Data shared by Ms. Rhodes and also reported in the *Los Angeles Times* showed a reduced number of traffic stops and a greater proportion made for moving violations after the change in policy.<sup>135</sup> Other experts who appeared before the Committee, including Professor Maria Ponomarenko, Co-Founder of the New York University School of Law Policing Project, shared research indicating that pretext stops are inefficient in recovering illegal contraband and ineffective in reducing crime rates.<sup>136</sup>

San Leandro Police Chief Abdul Pridgen shared similar sentiments during a recent discussion facilitated by the Public Policy Institute of California.<sup>137</sup> Chief Pridgen, the immediate Past President of the California Police Chiefs Association, asserted that police agencies should already be transitioning away from pretext stops to data-driven policing strategies.<sup>138</sup> According to Chief Pridgen, current traffic policing strategies have strained department resources and reforms to traffic policing can lead to better cooperation between police agencies and the communities they serve, resulting in more crimes being solved.<sup>139</sup>

In a September 2022 report, the Center for Policing Equity – a non-profit whose founders and board members include police officers and that partners with police agencies around the country to develop data-driven policing strategies – recommended that states ban the use of pretextual stops and create robust safeguards against their use.<sup>140</sup>

<sup>128</sup> *Whren v. United States*, 517 U.S. 806, 813 (1996).

<sup>129</sup> See Policing Project at New York University School of Law, *An Assessment of Traffic Stops and Policing Strategies in Nashville*, 7.

<sup>130</sup> See Katherine B. Spencer, Amanda K. Charbonneau & Jack Glaser, *Implicit Bias and Policing*, 10 *Social & Personality Psychology Compass*, 50 (2016). See also Amanda Charbonneau & Jack Glaser, *Suspicion and Discretion in Policing: How Laws and Policies Contribute to Inequity*, 11 *U.C. Irvine Law Review* 1327, 1336 (2021) (discussing studies).

<sup>131</sup> Megan Cassidy & Susan Neilson, *S.F. May Limit When Police Can Pull Over Drivers to Fight Racial Profiling. Will It Make the City Less Safe?*, *San Francisco Chronicle*, October 7, 2022.

<sup>132</sup> Alene Tchekmedyan, Ben Poston, & Julia Barajas, *L.A. Sheriff’s Deputies Use Minor Stops to Search Bicyclists, With Latinos Hit Hardest*, *Los Angeles Times*, November 4, 2021.

<sup>133</sup> *Id.* See also Nicole Santa Cruz & Alene Tchekmedyan, *Deputies Killed Dijon Kizsee After a Bike Stop. We Found 15 Similar Law Enforcement Shootings, Many Fatal*, *Los Angeles Times*, October 16, 2020.

<sup>134</sup> Committee on Revision of the Penal Code, Meeting on September 2, 2022, Part 1, 1:14:35–1:18:39.

<sup>135</sup> See Written Submission of Lizabeth Rhodes to Committee on Revision of the Penal Code for the Meeting on September 2, 2022; Libor Jany & Ben Poston, *Minor Police Encounters Plummet After LAPD Put Limits on Stopping Drivers and Pedestrians*, *Los Angeles Times*, November 14, 2022.

<sup>136</sup> See NYU School of Law Policing Project, *An Assessment of Traffic Stops and Policing Strategies in Nashville* (2018).

<sup>137</sup> Public Policy Institute of California, *Racial Disparities in Traffic Stops* Virtual Event, October 13, 2022.

<sup>138</sup> *Id.* at 0:30:58–0:31:31.

<sup>139</sup> *Id.* at 0:25:20–0:30:10.

<sup>140</sup> Hilary Rau et al., *Redesigning Public Safety: Traffic Safety*, Center for Policing Equity, 4 (September 2022).



Alternatives to police enforcement of traffic laws are still developing but include the establishment of civilian traffic enforcement agencies, the use of voucher programs to fix equipment issues, investments in improvements to road safety infrastructure, and the use of automated enforcement systems with appropriate oversight.<sup>141</sup>

The Committee's recommendation to limit the use of traffic stops for technical, non-safety-related offenses is in line with similar reforms being undertaken throughout the country, and can help to alleviate racial disparities, improve perceptions of the fairness of our criminal legal system, and encourage the development of more effective policing strategies.

### **EMPIRICAL RESEARCH**

A 2021 report by the National Institute of Health which analyzed traffic stop data and vehicle collision death rates in 33 states concluded that increased use of traffic stops did not decrease fatal car crashes.<sup>142</sup> While other research has found that increased traffic enforcement is associated with decreases in traffic crashes and injuries from accidents,<sup>143</sup> a recent study found that increasing traffic stops for violations that actually endangered public safety (as opposed to regulatory, equipment, or investigatory stops) resulted in better traffic safety outcomes.<sup>144</sup>

A study of traffic stops in Nashville, Tennessee, conducted by the New York University School of Law Policing Project which examined the effectiveness of using traffic enforcement as a crime fighting strategy concluded that traffic stops did not have a significant impact on short- or long-term crime trends.<sup>145</sup> As a result, the Nashville Police Department shifted its strategy to focus on unsafe driving and traffic stops fell by nearly 90% over the next 5 years.<sup>146</sup> While racial disparities persisted, the overall impact on communities of color was significantly diminished because there were dramatically fewer stops.<sup>147</sup>

A recent report by Catalyst California (formerly the Advancement Project) concluded that counties dedicate billions of dollars per year towards traffic policing and that much of the time spent on traffic policing is for infractions unrelated to public safety.<sup>148</sup> The report additionally concluded that the Sacramento County Sheriff's Department devoted nearly two-thirds of the total amount of time it spent conducting traffic stops to stops for non-moving and equipment violations and that Sheriff's Departments in San Diego and Los Angeles spent 40% of traffic enforcement time on these types of violations.<sup>149</sup>

### **INSIGHTS FROM OTHER JURISDICTIONS**

President Biden's May 2022 executive order on policing called for "ending discriminatory pretextual stops."<sup>150</sup> Several jurisdictions across the country have already begun to implement reforms limiting traffic stops:

<sup>141</sup> See *Investing in Evidence-Based Alternatives to Policing: Non-Police Responses to Traffic Safety*, Vera Institute of Justice (August 2021).

<sup>142</sup> Anuja L. Sarode et al., *Traffic Stops Do Not Prevent Traffic Deaths*, *Journal of Trauma Acute and Care Surgery* 14–7, Nat'l Inst. Health (July 2021).

<sup>143</sup> Jordan B. Woods, *Traffic Without the Police*, 73 *Stanford Law Review* 1471, 1536 (2021) (citing studies).

<sup>144</sup> Mike Dolan Fliss et al., *Re-Prioritizing Traffic Stops to Reduce Motor Vehicle Crash Outcomes and Racial Disparities*, *Injury Epidemiology* 7:3 (2020) (finding that prioritization of safety-related stops resulted in a decrease in the number of total crashes (-13%), injurious crashes (-23%), and traffic fatalities (-28%).)

<sup>145</sup> NYU School of Law Policing Project, *An Assessment of Traffic Stops and Policing Strategies in Nashville*, 3 (2018). See also James Cullen, *Ending New York's Stop-And-Frisk Did Not Increase Crime*, Brennan Center for Justice, April 11, 2016 (finding that ending the widespread "stop-question-frisk" practice in New York City did not lead to a rise in crime.)

<sup>146</sup> See Samantha Max, *Nashville Police Report Major Drop in Traffic Stops Following Accusations of Racial Bias*, WPLN News, March 25, 2021.

<sup>147</sup> *Id.*

<sup>148</sup> Chauncey Smith et al., *Reimagining Community Safety in California: From Deadly and Expensive Sheriffs to Equity and Care-Centered Wellbeing*, Catalyst California and ACLU SoCal, 10–12, 18–20 (October 2022).

<sup>149</sup> *Id.*

<sup>150</sup> Exec. Order No. 14074, 87 *Federal Register* 32945 (May 31, 2022).

### Legislation

- In 2020, the state of Virginia passed legislation prohibiting stops for traffic violations related to window tinting, loud exhausts, and lighting equipment, among others.<sup>151</sup>
- In 2021, the Philadelphia, Pennsylvania City Council implemented a policy prohibiting traffic stops for infractions related to vehicle registration, lighting equipment, window obstructions, and car bumpers.<sup>152</sup>
- In 2021, the Pittsburgh, Pennsylvania City Council approved legislation prohibiting stops for violations related to registration, license plates, and lighting equipment.<sup>153</sup>
- In 2022, the Oregon legislature passed a bill prohibiting police officers from conducting traffic stops for vehicle lighting equipment violations.<sup>154</sup>

### Police department policies

- In 2020, the Chief of the Lansing, Michigan Police Department issued new guidelines directing officers to focus traffic stops on offenses that endanger public safety, and not to conduct traffic stops for offenses such as cracked windshields, loud exhausts, and illegal window treatments.<sup>155</sup>
- In 2021, the Minneapolis Police Department revised its traffic stop policy to prohibit officers from stopping people for certain low level traffic infractions, including expired tabs, and inoperable lighting equipment.<sup>156</sup> Notably, the policy allows officers to issue drivers vouchers to cover the costs of fixing certain lighting equipment issues.<sup>157</sup>
- In 2022, the Chief of the Seattle Police Department identified several equipment violations that would no longer be treated as primary reasons to make a traffic stop, including expired or missing registration, missing license plates, and bicycle helmet violations.<sup>158</sup>

### California reforms

In California, the City of Berkeley,<sup>159</sup> as well as law enforcement agencies in Los Angeles,<sup>160</sup> Oakland,<sup>161</sup> San Francisco,<sup>162</sup> have developed (or are in the process of developing) policies that limit traffic enforcement for low-level offenses.

<sup>151</sup> Virginia SB 5029 (Lucas), 2020 Special Session I.

<sup>152</sup> City of Philadelphia Bill No. 210636-A

<sup>153</sup> See Julia Felton, *Pittsburgh Bans Traffic Stops for Minor Violations*, TribLIVE.com, December 28, 2021. See also City of Pittsburgh, *Pennsylvania Code of Ordinances § 503.17*.

<sup>154</sup> Senate Bill 1510, 81st Oregon Legislative Assembly - 2022 Regular Session.

<sup>155</sup> Lansing Police Department, *Internal Memorandum Re: New Guidelines for Traffic Stops* (July 2020).

<sup>156</sup> See *Minneapolis Police Department Policy and Procedure Manual*, No. 7-601 (October 8, 2021).

<sup>157</sup> *Id.*

<sup>158</sup> Letter from Seattle Police Department Chief Adrian Z. Diaz to Inspector General Lisa Judge, January 14, 2022.

<sup>159</sup> Rigel Robinson & Ben Gerhardstein, *How Berkeley is De-Policing Traffic Enforcement*, Vision Zero Cities Journal (2021).

<sup>160</sup> Los Angeles Police Department Manual Section 1/240.06, *Policy — Limitation on Use of Pretextual Stops*. The policy directs officers to make stops for minor equipment violations only when the violation interferes with public safety, to articulate the public safety reason for the stop on their body-worn video, to not conduct pretext stops unless they are acting on articulable information regarding a serious crime, and to limit all their actions during stops to the original basis of the stop in most circumstances.

<sup>161</sup> See Oakland Police Department, Office of the Chief of Police, *2016–18 Racial Impact Report* (2019) (finding that a directive that Oakland Police officers focus less on enforcement of vehicle code violations and more on conducting intelligence-led stops led to a 43% and 35% reduction in the number of Black and Hispanic people stopped respectively.)

<sup>162</sup> San Francisco Police Department, *Draft General Order 9.01*. The proposed order limits the use of pretext stops, stops for minor offenses, and searches and questioning after stops.

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# 5. Limit Consent Searches During Traffic Stops

# Limit Consent Searches During Traffic Stops

## RECOMMENDATION

Searches of people and vehicles during traffic stops in which the only legal justification for the search is the person’s consent have very low rates of discovering evidence of crime and are disproportionately directed at people of color.

The Committee therefore recommends the following:

Allow police officers to request permission to search during traffic stops only when the officer has reasonable suspicion to believe the search will uncover evidence of a crime.

## RELEVANT STATUTES

Penal Code § 13519.4

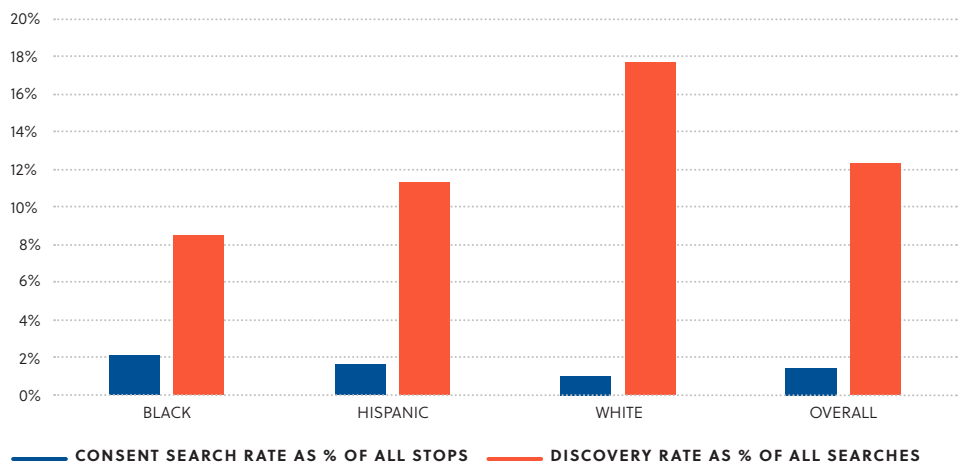
## BACKGROUND AND ANALYSIS

While traffic infractions are generally minor offenses that carry a maximum punishment of a fine, they can sometimes lead to more intrusive interactions with police, including searches of people or vehicles. The legal justifications for these searches can vary,<sup>163</sup> but in many instances – over 21,000 police searches in 2020 alone – the only basis for the search is the stopped person’s consent.<sup>164</sup>

Police officers have unlimited discretion to ask people for consent to a search and are not required to identify any facts supporting a suspicion of wrongdoing.<sup>165</sup> But searches based only on a person’s consent are inefficient. California law enforcement reported that only 12% of consent searches resulted in the discovery of anything illegal.<sup>166</sup> And police officers perform consent-only searches in stops of Black and Hispanic people at disproportionate rates than in stops of white people, despite it being less likely that they will find contraband or evidence.<sup>167</sup>



### CONSENT SEARCH RATE & DISCOVERY RATE BY RACE (2020)



<sup>163</sup> Officers reporting to RIPA can select from 13 different search criteria including, officer safety, search warrant, incident to arrest, and vehicle inventory. Racial & Identity Profiling Advisory Board, *Annual Report 2022*, 133, footnote 259.

<sup>164</sup> The RIPA Board reported 39,709 total consent-only searches in 2020, 53.4% of which occurred during traffic stops. *Id.* at 102, 105.

<sup>165</sup> See *Florida v. Royer*, 460 U.S. 491 (1983); *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973).

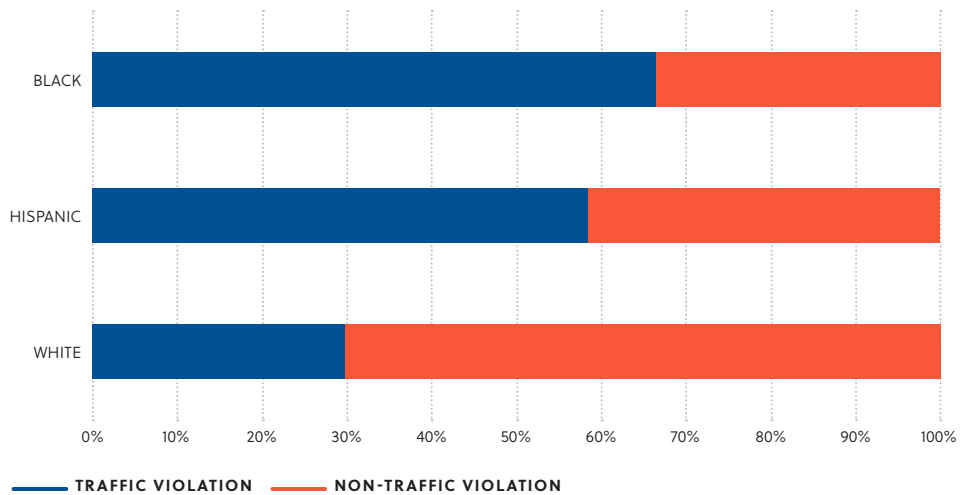
<sup>166</sup> Racial & Identity Profiling Advisory Board, *Annual Report 2022*, 103, 105.

<sup>167</sup> *Id.* at 55.

Source: California Racial & Identity Profiling Advisory Board, *Annual Report 2022 Appendices*, 30-31, Tables A.15 and A.16.

Data show that when consent-only searches are performed, the underlying reason for the initial police contact is more likely to be traffic enforcement for people of color than it is for white people.<sup>168</sup>

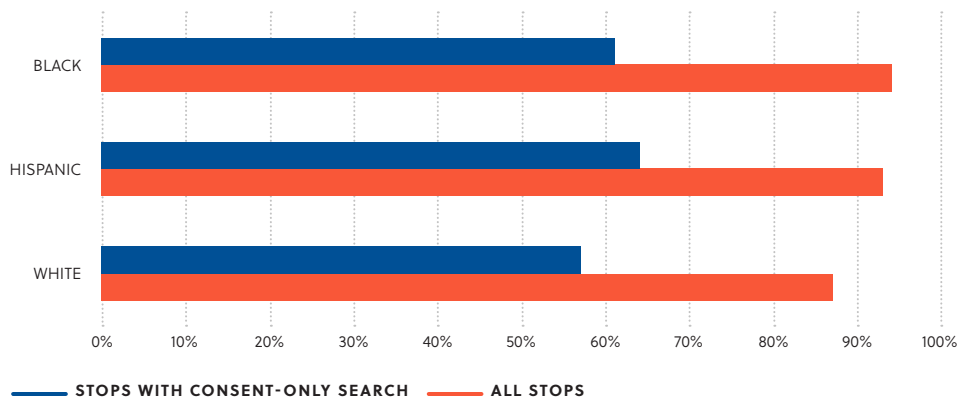
**REASON FOR STOPS WITH CONSENT-ONLY SEARCHES BY RACE (2020)**



Source: California Racial & Identity Profiling Advisory Board, *Annual Report 2022*, 106, Figure 44.

Data also indicate that stops with consent-only searches often lead to officers releasing the person without issuing a citation or warning, suggesting that these stops are done for pretextual reasons and not to correct a traffic violation. In the vast majority of cases where people were stopped for traffic offenses, police issued a citation or a warning, and only 7% were released with no action.<sup>169</sup> But in stops in which officers conducted a consent-only search, people were released with no action taken in 39% of stops, and the rate varied by race – which suggests that many stops with consent searches had no real underlying basis and were merely an excuse to initiate a search.<sup>170</sup>

**PROPORTION OF STOPS WITH FURTHER ACTION TAKEN BY RACE (2020)**



Source: California Racial & Identity Profiling Advisory Board, *Annual Report 2022*, 107, Figure 45, and 44, Figure 15.

168 *Id.* at 105–06.  
 169 *Id.* at 43.  
 170 *Id.* at 106–07.

California's largest law enforcement agency, the California Highway Patrol, issued a moratorium on consent searches from 2001 to 2006, upon the recommendation of a team of CHP managers and a pending federal lawsuit alleging racial discrimination.<sup>171</sup> Then CHP Commissioner D.O. Helmick said that asking people for permission to search their cars was "a lazy way of doing your work."<sup>172</sup> Analysis of 2019 RIPA data performed by the Public Policy Institute of California found that the likelihood of being searched and the racial disparities in search rates are notably smaller in traffic stops made by CHP than in those made by local agencies, but that searches performed by CHP have higher hit rates.<sup>173</sup>

The Racial Identity and Profiling Advisory Board, concluded that policy-makers should move to ban consent searches altogether.<sup>174</sup> At least one state, Connecticut, has passed legislation that prohibits police officers from asking for consent to search a vehicle during a traffic stop.<sup>175</sup>

In California, unless police officers have consent to search, they need probable cause that a vehicle contains evidence of criminal activity or contraband in order to conduct a warrantless search of a vehicle.<sup>176</sup> Officers are also allowed to conduct a more limited search of a vehicle when they reasonably suspect that a person is armed and dangerous.<sup>177</sup> The reasonable suspicion threshold should be extended to consent searches, so that consent-based searches are only undertaken when there is some articulable level of suspicion, as opposed to a potentially-biased hunch.

Limiting consent searches during traffic stops would reduce opportunities for bias while promoting more efficient policing strategies.

## EMPIRICAL RESEARCH

Research by the Public Policy Institute of California concluded that even controlling for circumstances unrelated to racial bias – such as the age or gender of the stopped person, or the location where the stop occurred – Black people were still 1.5 times more likely to be searched during a stop than white people.<sup>178</sup>

## INSIGHTS FROM OTHER JURISDICTIONS

A few states, including Minnesota<sup>179</sup> and New Jersey<sup>180</sup> have required that police officers have reasonable suspicion to ask for consent searches. And recently passed legislation in the state of Connecticut limits the circumstances in which police can search motor vehicles that are stopped solely for traffic violations.<sup>181</sup> Under the law, police officers may not ask for a driver's consent to conduct a search of a vehicle or its contents. Instead, any search must be (1) based on probable cause or (2) the driver's *unsolicited* consent, given in writing or recorded on body-worn equipment or dashboard camera.<sup>182</sup>

The Austin Police Department in Texas revised its consent search policy in 2012 to require that officers only request consent to search when they have an articulable reason to believe the search is necessary and likely to produce evidence related to an investigation.<sup>183</sup> The policy also requires officers to obtain supervisor approval and the signature of the person to be searched before the search is initiated.<sup>184</sup> In 2011, the

<sup>171</sup> *California Highway Patrol Bans Consent Searches Following Review of Data Collection Showing Discriminatory Pattern*, American Civil Liberties Union (April 2001).

<sup>172</sup> Maura Dolan & John M. Glionna, *CHP Settles Lawsuit Over Claims of Racial Profiling*, Los Angeles Times, February 23, 2003.

<sup>173</sup> Magnus Lofstrom et al., *Racial Disparities in Traffic Stops*, Public Policy Institute of California (October 2022).

<sup>174</sup> Racial & Identity Profiling Advisory Board, *Annual Report 2022*, 113.

<sup>175</sup> See Connecticut House Bill No. 6004, July Special Session, Public Act No. 20-1.

<sup>176</sup> *United States v. Ross*, 456 U.S. 798, 799–800 (1982).

<sup>177</sup> *Michigan v. Long*, 463 U.S. 1032, 1049 (1983).

<sup>178</sup> Magnus Lofstrom et al., *Racial Disparities in Law Enforcement Stops*, Public Policy Institute of California, 12–13 (October 2021).

<sup>179</sup> *Minnesota v. Fort*, 660 N.W.2d 415, 418–19 (2003).

<sup>180</sup> *New Jersey v. Carty*, 170 N.J. 632, 647 (2002).

<sup>181</sup> Connecticut House Bill No. 6004, July Special Session, Public Act No. 20-1.

<sup>182</sup> *Id.*

<sup>183</sup> City of Austin Police Department, *2012 Annual Racial Profiling Report*, 3 (February 2013).

<sup>184</sup> *Id.*

year before the policy was implemented, officers conducted 694 consent searches, but by 2018 (the latest year for which data is available), the number of consent searches had fallen to 69 – a 90% reduction.<sup>185</sup>

<sup>185</sup> City of Austin Police Department, *Annual Racial Profiling Report: 2018*, 4 (February 2019).

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# 6. Ensure Public Defense Counsel Before Arraignment



## Ensure Public Defense Counsel Before Arraignment

### **RECOMMENDATION**

Data show that effective legal representation at an arrested person's first court appearance reduces recidivism and saves money. Under current California law, only people who can pay for their own attorney are guaranteed legal representation prior to a court appearance. California does not currently provide appointment of public defenders for indigent people facing criminal charges until after someone's first appearance in court.

The Committee therefore recommends the following:

Require that people unable to afford their own attorney have counsel appointed within 24 hours of booking, or sufficiently before arraignment to provide meaningful representation, whichever is earlier.

To facilitate this prompt assignment of counsel, the following should be added to the Penal Code:

- A presumption that a detained person is eligible for public defender services.
- Notification to the public defender of individuals who are being held in custody after an arrest.
- Defense counsel access from local jails and courts to detained individuals prior to formal appointment of counsel, without delaying the initial hearing.
- Allow individuals to waive the right to counsel only after they have spoken to defense counsel.

### **RELEVANT STATUTES**

Penal Code §§ 810(b), 825, 849, 987, 988, 987.2(a), 987.5, 1269c  
Government Code §§ 27700–27712

### **BACKGROUND AND ANALYSIS**

Prompt assignment of counsel not only increases fairness and helps protect constitutional rights, but data show that it also has significant public safety and cost-saving benefits.

Professor Paul Heaton, Academic Director of the Quattrone Center for the Administration of Justice at the University of Pennsylvania Law School, presented the Committee with empirical evidence that “improving the quality of counsel at first appearance can realize broadly shared goals of reducing bail violations, enhancing public safety, diminishing racial disparity, and reducing the system’s imprint on people’s lives.”<sup>186</sup>

In California, unlike many other states, recently arrested people who cannot afford to hire their own attorney are not guaranteed access to a lawyer until after their first court appearance, during which a judge inquires if the person can afford counsel, and appoints counsel when necessary.<sup>187</sup> This system recently earned California a failing grade on its first appearance procedures by researchers at the Dedman School of Law.<sup>188</sup> Judge Juliet McKenna of the Superior Court of the District of Columbia, told the Committee that she could not imagine a fair and efficient criminal justice system without the prompt appointment of defense counsel, as routinely occurs in her court.<sup>189</sup>

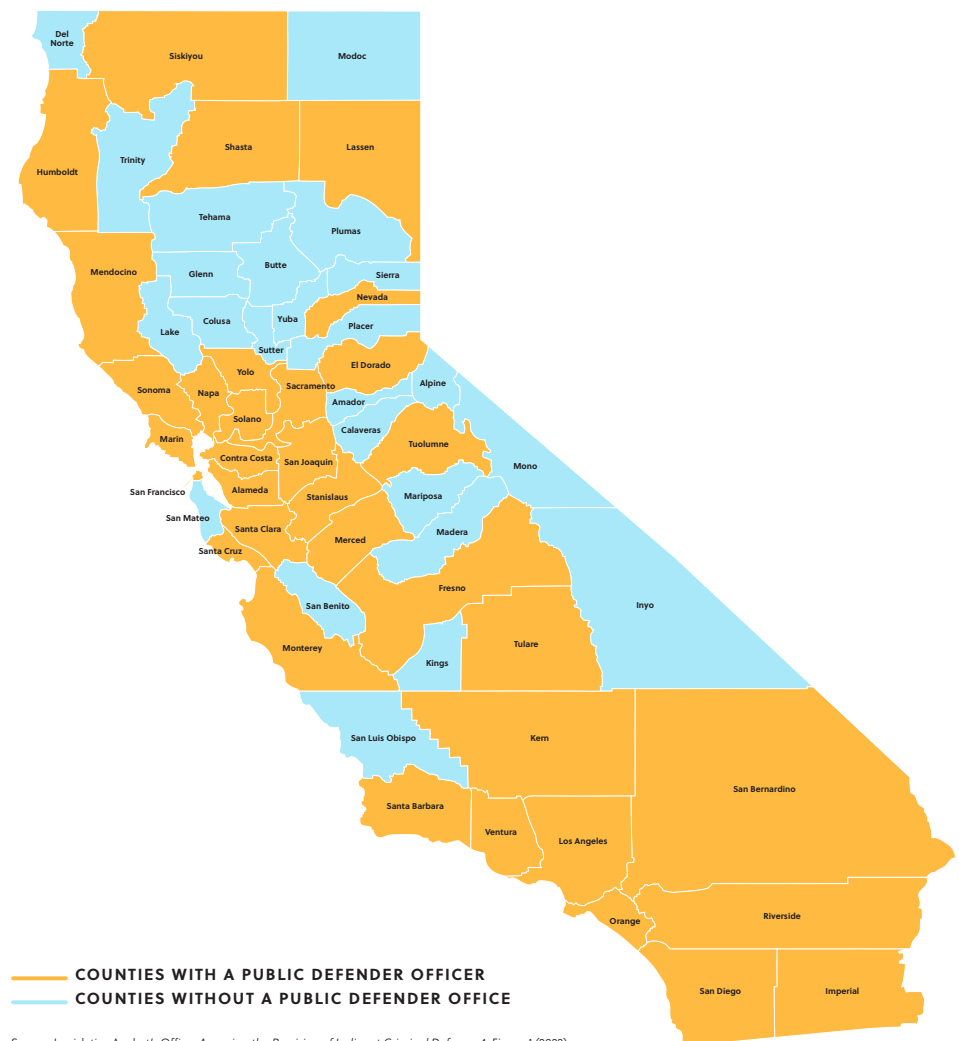
<sup>187</sup> See Penal Code § 987.

<sup>188</sup> Malia N. Brink, Jiacheng Yu, & Pamela R. Metzger, *Grading Injustice: Initial Appearance Report Cards*, Deason Criminal Justice Reform Center, 15 (September 2022).

<sup>189</sup> Committee on Revision of the Penal Code, Meeting on September 2, 2022, Part 2, 0:36:00–0:39:06

As explained to the Committee by Aditi Goel, Senior Program Manager at the Sixth Amendment Center, California is one of only 8 states that does not have a state government entity overseeing any part of trial-level indigent defense services.<sup>190</sup> California is also one of only 5 states in the nation that does not provide regular funding for trial level public defender systems.<sup>191</sup> Galit Lipa, Executive Director of the Indigent Defense Improvement Division of the Office of the State Public Defender, told the Committee that access to counsel during the early stages of a case is inconsistent across the state and nonexistent in many counties. For example, in Butte County – which does not have an institutional public defender office – people can be arrested and spend up to 10 nights in jail before seeing a lawyer because the Penal Code does not specify when counsel must be appointed.<sup>192</sup>

**CALIFORNIA PUBLIC DEFENDER OFFICES BY COUNTY**



190 Written Submission of Aditi Goel to Committee on Revision of the Penal Code for the Meeting on September 2, 2022. The other states are Arizona, Illinois, Mississippi, Nebraska, Pennsylvania, South Dakota, and Washington.

191 Written Submission of Galit Lipa to Committee on Revision of the Penal Code for the Meeting on September 2, 2022.

192 The Penal Code contains some provisions allowing a lawyer to take action on a case before arraignment. See Penal Code §§ 825(b) (specifying that an attorney may visit a person after their arrest), and 1269c (allowing attorneys to request the magistrate reduce cash bail before arraignment).

While there is no statewide data on the number of guilty pleas entered into without the assistance of counsel, according to experts and practitioners consulted by Committee staff, the practice is common throughout the state.<sup>193</sup> For example, a review of Kern County data conducted by the ACLU found that more than 75% of people went before a judge without counsel at misdemeanor arraignment over a 7-year period.<sup>194</sup> At least 30% of these people (more than 67,000 cases) pled guilty or no contest without counsel.<sup>195</sup> According to information submitted to the Committee by the Immigrant Legal Resource Center, pleading guilty without counsel is especially treacherous for noncitizens – who account for approximately 12% of all defendants in the state – because they may face immigration consequences as a result of their conviction, but not be given sufficient information about them before entering a guilty plea.<sup>196</sup>

A few California public defender offices have developed early representation programs that allow attorneys to begin assisting people much earlier in the process and before they even appear before a judge.<sup>197</sup> At the September 2022 meeting, Carlie Ware, who supervises an early representation unit in Santa Clara County, outlined the building blocks of such a program, including information sharing between county agencies and access to the people held in custody.<sup>198</sup> Santa Clara County Assistant District Attorney David Angel endorsed the practice of early appointment of counsel in Santa Clara and emphasized that public defenders and prosecutors are often aligned on assigning counsel as early as possible because arrested people are released from custody sooner with access to more services, improving public safety.<sup>199</sup> Whether counties rely on a public defender office or a panel of private attorneys to provide indigent defense, the building blocks outlined by Ms. Ware can be used to ensure effective representation at the earliest stages of a case.

Some public defender offices have incorporated social workers to facilitate meaningful access to counsel.<sup>200</sup> These and other professionals may be better suited to the information-gathering and needs-assessments that occur during a first meeting with a client and similar models should continue to be explored in California. Development of these models can facilitate further expansion of holistic defense – a model in which public defenders work with interdisciplinary teams to address the underlying causes and collateral impacts of criminal legal involvement – which research has shown reduces incarceration rates, sentence lengths, and pretrial detention without harming public safety.<sup>201</sup>

California recently passed legislation improving the appointment of counsel process in juvenile cases. Assembly Bill 2644 (Holden) requires public defenders to be notified of all juvenile bookings within 2 hours. Extending similar reforms to the adult system can improve public safety and generate cost-savings, while recognizing that people should be treated equally regardless of how much money they have.

## EMPIRICAL RESEARCH

Providing legal assistance earlier in the criminal legal process can have important public safety benefits. Recent research by Professor Paul Heaton using data from nearly 100,000 cases in Philadelphia found that people who were provided assistance from the public defender's office before their bail hearings were 64% less likely to have

<sup>193</sup> See Letter from ACLU of Northern California and Southern California to the Committee on Revision of the Penal Code for the Meeting on September 2, 2022.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> See Letter from the Immigrant Legal Resource Center to the Committee on Revision of the Penal Code for the Meeting on September 2, 2022. Defense attorneys are required to provide accurate advice about the immigration consequences of a plea to their clients. *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010); Penal Code § 1016.3. When a person pleads guilty to an offense without counsel, courts are only required to give them a general advisement that the plea can carry negative immigration consequences. Penal Code § 1016.5.

<sup>197</sup> Public defender offices in Contra Costa, Sacramento, Santa Clara, and Santa Cruz have all developed early representation programs. See *Early Representation, Contra Costa Public Defenders; New Public Defender Program Wins Merit Award, Sac County News*, November 12, 2020; Robert Salonga, *'It Results in More Justice': New Santa Clara County Public Defender Program Looks to Even the Field at Arraignments*, *The Mercury News*, February 29, 2020; Santa Cruz County Officer of the Public Defender, *Early Representation*.

<sup>198</sup> Committee on Revision of the Penal Code, Meeting on September 2, 2022, Part 2, 0:39:14–0:45:35.

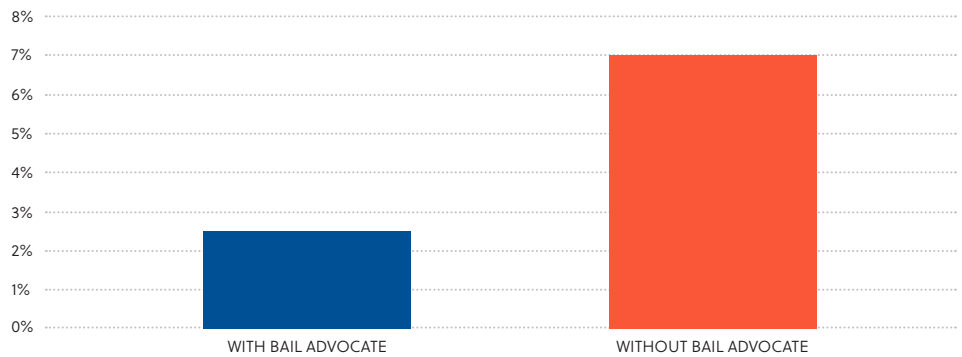
<sup>199</sup> *Id.* at 0:45:48–0:51:10.

<sup>200</sup> See, e.g., *New Public Defender Program Wins Merit Award, Sac County News* (November 12, 2020) (describing the Sacramento County Public Defender Office's Pretrial Support Project, which uses law students and social workers to conduct needs assessments of arrested individuals within 24 hours of booking, and provide linkage to services and case management.)

<sup>201</sup> See James M. Anderson, Maya Buenaventura, & Paul Heaton, *The Effects of Holistic Defense on Criminal Justice Outcomes*, *Harvard Law Review*, Vol. 132, No. 3 (January 2019).

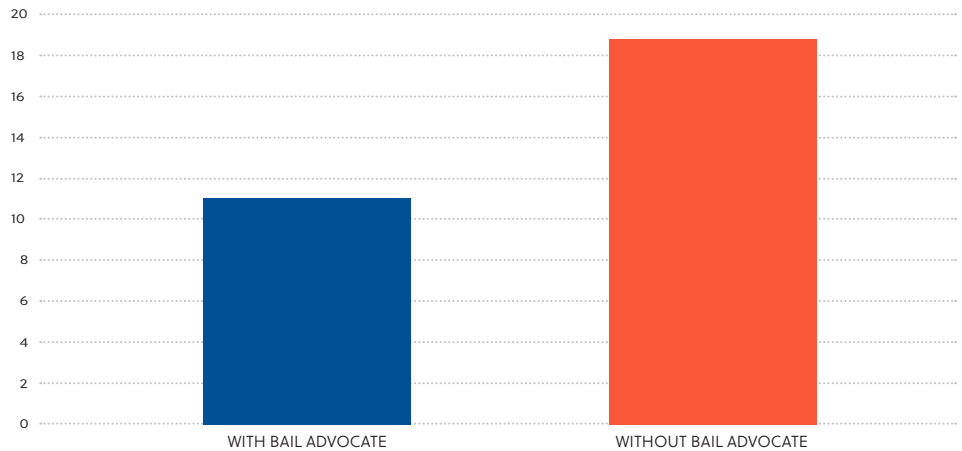
a bail violation and 26% less likely to be arrested in the future.<sup>202</sup> Representation by a bail advocate was also associated with a decrease in the likelihood of a guilt determination, less harsh sentences, and a reduction in racial disparities in pretrial release rates.<sup>203</sup>

**PHILADELPHIA ENHANCED PUBLIC DEFENSE STUDY: PERCENTAGE OF PEOPLE WITH BAIL REVOKED OR FORFEITED**



Source: Presentation by Professor Paul Heaton to Committee on Revision of the Penal Code, September 2, 2022.

**PHILADELPHIA ENHANCED PUBLIC DEFENSE STUDY: NEW PRETRIAL ARRESTS PER 100 PEOPLE**



Source: Presentation by Professor Paul Heaton to Committee on Revision of the Penal Code, September 2, 2022.

202 Paul Heaton, *Enhanced Public Defense Improves Pretrial Outcomes and Reduces Racial Disparities*, Indiana Law Journal, Vol. 96, Iss. 3, Article 2, 724–25 (2021).

203 *Id.* at 725–28.

204 See National Legal Aid and Defender Association, *Access to Counsel at First Appearance: A Key Component of Pretrial Justice*, 15–25 (2020).

205 Danielle Soto & Mark Lipkin, *Representation at Arraignment: The Impact of “Smart Defense” on Due Process and Justice in Alameda County*, Impact Justice, 20 (2018).

206 Alena Yarmosky, *The Impact of Early Representation: An Analysis of the San Francisco Public Defender’s Pre-Trial Release Unit*, California Policy Lab (June 2018).

207 Bryan L. Sykes, Eliza Solowiej, & Evelyn J. Patterson, *The Fiscal Savings of Accessing the Right to Counsel Within Twenty-Four Hours of Arrest: Chicago and Cook County*, 2013, 5 UC Irvine Law Review 813, 829 (2015).

People represented by counsel at their first court appearance are more likely to be released pretrial<sup>204</sup> and this can result in significant cost savings. After the Alameda County Public Defender’s Office began to represent people at their first court hearing, the pretrial release rate increased from 1% to 20%.<sup>205</sup> A study of a similar program in San Francisco showed an increase of releases at arraignment from 14% to 28%, and an estimated savings of more than 11,000 jail bed-days per year.<sup>206</sup> A study of early representation in Cook County, Illinois, found that providing counsel within 24 hours of arrest would save between \$12 and \$44 million per year.<sup>207</sup>

## INSIGHT FROM OTHER JURISDICTIONS

Twenty-four states, including Illinois, Florida, and New York, require that the state provide counsel at a person's initial appearance.<sup>208</sup>

- *Massachusetts*: At the September 2022 Committee meeting, Aditi Goel described the appointment of counsel process in Massachusetts, which requires courts to determine whether people are eligible for appointed counsel prior to the first appearance and to appoint attorneys for those who are eligible.<sup>209</sup> An attorney must enter a notice of appearance on or before the arraignment so that a person has a meaningful opportunity to consult with their attorney.<sup>210</sup>
- *Washington D.C.*: Judge Juliet J. Mckenna of Washington D.C. also explained her jurisdiction's rules, which require appointment of and an opportunity to consult with counsel prior to an accused person's initial appearance.<sup>211</sup>
- *Florida*: In addition to mandating that an arraignment take place within 24 hours after arrest,<sup>212</sup> Florida law also requires that counsel be provided as soon as possible after arrest.<sup>213</sup> The booking officer must immediately notify the public defender if a person is indigent and desires counsel and then the public defender may interview that person, offer advice, and represent the person until a formal finding of indigency and appointment by the court at arraignment.<sup>214</sup>

208 Malia N. Brink, Jiacheng Yu, & Pamela R. Metzger, *Grading Injustice: Initial Appearance Report Cards*, Deason Criminal Justice Reform Center, 65 (September 2022). Two United States territories, Guam and the Virgin Islands also require counsel at an initial appearance. *Id.* at 22, 57. Ohio requires it for any offense punishable by more than six months in jail. *Id.* at 47. Like many other states, California received an "F" grade on its policies around initial court appearances for arrested people. *Id.* at 15.

209 Committee on Revision of the Penal Code, Meeting on September 2, 2022, Part 2, 0:32:22–0:33:19; Mass. Gen. Law c. 211D, § 5 (2022).

210 Mass. R. Crim. Pro. Rule 7(c)(1).

211 Committee on Revision of the Penal Code, Meeting on September 2, 2022, Part 2, 0:33:38–0:39:06. See also D.C. Superior Court Criminal Rule 44(a); D.C. Superior Court Criminal Rule 5(c) ("The court must allow the defendant reasonable time and opportunity to consult counsel.")

212 Fla. R. Crim. P. 3.130(a).

213 Fla. R. Crim. P. 3.111(a); 3.130(c)(1). See also John P. Gross, *The Right to Counsel But Not the Presence of Counsel: A Survey of State Criminal Procedures for Pre-trial Release*, 69 Florida Law Review 831 (2018).

214 Fla. R. Crim. P. 3.111(c)(2)-(4).

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# 7. Modernize the Competency to Stand Trial System

## Modernize the Competency to Stand Trial System

### RECOMMENDATION

California’s approach to competency to stand trial – the process for determining whether an accused person’s mental health condition so impairs their understanding of the legal system that they cannot be prosecuted – results in long delays in providing treatment and does little to improve public safety or mental health outcomes.

The Committee therefore recommends the following:

1. Require judges to determine whether restoration to competency is in the interests of justice by considering all relevant circumstances of the offense, including the likelihood and length of incarceration if convicted. A presumption against restoration would apply to: Penal Code section 1170(h) felonies, wobblers, and assault and robbery offenses. If a judge concludes that restoration is not in the interests of justice, the court can then consider diversion, a conservatorship, or other existing treatment options.
2. Require court-appointed mental health experts to return competency evaluations within 30 days. The court may extend the time for good cause.
3. Require a judge to determine – and court-appointed mental health experts to opine – whether a person found incompetent to stand trial has a substantial probability of attaining competency within the required time frame. In addition, require the court-appointed mental health expert to evaluate their suitability for mental health diversion.

### RELEVANT STATUTES

Penal Code §§ 1001.36, 1368, 1369, 1369.5, 1370, 1370.1

### BACKGROUND AND ANALYSIS

California’s approach to competency to stand trial is broken.<sup>215</sup> This system – which considers whether an accused person’s mental health condition prevents them from understanding the proceedings against them – is required by due process, but its core working principles have not been updated in decades. The current system does not provide long-term treatment or improve safety. People who are found incompetent and then restored to competency often cycle back through the very same process – over a 10 year period, one-third of all people who were restored to competency and discharged from the Department of State Hospitals were later arrested and once again found incompetent to stand trial.<sup>216</sup> Many were readmitted to DSH multiple times.<sup>217</sup> The number of people found incompetent with more than 14 arrests has also steadily increased.<sup>218</sup> Once returned to court after being found competent at the state hospital, people are most likely to be sent back into the community – only 24% of people found incompetent to stand trial are sent to prison – and 70% of people restored to competency are rearrested within 3 years.<sup>219</sup>

<sup>215</sup> While the process for determining competency for a person with a developmental disability is largely the same as the process for a person with serious mental illness, the overall number of commitments is much smaller: between June 2021 and June 2022, the Department of Developmental Services received about 6 commitments a month while the Department of State Hospitals received an average of 400 referrals per month. The current average wait time to be placed at a DDS facility is 27 days. *Stiavetti v. Clendenin*, Alameda County Superior Court Case No. RG15-779731, Decl. of Sherrie Molina, July 14, 2022, ¶ 6.

<sup>216</sup> Data provided to Committee staff by DSH and covers FY 2012–13 to FY 2021–22.

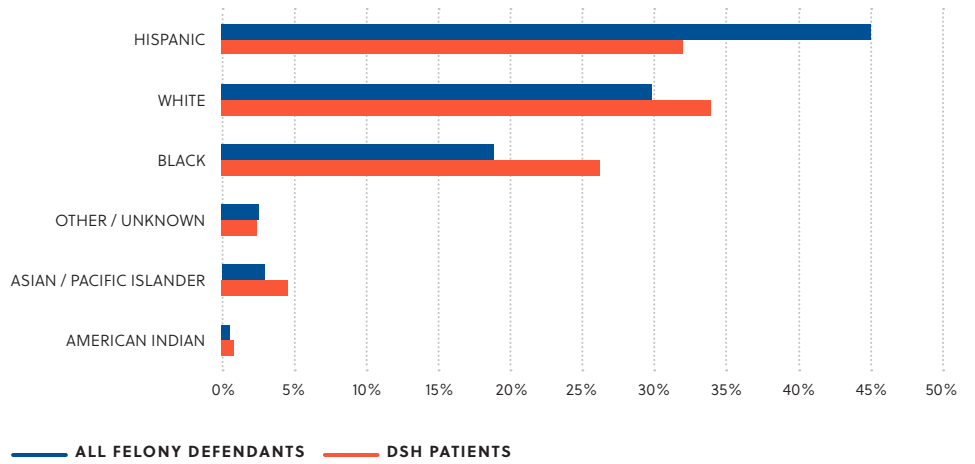
<sup>217</sup> *Id.*

<sup>218</sup> Barbara E. McDermott, Katherine Warburton, & Chloe Auletta-Young, *A Longitudinal Description of Incompetent to Stand Trial Admissions to a State Hospital*, CNS Spectrums, (25): 232 (2020).

<sup>219</sup> Incompetent to Stand Trial Solutions Workgroup, *Report of Recommended Solutions*, 11 (November 2021).

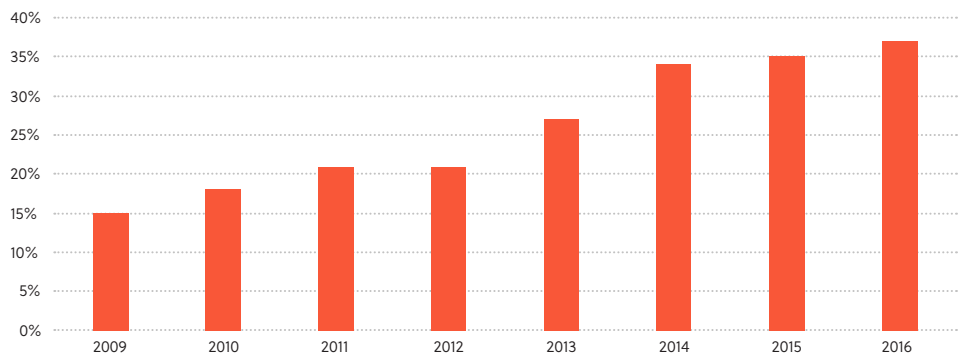


**RACE OF FELONY DEFENDANTS AND DSH PATIENTS FOUND INCOMPETENT TO STAND TRIAL**



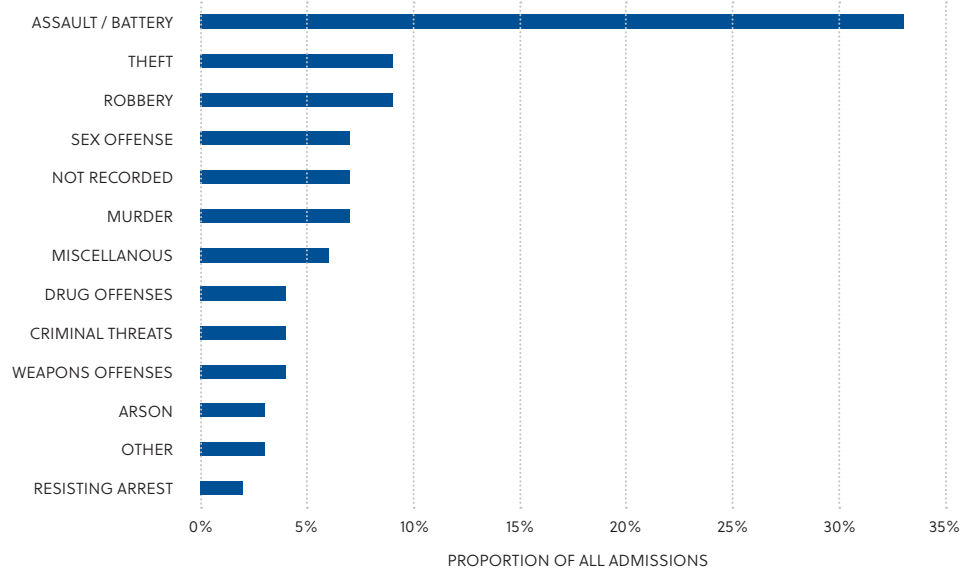
Source: Felony defendant data is from 2020 and sourced from Judicial Council of California, *Disposition of Criminal Cases According to the Race and Ethnicity of the Defendant*. State hospital data is from DSH, *2022-23 Governor's Budget Proposal*, 22, and covers FY 2020-21.

**INCOMPETENT TO STAND TRIAL ADMISSIONS TO NAPA STATE HOSPITAL WITH AT LEAST 15 PRIOR ARRESTS**



Source: McDermott, Warburton, and Auletta-Young, *A Longitudinal Description of Incompetent to Stand Trial Admissions to a State Hospital*, Table 1.

**CHARGED OFFENSES FOR INCOMPETENT TO STAND TRIAL ADMISSIONS TO NAPA STATE HOSPITAL (2009–2016)**



Source: McDermott, Warburton, and Auletta-Young, *A Longitudinal Description of Incompetent to Stand Trial Admissions to a State Hospital*, 226. "Other" offenses include kidnapping, white collar crimes, major driving offenses, and escape. "Miscellaneous" offenses include vandalism and disorderly conduct.

The process to achieve these outcomes is barely functioning. In the last 10 years, the number of people found incompetent to stand trial in California has far outpaced the state’s ability to provide timely services in response. The waitlist for placement at the state hospital – which only treats people with felony charges – has increased from 426 in 2014 to 1,737 in August 2022 and the average wait time for placement is 5 months.<sup>220</sup> The waitlist has grown even as the state made an additional 1,380 restoration beds available over the last decade<sup>221</sup> and spent \$100 million to expand mental health diversion for people likely to become incompetent.<sup>222</sup> The delays have resulted in a court order requiring the state to reduce the time it takes to begin competency restoration.<sup>223</sup>

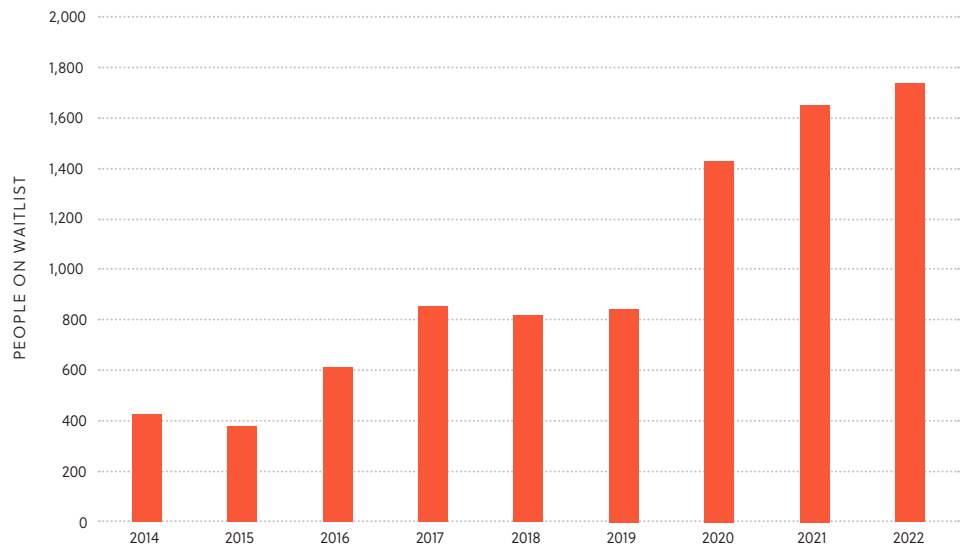
<sup>220</sup> *Stiavetti v. Clendenin*, Alameda County Superior Court Case No. RG15779731, Respondent Clendenin’s Post-Judgment Status Report for Progress Point One, October 27, 2022.

<sup>221</sup> IST Workgroup Report at 12.

<sup>222</sup> *Id.*

<sup>223</sup> *Stiavetti v. Clendenin*, 65 Cal.App.5th 691 (First Appellate District 2021). At least a dozen states, including California, have been sued for failing to conduct the competency restoration process within a “reasonable period of time” as required by the United States constitution. See Hallie Fader-Towe and Ethan Kelly, *Just and Well: Rethinking How States Approach Competency to Stand Trial*, Council of State Governments Justice Center, 4 (October 2020). Many still struggle to comply with court orders. For example, the state of Washington has paid more than \$100 million in contempt fines. See *Trueblood et al v. Washington Department of Social and Health Services*, Case No. 2:14-cv-01178, Settlement Agreement, August 16, 2018.

## WAITLIST FOR COMPETENCY RESTORATION



Source: Department of State Hospitals, Division of Hospital Strategic Planning and Implementation, *JST Waitlist by Fiscal Year* (2014–2020 data); *Stiavetti v. Clendenin*, Alameda County Superior Court Case No. RG15779731, Resp't Clendenin's Post-Judgment Status Report for Progress Point One, Oct. 27, 2022 (2021–2022 data). Data from 2014 to 2020 is reported from the last week of each calendar year and data from 2021 to 2022 is reported from the last week of August.

This experience shows that California is putting too many people through the competency restoration process for little to no long-term benefit for them or to public safety. Dr. Katherine Warburton, Statewide Medical Director at the California Department of State Hospitals, explained to the Committee that the competency restoration process does nothing to interrupt cycles of criminal legal involvement because the goal of competency restoration is only to achieve a basic understanding of the court process, not to provide continuing care. Despite the tremendous resources spent on restoring people to competency, people, as Dr. Warburton put it, “often end up worse off than when they started.”<sup>224</sup>

A large cause of the problem is that once someone is determined to be incompetent in a felony case, the judge has no choice but to commit that person to the state hospital for restoration, even if other treatment options would be cheaper, more effective, and more protective of public safety. The competency system has become a catchall for a large number of people with mental health issues that come before the criminal court. As panelist Dr. Daniel Murrie, an expert on competency practices across the country, told the Committee, there are “far, far better approaches to linking people with the services they need.”<sup>225</sup>

For example, Judge Steven Leifman explained that in Miami-Dade County, people charged with nonviolent felonies are put in a diversion program once stabilized, foregoing restoration and prosecution altogether, which has ultimately resulted in better outcomes.<sup>226</sup> Judge James Bianco noted that Los Angeles County has successfully released people charged with serious or violent cases to diversion, rather than sending them to the state hospital.<sup>227</sup> And though California recently changed

<sup>224</sup> Committee on Revision of the Penal Code, Meeting on May 17, 2022, Part 1, 0:22:48–0:23:08.

<sup>225</sup> *Id.* at 1:00:03–1:00:07.

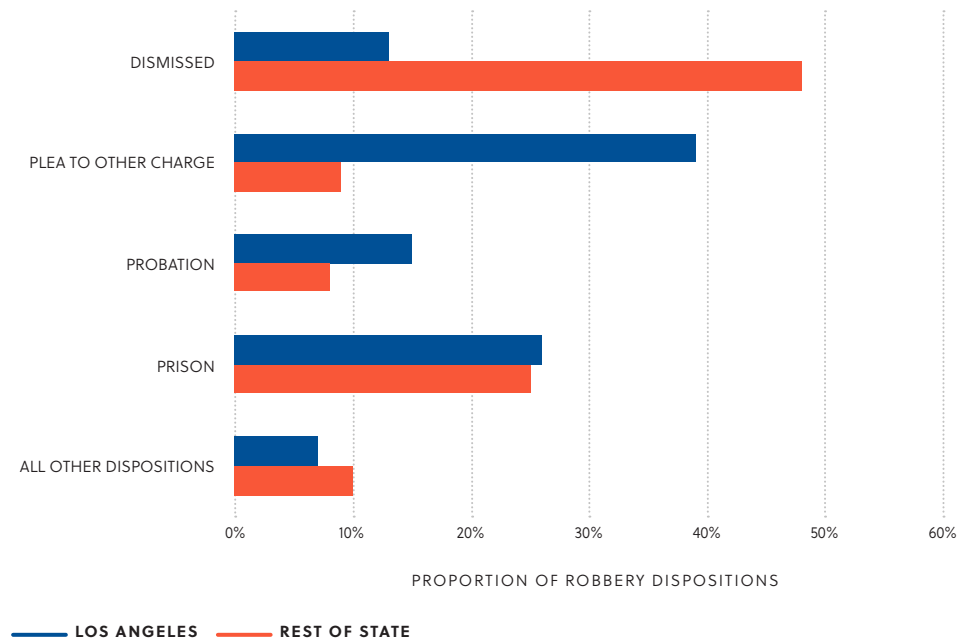
<sup>226</sup> *Id.* at 0:57:47–0:58:24. See also Miami Foundation for Mental Health, *Jail Diversion: The Miami Model*; Miami-Dade Forensic Alternative Center, *Pilot Program Status Report* (August 2010).

<sup>227</sup> Committee on Revision of the Penal Code, Meeting on May 17, 2022, Part 2, at 0:01:26–0:01:48.

the Penal Code to stop attempting to restore competency for people charged with misdemeanors,<sup>228</sup> Teresa Pasquini, a parent to a son with schizophrenia who cycled through the incompetency process, explained that “a felony charge is not the whole story and must not be the main driver of immediate solutions.”<sup>229</sup>

To better address public safety and long-term mental health treatment for people found incompetent to stand trial, judges should be required to determine whether restoration to competency is in the interests of justice for almost all cases. A judge would not make this determination for offenses that are already excluded under the existing mental health diversion statute, which includes offenses such as murder and numerous sex offenses.<sup>230</sup> Presumptions against restoration should apply to Penal Code section 1170(h) offenses, wobbler offenses, and certain assault and robbery offenses. These latter offenses are some of the most common for which restoration to competency is undertaken, and as noted above, approximately 70% of people restored to competency receive short sentences or the dismissal of charges, suggesting that even people charged with these offenses are a low risk to public safety.

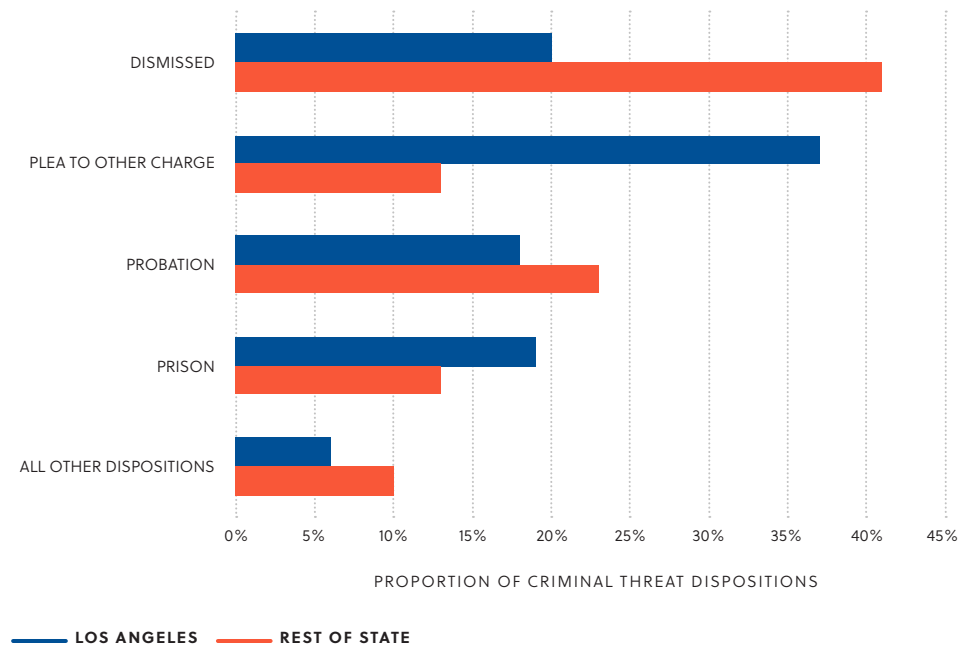
**DISPOSITIONS OF ROBBERY CHARGES AFTER RESTORATION TO COMPETENCY (FY 2016-17 TO FY 2018-19)**



Source: Data provided by Department of State Hospitals. Data is at the charge level and may not represent every charge filed against a defendant. "Probation" dispositions include both probation with no jail time as a condition and with jail time as a condition. "All other dispositions" are dispositions that totaled less than 10 and include additional dismissals, acquittals, unreported dispositions, and diversion dispositions.

228 See SB 317 (Stern 2021) (amending Penal Code § 1370.01).  
 229 Committee on Revision of the Penal Code, Meeting on May 17, 2022, Part 1, at 1:12:14–1:12:21.  
 230 See Penal Code § 1001.36(b)(2).

**DISPOSITIONS OF CRIMINAL THREAT CHARGES AFTER RESTORATION TO COMPETENCY (FY 2016-17 TO FY 2018-19)**



Source: Data provided by Department of State Hospitals. Data is at the charge level and may not represent every charge filed against a defendant. "Probation" dispositions include both probation with no jail time as a condition and with jail time as a condition. "All other dispositions" includes unknown dispositions, additional competency proceedings, and dispositions that totaled less than 10, including additional dismissals, acquittals, and diversion dispositions.

When deciding whether restoration is in the interests of justice, the court should consider all aspects of the offense, the defendant’s mental health condition and history of treatment, whether the person is likely to face incarceration if convicted, the likely length of a term of incarceration, and other relevant circumstances. And if the court finds that restoration to competency is not in the interests of justice, the court would then consider whether existing mental health diversion<sup>231</sup> or other interventions, such as assisted outpatient treatment or a civil conservatorship, are appropriate. While barriers may exist to moving people into diversion quickly in some counties, stakeholders nonetheless agree that diversion should be expanded.<sup>232</sup> If someone was not successful in these programs, prosecution could resume.

In addition to rethinking the one-size-fits all approach to competency, other reforms can make the process more efficient and focused on better long-term outcomes. Unlike in many other states, judges in California cannot conclude that someone is unlikely to be restored to competency without first requiring some attempt at restoration.<sup>233</sup> A study of discharges from 2009 to 2016 found that around 11% of people sent to the state hospital for restoration were unable to be restored.<sup>234</sup> More recent data from DSH shows that about 19% of people discharged as unrestorable had a neurocognitive diagnosis<sup>235</sup> and another 19% discharged as unrestorable had an intellectual disability diagnosis.<sup>236</sup>

231 Penal Code § 1001.36.  
 232 Sheila Tillman, Katie Herman, & Hallie Fader-Towe, *Mental Health Diversion in California Survey Analysis*, Council of State Governments Justice Center, 7 (January 2022).  
 233 In California, a judge may only consider a different outcome once a person has been committed to a treatment facility. Within 90 days after commitment to a treatment facility, the medical director makes a written report to the court concerning the defendant’s progress toward recovery of mental competence. If there is no substantial likelihood that the defendant will regain mental competence in the foreseeable future the person is returned to court. Penal Code § 1370(b)(1).  
 234 McDermott, Warburton, & Auletta-Young, *Incompetent to Stand Trial Admissions to a State Hospital*, 226 (study of data between 2009–2016 showed 10.8% of people were ultimately not restored).  
 235 98% of this group had that diagnosis as part of their primary or secondary diagnosis. Data provided to Committee staff from DSH and is from FY 2016–17 to FY 2018–19.  
 236 83% of this group had that diagnosis as part of their primary or

There are also no significant deadlines for each step in the competency process. Once a doubt is raised, the court suspends the legal proceedings and the person's competency is evaluated by a court-appointed mental health expert, also called an "alienist," who submits a report to the court.<sup>237</sup> The Penal Code and Rules of Court specify the scope and contents of the report, but there is no timeline for the completion of a competency evaluation after it is ordered by the court.<sup>238</sup> A recent survey of California counties by the Judicial Council found that this can range from 1 week to 3 months, with a 4 week average.<sup>239</sup> And if a defendant wants to be considered for mental health diversion after a finding of incompetency, they must often wait for a separate evaluation on their suitability for diversion.<sup>240</sup> People may not be receiving necessary and appropriate mental health treatment during these long delays. Other states impose a reasonable deadline on the completion of this process.<sup>241</sup>

Giving judges the discretion to determine what is the most appropriate response to a finding of incompetency is a key step to improving public safety and improving long-term outcomes for people with serious mental health issues. Improving the efficiency and scope of the evaluation process will also bring predictability to a discrete part of the process and help connect people to appropriate treatment sooner.

## EMPIRICAL RESEARCH

Between 2009 and 2016, assault, theft, and robbery were the three most commonly charged offenses for people sent to the state hospital for competency restoration, comprising almost 50% of the charged offenses.<sup>242</sup> People admitted with these charges were also more likely to have had extensive arrest histories, suggesting the current competency restoration process does not interrupt criminal legal involvement.<sup>243</sup>

## INSIGHTS FROM OTHER JURISDICTIONS

A group of national experts, including psychiatrists, judges, and advocates, partnered with the Council of State Governments Justice Center, the American Psychological Foundation, and the National Center for State Courts, to recommend strategies for states to improve their competency process. Among other recommendations, the experts advised states to reserve restoration only for the most serious of cases.<sup>244</sup>

Unlike California, many states, including Colorado and Missouri, set a specific time frame to complete the competency evaluation, with a national average of 31 days.<sup>245</sup> The American Bar Association recommends a deadline of 14 days<sup>246</sup> and the National Judicial College recommends anywhere between 15 and 30 days.<sup>247</sup> States with clear timelines also provide for extensions, in some cases time-limited, for good cause.<sup>248</sup> California's Incompetent to Stand Trial Workgroup recently also recommended creation of a mandatory time frame for both the appointment of evaluators and receipt of reports.<sup>249</sup>

At least 5 states, including Kentucky, Michigan, and Ohio, require courts to find at the time of the competency hearing whether it is reasonably foreseeable the defendant will become competent within the maximum specified timeframe. Some of these states also require the competency evaluator to opine on the likelihood of restorability. In general in these states, if the court determines at the competency

secondary diagnosis. Data provided to Committee staff from DSH and is from FY 2016–17 to FY 2018–19.

<sup>237</sup> Penal Code § 1369(a)(1).

<sup>238</sup> Penal Code § 1369(a)(2); California Rule of Court 4.130(d)(2).

<sup>239</sup> Marshall Comia, *Incompetent to Stand Trial (IST) Evaluators: Recruitment, Hiring, and Compensation Practices in California's Trial Courts: A Qualitative Analysis of California Courts*, Judicial Council of California, 16 (July 2022). This report also described others challenges in the process, including inadequate funding to pay evaluators and a shortage of qualified evaluators.

<sup>240</sup> Penal Code § 1001.36.

<sup>241</sup> Neil Gowensmith, *Resolution or Resignation: The Role of Forensic Mental Health Professionals Amidst the Competency Services Crisis*, Psychology, Public Policy, and Law, 25(1), 7 (2019).

<sup>242</sup> McDermott, Warburton, & Chloe Auletta-Young, *Incompetent to Stand Trial Admissions to a State Hospital*, 232.

<sup>243</sup> *Id.*

<sup>244</sup> Hallie Fader-Towe & Ethan Kelly, *Just and Well: Rethinking How States Approach Competency to Stand Trial*, Council of State Governments Justice Center, 17–18 (October 2020). See also Richard Schwermer, *Leading Reform: Competence to Stand Trial Systems — A Resource for State Courts*, Conference of Chief Justices and Conference of State Court Administrators, 3–4 (August 2021).

<sup>245</sup> Colo. Rev. Stat. Ann. § 16-8.5-103; Mo. Rev. Stat. Ann. § 552.020; Gowensmith, *Resolution or Resignation*, at 7.

<sup>246</sup> American Bar Association, *Criminal Justice Standards on Mental Health*, adopted August 8, 2016, Standard 7-4.4(d).

<sup>247</sup> Gowensmith, *Resolution or Resignation*, at 7.

<sup>248</sup> See, e.g., Colo. Rev. Stat. Ann. § 16-8.5-103; Mo. Rev. Stat. Ann. § 552.020.

<sup>249</sup> IST Workgroup at 38. For example, Connecticut sets two timelines: the examination must be completed within 15 business days from the day the court orders it and the examiner must submit a written report to the court within 21 days of the order. Conn. Gen. Stat. Ann. § 54-56d(d).

hearing that there is no substantial probability of attaining competency, the case is dismissed and the defendant may be referred for a civil conservatorship.<sup>250</sup> The American Bar Association's Criminal Justice Standards on Mental Health also recommends that if the evaluator determines the defendant is incompetent to stand trial, the evaluator should address the likelihood of the person attaining competence during the treatment period.<sup>251</sup>

<sup>250</sup> See e.g. Ken. Rev. Stat. Ann. § 504.110; Mich. Comp. Laws Ann. § 330.2031; Neb. Rev. Stat. Ann. § 29-1823(4); Nev. Rev. Stat. Ann. § 178.460(4)(d); Oh. Rev. Code Ann. § 2945.38(2).

<sup>251</sup> American Bar Association, *Criminal Justice Standards on Mental Health*, adopted August 8, 2016, Standard 7-4.6(b)(iv) & (c)(iii).

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# 8. Encourage Data Sharing to Address Frequent Utilizers



## Encourage Data Sharing to Address Frequent Utilizers

### RECOMMENDATION

A small group of people cycle repeatedly through multiple county systems, but localities often do not collect or utilize data that could improve care and outcomes for this group of people.

The Committee therefore recommends the following:

Counties and other stakeholders should collaborate across multiple systems – such as jails, behavioral health, and emergency healthcare – to identify and improve outcomes for frequent utilizers of these systems. The state should fund the implementation and evaluation of local pilot projects that do so.

### RELEVANT STATUTES

Penal Code §§ 13100–13326, 13300

### BACKGROUND AND ANALYSIS

A small number of highly-vulnerable people cycle repeatedly through multiple systems, including jails, emergency rooms, shelters, and other public systems due to underlying behavioral health, housing, and other needs.<sup>252</sup> The result for these people, often referred to as high or frequent utilizers, is inefficient and fragmented care that does not lead to stabilization, improved outcomes, or benefits to public safety.<sup>253</sup>

Care coordination across systems is often limited, in part, because data systems are not linked. Local data on how people cycle through various systems is either not collected or collected incompletely. Though there have been efforts to encourage data sharing and collaboration for years,<sup>254</sup> communities are still in the process of collecting data and reporting outcomes.<sup>255</sup> The biggest effort underway in California is the Data-Driven Recovery Project at the Mental Health Services Oversight & Accountability Commission (MHSOAC), which is providing technical assistance to 10 counties in California to build their capacities to link criminal justice, behavioral health, and social services data.<sup>256</sup>

Once equipped with data about their frequent utilizers, communities can take direct and coordinated actions that identify gaps in service and more effectively match frequent utilizers with appropriate services and support. Strategies have ranged from targeted outreach, linkage to services, and care coordination to the development of crisis stabilization centers.<sup>257</sup>

The research and results from across the country explored below show that every locality in California could benefit from increased data sharing, collaboration, and targeted interventions for people who frequently come into contact with justice, health, and behavioral health systems.

<sup>252</sup> Arnold Ventures, *Early Lessons from Data-Driven Justice Pilot Sites*, 1 (June 2021). Some California specific studies: Elsa Augustine & Evan White, *High Utilizers of Multiple Systems in Sonoma County*, California Policy Lab, 3, 7 (July 2020); Long Beach Justice Lab, *The Justice Lab 2019 Year End Report*, 2 (2019); Sonya Shadravan, Dustin Stephens, Oona Appel, & Kristen Ochoa, *Cross-Sectional Study of Homeless High Service Utilizers in Los Angeles County Jails: Race, Marginalization and Opportunities for Diversion*, *Ethnicity & Disease* 30:3, 505 (Summer 2020).

<sup>253</sup> There is no standardized definition as to what constitutes a high or frequent utilizer. Each locality or study has defined it differently, depending on the data set and population. See e.g. *Data Driven Justice: A Playbook*, at 11–12.

<sup>254</sup> In 2016, a federal initiative started under the Obama Administration — Data-Driven Justice — encouraged city, county, and state governments to collect data on people with mental illness, substance use disorders, and chronic health problems in their local criminal justice and health care systems. Arnold Ventures and the National Association of Counties recently relaunched the program as the Familiar Faces Initiative. See National Association of Counties, *Familiar Faces Initiative*. A similar effort called Stepping Up is supported by the Council of State Governments Justice Center. See *The Stepping Up Initiative, Stepping Up Innovator Counties: Leading the Way in Justice System Responses to People with Behavioral Health Needs*, 1 (August 2021).

<sup>255</sup> Arnold Ventures, *Early Lessons from Data-Driven Justice Pilot Sites*, at 1.

<sup>256</sup> See MHSOAC, *Innovation Incubator*. The participating counties are Calaveras, El Dorado, Lassen, Marin, Modoc, Nevada, Plumas, Sacramento, San Bernardino, and Yolo.

<sup>257</sup> See generally Arnold Ventures, *Responding Better: A Collaborative Approach to Helping Those in Crisis: Key Insights and Recommendations from the Data-Driven Justice Pilot Initiative* (November 2020).

## EMPIRICAL RESEARCH

At the May 2022 meeting, Judge Steven Leifman explained that 97 people in Miami-Dade County were arrested 2,200 times and spent a combined 39,000 days in jail, emergency rooms, state hospitals, and psychiatric facilities over a period of 5 years, costing the county \$17 million.<sup>258</sup> The county created a cross-system collaboration that resulted in the creation of several programs, such as a Crisis Intervention Team, post-booking diversion, and a state funded pilot project that places people found incompetent to stand trial in community-based treatment. As a result of the county's reform efforts, the county jail population dropped significantly, allowing the county to close a jail facility and save over \$39 million per year.<sup>259</sup>

Some counties have worked with non-government organizations to collect and study data. Studies in California have analyzed data from a wide range of sources, such as emergency rooms, shelters, jails, and 911 calls. For example, an analysis of 911 calls to the Oakland Police Department showed that one police district accounted for almost a quarter of calls and workload.<sup>260</sup>

Sonoma County worked with the California Policy Lab to identify its highest utilizers of multiple systems, finding that despite making up only 1% of the population, each year they accounted for an average of 28% of behavioral health costs, 52% of nights in housing or shelters for the homeless, and 26% of jail time.<sup>261</sup>

The Benioff Homelessness and Housing Initiative at UCSF also worked with the California Policy Lab to study the small number of San Francisco residents cycling in and out of the county's health and criminal legal systems. By linking together 10 years of data from physical health, behavioral health, housing, and criminal legal sectors, they found that 24% of the high utilizer cohort in 2011 continued to be high utilizers the following year.<sup>262</sup> The 2011 cohort had a startling death rate – by the end of the ten-year period, 26% were deceased.<sup>263</sup>

Targeted use of such data can have dramatic results. In 2011, the City of San Diego launched a program that identified the 25 most frequent users of public services, who cost \$3.5 million in hospital and criminal justice costs, and enrolled them in a Housing First program. Three years later the rate of arrests and emergency room visits dropped by nearly 80%.<sup>264</sup> The program was discontinued after the three-year pilot period because it lacked sustainable funding.<sup>265</sup> In Pinellas County, Florida, the county identified the top 30 users of crisis stabilization and jail services, developed and implemented an intensive level of treatment and services, and cut their jail and hospital days and costs in half.<sup>266</sup>

<sup>258</sup> Committee on Revision of the Penal Code, Meeting on May 17, 2022, Part 1, 1:19:04–1:20:04. See also Report of Criminal Mental Health Project, Eleventh Judicial Circuit, Miami-Dade County, Florida (December 2021).

<sup>259</sup> *Id.*

<sup>260</sup> *Police Data Analysis Report: Oakland, California*, Center for Public Safety Management, 19 (December 2020).

<sup>261</sup> Elsa Augustine & Evan White, *High Utilizers of Multiple Systems in Sonoma County*, California Policy Lab, 3 (July 2020).

<sup>262</sup> Caroline Cawley et al, *Signals of Distress: High Utilization of Criminal Legal and Urgent and Emergency Health Services in San Francisco*, California Policy Lab, 8–9 (September 2022).

<sup>263</sup> *Id.* at 8.

<sup>264</sup> Fermanian Business & Economic Institute at Point Loma Nazarene University, *Project 25: Housing the Most Frequent Users of Public Services Among the Homeless*, 12 (April 2015).

<sup>265</sup> Kelly Davis, *Despite Early Success, San Diego Homeless Program Struggles to Expand*, USC Annenberg Center for Health Journalism, March 6, 2017.

<sup>266</sup> *Case Study: Pinellas County, Fla. Familiar Faces Initiative*, National Association of Counties.

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# 9. Update Pretrial Procedures

## Update Pretrial Procedures

### RECOMMENDATION

Under current law, people can be held in jail for days without seeing a lawyer because the Penal Code does not require an arraignment on Sundays or holidays. California has also failed to incorporate into its Penal Code the requirement that a judge promptly review warrantless arrests for probable cause.

The Committee therefore recommends the following:

- Ensure that all arrested people have their first appearance in court no more than 48 hours after arrest, without exception.
- Codify the requirement of a prompt judicial review of probable cause for warrantless arrests of adults and juveniles and require courts to make a record of the determination.

### RELEVANT STATUTES

Penal Code §§ 825, 849

Welfare & Institutions Code §§ 631, 632

### BACKGROUND AND ANALYSIS

Unlike many other states, California’s pretrial timeline is missing important procedural protections of when the first court appearance must occur and a judge’s duty to review whether a warrantless arrest is supported by probable cause.

#### *Arraignment Timeline*

Judge J. Richard Couzens told the Committee that judges recognize that the first 48 hours after a person’s arrest is a critical time.<sup>267</sup> While many arrested people are not charged – in 2021, more than 20,000 felony arrests were rejected by prosecutors for lack of sufficient evidence – under current law these people can nonetheless often be detained and not brought to court to learn the status of their case for more than 2 days.<sup>268</sup> Though arraignments (what California and many states call the first court appearance) must occur “without unnecessary delay” after arrest and the Penal Code sets a general 48 hour timeframe, Sundays and holidays are excepted.<sup>269</sup> This elongated timeline helped earn California a failing grade on its pretrial procedures in a recent report from the Dedman School of Law.<sup>270</sup>

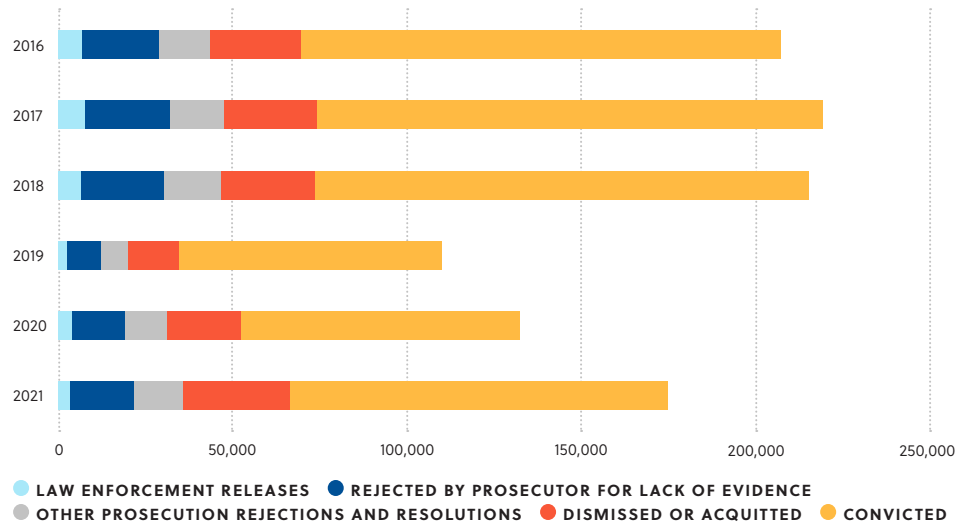
<sup>267</sup> Committee on Revision of the Penal Code, Meeting on October 11, 2022, Part 2, 01:24:30–01:24:41.

<sup>268</sup> California Department of Justice, *Crime in California 2021*, Table 38A.

<sup>269</sup> Penal Code § 825(a).

<sup>270</sup> Malia N. Brink, Jiacheng Yu, Pamela R. Metzger, *Grading Injustice: Initial Appearance Report Cards*, Deason Criminal Justice Reform Center (October 2022).

## DISPOSITION OF CALIFORNIA ADULT FELONY ARRESTS (2016–2021)



Source: California Department of Justice, *Crime in California 2021*, Tables 37 & 39A.

California should not have exceptions for Sundays and holidays and should require arraignment no later than 48 hours arrest, as many other states do, including Texas, Florida, and Alabama.<sup>271</sup> While removing the exceptions to the arraignment timeline will impose new costs, local stakeholders can take a variety of approaches to implementing this requirement. Some localities may prioritize bringing recently arrested people to court so that the 48 hour timeline is met without requiring court to be open more days while others may choose to have arraignments every day of the week. And those that do have more frequent arraignments do not need to have an entire court building and all its staff to be open a full day – instead, courts can prioritize efficient arraignment proceedings with minimal court staff at set times on days when the court would otherwise be closed, as well as exploring other pragmatic ways to provide initial court appearances. Current law already provides that at least one judge must be on call whenever court is not in session to resolve issues about release from custody.<sup>272</sup>

#### Judicial Review of Warrantless Arrests

Despite a United States Supreme Court case arising from Riverside County more than 30 years ago, California has not codified a core requirement of the federal Fourth Amendment: that every arrest must be promptly reviewed by a neutral judge.<sup>273</sup>

Sue Burrell, Policy Director Emeritus, Pacific Juvenile Defender Center, informed the Committee that this requirement might be honored in most counties, but there is often no record made of it and there is no mention of it in the Penal Code.<sup>274</sup>

This rule – required by the 1991 case *County of Riverside v. McLaughlin* – specifies that probable cause determinations made within 48 hours of arrest will generally meet the Fourth Amendment’s promptness requirement, but that no additional time for

<sup>271</sup> *Id.*; Ala. R. Crim. Proc. 4.3; Fla. R. Crim. Proc. 3.130(a); Tex. Code Crim. Proc. Ann. art. 15.17.

<sup>272</sup> Penal Code § 810.

<sup>273</sup> See *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

<sup>274</sup> Committee on Revision of the Penal Code, Meeting on October 11, 2022, Part 3, 0:01:08–0:04:14. See also Written Submission of Sue Burrell to Committee on Revision of the Penal Code for October 11, 2022 meeting.

weekends or holidays is allowed.<sup>275</sup> While probable cause determinations do not need to be ruled upon in open court and typically rely on short written statements from the arresting officer, prompt judicial reviews of warrantless arrests are an essential safeguard against blatantly illegal arrests or mistakes by law enforcement.<sup>276</sup>

Some courts in California review warrantless arrests for probable cause during the arraignment. But this means that the requirements of *McLaughlin* are routinely violated if the arraignment is held after 48 hours due to a weekend or holiday, which is another reason to require all arraignments to be completed no later than 48 hours from arrest. The potential problems are even worse in juvenile cases, where current law allows 3 to 7 days to pass before a judicial review of the arrest.<sup>277</sup>

California should both update its arraignment timeline to align with other states and amend its adult and juvenile statutes to ensure court procedures throughout the state are in compliance with constitutional standards. Doing so would decrease wrongful detention, reduce unnecessary incarceration, and allow the vindication of other important constitutional rights.

## **EMPIRICAL RESEARCH**

As explored elsewhere in this report, almost any period of pretrial detention is harmful to the incarcerated person and community.<sup>278</sup>

Research on statewide juvenile court procedures conducted in 2015 found that while some counties reviewed warrantless arrests of juveniles within 48 hours of arrest, the majority of counties did not.<sup>279</sup> A 2022 survey of adult court public defenders about probable cause determinations indicated significant variation in county practices, with many responses indicating that the 48-hour rule was not adhered to or that courts did not make a record of the determinations.<sup>280</sup>

## **INSIGHT FROM OTHER JURISDICTIONS**

At least 13 states require a first appearance to be held within 48 hours (or less) of arrest, including Texas, Florida, Alabama, Georgia, Mississippi, and New York.<sup>281</sup> As explained to the Committee by Judge Juliet McKenna of the Superior Court of the District of Columbia, the rules from *McLaughlin* are strictly adhered to in other jurisdictions and judges in her court are “petrified” of violating the rule.<sup>282</sup> Many other states, such as Florida, Louisiana, and Arizona, expressly incorporate *McLaughlin*’s requirements of a prompt review of probable cause into their criminal codes.<sup>283</sup>

<sup>275</sup> *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). Justice Antonin Scalia dissented in the case, arguing that 48 hours was too much and that such reviews should be conducted within 24 hours, a shorter time limit than the 36 hours suggested by the other dissenters. *Id.* at 70 (Scalia, J. dissenting).

<sup>276</sup> Sue Burrell, *The 48-Hour Rule and Overdetention in California Juvenile Proceedings*, UC Davis Journal of Juvenile Law & Policy, Vol. 20:1, 8 (2016).

<sup>277</sup> Welfare & Institutions Code §§ 631, 632, 635.

<sup>278</sup> Sandra Susan Smith, *Pretrial Detention, Pretrial Release, & Public Safety*, Arnold Ventures (July 2022).

<sup>279</sup> Sue Burrell, *The 48-Hour Rule and Overdetention in California Juvenile Proceedings*, UC Davis Journal of Juvenile Law & Policy, Vol. 20:1, 16–17 (2016).

<sup>280</sup> See Written Submission of Sue Burrell to Committee on Revision of the Penal Code for the Meeting on October 11, 2022.

<sup>281</sup> Malia N. Brink, Jiacheng Yu, Pamela R. Metzger, *Grading Injustice: Initial Appearance Report Cards*, Deason Criminal Justice Reform Center (October 2022).

<sup>282</sup> Committee on Revision of the Penal Code, Meeting on September 2, 2022, Part 2, 1:04:31–1:05:29.

<sup>283</sup> Fla. R. Crim. P. 3.133; La. C. Cr. P. 230.2; Ariz. R. Crim. P. 4.2, 4.1. See also Alaska Stat. § 12.25.150; Del. Code Ann. Tit. 11, § 1909; MD Rules, rule 4–212(f); Minn. R. Crim. P. 4.02(5); Mo. Rev. Stat. § 544.170; N.H. Rev. Stat. Ann. § 594:20–a.

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# 10. Codify *Humphrey's* Elimination of Wealth-Based Detention

## Codify Humphrey's Elimination of Wealth-Based Detention

### RECOMMENDATION

Lower courts are not following the California Supreme Court's *Humphrey* decision that people should not be kept in jail because they cannot afford to pay cash bail.

The Committee therefore recommends the following:

- Codify and clarify elements of the California Supreme Court *Humphrey* decision, including a presumption of release, when conditions of release should be imposed, and how courts should determine affordable cash bail amounts.
- Allow courts to accept a refundable percentage of cash bail amounts.

### RELEVANT STATUTES

Penal Code §§ 1268–1320.5

### BACKGROUND AND ANALYSIS

More than 40,000 people are currently held in California's jails awaiting trial.<sup>284</sup> Many are held because they cannot pay cash bail – an amount set by a county schedule or court that specifies how much money they can pay to leave custody.<sup>285</sup> California's cash bail amounts are notoriously high and the most recent data from 2009 shows that the median bail amount in California is 5 times the amount imposed in the rest of the country.<sup>286</sup> California's retiring Chief Justice Tani Cantil-Sakauye recently described the cash bail system as “outdated, unsafe and unfair,” and favoring people with financial resources.<sup>287</sup>

In March 2021, in a unanimous decision in *In re Humphrey*, the California Supreme Court disapproved California's system of “wealth-based detention” and held that people should not be held in jail solely because they could not afford to pay cash bail.<sup>288</sup> Former California Supreme Court Justice Mariano-Florentino Cuéllar – *Humphrey*'s author – told the Committee that *Humphrey* held that a person should “not be held in custody pending trial unless the court has made an individualized determination. That's key. Determination not about a group of people, not about a class of offenses, but about this particular individual.”<sup>289</sup>

But more than a year and a half after the decision, testimony and data presented to the Committee show that *Humphrey* is not being followed. A recent report from the Berkeley Policy Advocacy Clinic and the UCLA School of Law Bail Practicum presented to the Committee by Professor Stephanie Campos-Bui showed that pretrial detention has not decreased, cash bail amounts remain unattainably high, and many judges throughout the state have concluded that *Humphrey* increased their power to hold people in custody.<sup>290</sup>

This state of affairs – which allows those who can afford cash bail to buy their release while confining people who cannot – has resulted in widespread pretrial detention that is unfair, racially-biased, and harmful to individual people and their families and

<sup>284</sup> California Board of State and Community Corrections, *Jail Population Trends*, Table 1, September 15, 2022 (showing June 2022 data).

<sup>285</sup> See, e.g., Pretrial Detention Reform Workgroup, *Pretrial Detention Reform: Recommendations to the Chief Justice*, 25 (October 2017).

<sup>286</sup> Sonya Tafoya, Public Policy Institute of California, *Pretrial Detention and Jail Capacity in California*, 4 (July 2015) (analyzing data ending in 2009).

<sup>287</sup> Darrell Smith, *Outgoing Chief Justice, a Trailblazer in California Courts, Says More Barriers Need to Be Broken*, *The Sacramento Bee*, December 5, 2022.

<sup>288</sup> *In re Humphrey*, 11 Cal. 5th 135, 151 (2021).

<sup>289</sup> Committee on Revision of the Penal Code, Meeting on November 29, 2022, Part 1, 0:22:48–0:23:02.

<sup>290</sup> Alicia Virani, Stephanie Campos-Bui, Rachel Wallace, Cassidy Bennett, & Akruhi Chandrayya, *Coming Up Short: The Unrealized Promise of In re Humphrey*, UCLA School of Law Bail Practicum & Berkeley Law Policy Advocacy Clinic, 3, 21 (October 2022). See also Johanna Lacoë, Alissa Skog, & Mia Bird, *Bail Reform in San Francisco: Pretrial Release and Intensive Supervision Increased After Humphrey*, California Policy Lab, 1 (May 2021) (in San Francisco, which began adhering to *Humphrey* in January 2018 after the initial appellate decision, the overall likelihood of detention declined from 25% to 22% and the total jail population remained relatively stable).

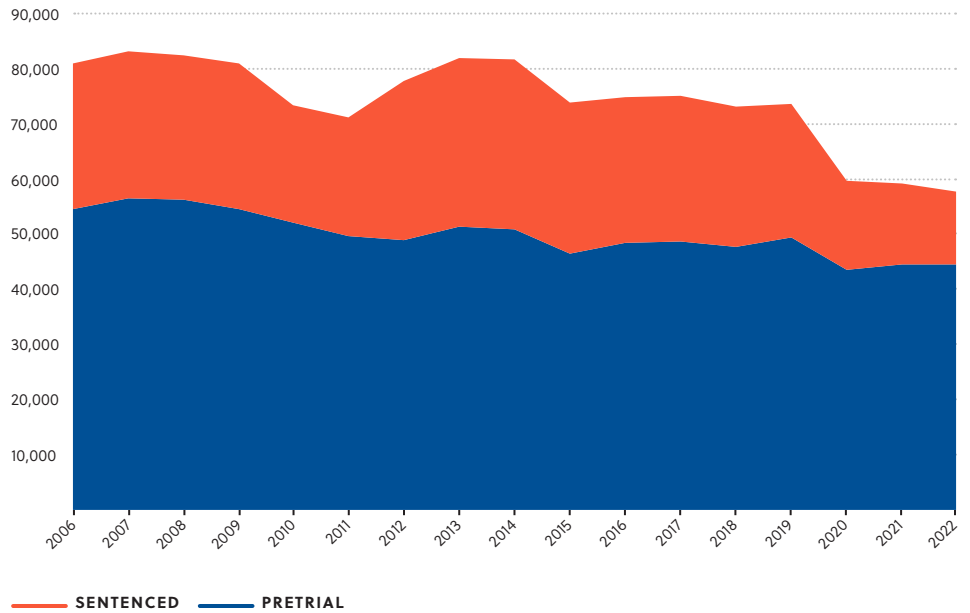


loved ones. Communities also suffer because pretrial detention increases long-term recidivism and reduces employment prospects.<sup>291</sup>

In 2017, a workgroup created by Chief Justice Tani Cantil-Sakauye recommended that cash bail be eliminated and replaced with risk-based release decisions.<sup>292</sup> Those recommendations were embedded in SB 10, a comprehensive reform bill that passed the Legislature and received Governor Brown’s signature in 2018. In 2020, that law was subject to a referendum and – despite Governor Newsom’s support<sup>293</sup> – was repealed before it went into effect.<sup>294</sup>

Six months later the California Supreme Court acknowledged in *Humphrey* that cash bail is too often set at an amount that judges know the arrested person cannot pay and is used to detain people in jail indefinitely without following due process.<sup>295</sup> This system undermines respect for the rule of law where, according to the United States Supreme Court and the California Supreme Court, “liberty is the norm and detention prior to trial or without trial is the carefully limited exception.”<sup>296</sup>

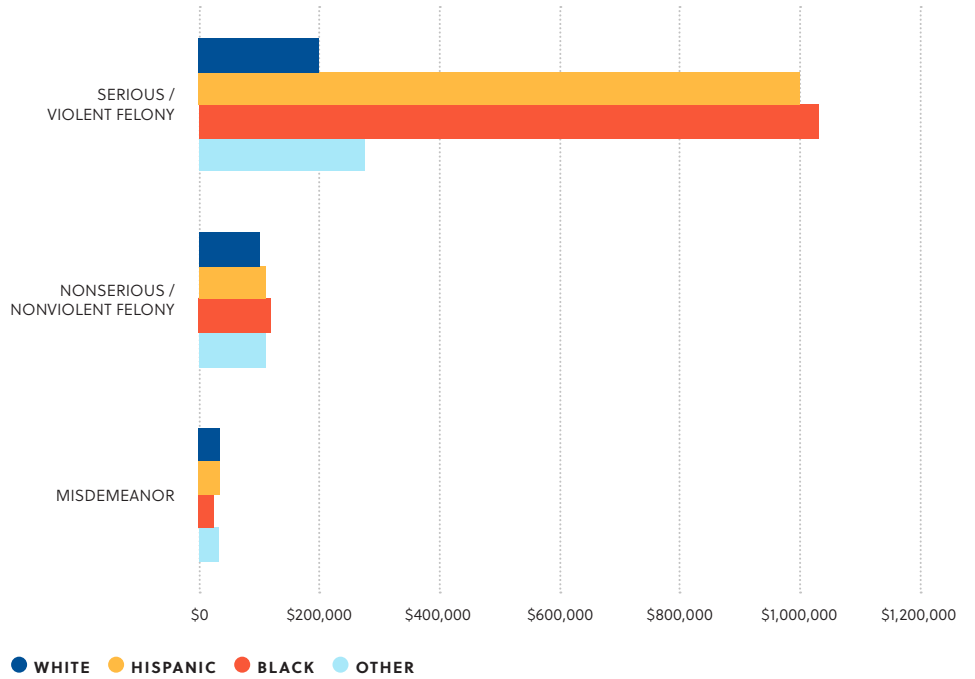
**CALIFORNIA JAILS POPULATION (2006–2022)**



Source: California Jail Profile Surveys, 2006–2022. 2022 Data is as of June 2022. All data available at the California Board of State and Community Corrections.

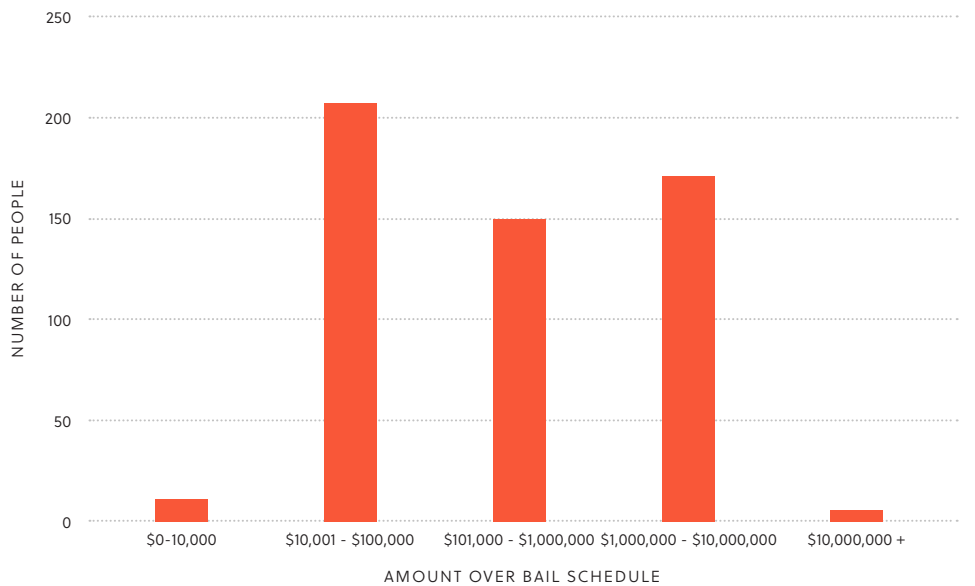
291 See e.g., Will Dobbie & Crystal Yang, *The Economic Costs of Pretrial Detention*, Brookings Papers on Economic Activity, 2 (March 2021) (finding that just 3 days of pretrial incarceration reduces earnings by an average of \$29,000 over the detained person’s life).  
 292 Pretrial Detention Reform Workgroup, *Pretrial Detention Reform: Recommendations to the Chief Justice* (October 2017).  
 293 Patrick McGreevy, *California Voters to Decide Whether to End Cash Bail System with Proposition 25*, Los Angeles Times, October 7, 2020.  
 294 Patrick McGreevy, *Prop. 25, Which Would Have Abolished California’s Cash Bail System, Is Rejected by Voters*, Los Angeles Times, November 3, 2020.  
 295 *Humphrey*, 11 Cal. 5th at 143. See also *In re Brown*, 76 Cal. App. 5th 296  
 296 *Humphrey*, 11 Cal. 5th at 156; *United States v. Salerno*, 481 U.S. 739, 755 (1987).

**LOS ANGELES COUNTY JAIL: MEDIAN CASH BAIL AMOUNTS**



Source: Chris Kaiser-Nyman, *Money Bail and the Los Angeles County Jail System*, Vera Institute of Justice, Figure 3, October 2022. Data is as of May 2, 2022.

**LOS ANGELES COUNTY JAIL: NUMBER OF PEOPLE WITH CASH BAIL AMOUNTS OVER BAIL SCHEDULE**



Source: Chris Kaiser-Nyman, *Money Bail and the Los Angeles County Jail System*, Vera Institute of Justice, Figure 4, October 2022. Data is as of May 4, 2022.

A panel of California judges shared similar concerns with the Committee. Judge Lisa Rodriguez of San Diego Superior Court and Vice Chair of the Judicial Council's Criminal Law Advisory Committee, told the Committee that many judges are still constructively detaining people by setting high cash bail amounts despite *Humphrey's* ruling to the contrary.<sup>297</sup> Judge George C. Eskin also urged the Committee to codify *Humphrey's* requirements, particularly by providing guidance on how judges should evaluate a defendant's ability to afford cash bail.<sup>298</sup> Judge Brett Alldredge of Tulare County frankly acknowledged that many judges find it easier to allow people to be detained by high cash bail amounts because they fear negative headlines if a released person commits a high-profile offense.<sup>299</sup> Judge J. Richard Couzens explained that there is a conflict between the individualized determinations required by *Humphrey* and what current law requires, particularly around the use of bail schedules by judges.<sup>300</sup>

Ryan Couzens, Assistant Chief Deputy District Attorney in Yolo County, also expressed support for codifying certain aspects of *Humphrey*, including a presumption of release in most cases. He explained that his office has already adopted a policy directing prosecutors not to seek cash bail in most cases, even for serious crimes.<sup>301</sup>

Judges undoubtedly have, as *Humphrey* held, the "narrow" ability to order pretrial detention to protect public safety,<sup>302</sup> but the contours of that power in California are currently being resolved by the courts, with the California Supreme Court likely to review the issue.<sup>303</sup> But there is no indication that other issues arising every day in bail settings will be settled by the courts anytime soon.

For these reasons, the Committee concludes it is critical for the Legislature to create rules to implement *Humphrey* consistently throughout the state and ensure judges have fair guidelines for determining an arrested person's ability to afford bail.

There are three steps that should be taken immediately:

- *Presumption of release:* Codify that every arrested person has a presumption of release and that the prosecution bears the burden of showing why this presumption should be overcome. As Erwin Chemerinsky, Dean of the UC Berkeley School of Law, told the Committee, the fundamental "right[] to pretrial liberty"<sup>304</sup> was a key part of *Humphrey's* reasoning and should be made an explicit part of the Penal Code.<sup>305</sup>
- *Least restrictive conditions:* Codify *Humphrey's* rule that if release without conditions is not appropriate to protect public safety or ensure appearance in court, a court must impose the least restrictive non-financial conditions possible.<sup>306</sup>

Such conditions – which are typically informed by an assessment completed by a probation or pretrial services entity – can include checking in with a probation or pretrial services officer, attending treatment programs, complying with stay away or other protective orders, or wearing an electronic monitoring device.

<sup>297</sup> Committee on Revision of the Penal Code, Meeting on October 11, 2022, Part 1, 1:33:38–1:34:11.

<sup>298</sup> *Id.* at 1:31:24–1:32:13.

<sup>299</sup> *Id.* at 1:37:24–1:38:44.

<sup>300</sup> *Id.* at 1:45:27–1:45:56.

<sup>301</sup> Committee on Revision of the Penal Code, Meeting on October 11, 2022, Part 3, 0:16:40–0:18:18. See also Yolo County District Attorney Policies, Bail and Pretrial Release.

<sup>302</sup> *Humphrey*, 11 Cal.5th at 143. See also *In re White*, 9 Cal. 5th 455 (2020) (addressing standards of proof and review for detention orders).

<sup>303</sup> The legal issue is how to resolve a potential conflict between different sections of the California constitution, Article 1, § 12 and Article 1, § 28(f)(3). Section 12 specifies that people "shall be released on bail by sufficient sureties" and then defines a narrow group of people who may be detained after a court makes certain findings. Section 28(f)(3) says people "may be released," which the California Supreme Court has indicated would allow for much more detention. See *People v. Standish*, 38 Cal.4th 858, 877 (2006). Though both sections were initially added to the constitution by voter initiatives in 1982, Section 12 controlled because it received more votes. *Id.* at 874–78. But a voter initiative in 2008 amended portions of Section 28, and the effect of those amendments – if any – has not yet been definitively resolved and was explicitly left as an open question by *Humphrey*. *Humphrey*, 11 Cal. 5th at 155, footnote 7. The California Supreme Court ordered a lower court to directly address this issue, which suggests that the Court will in turn grant review. See *In re Kowalczyk*, 2022 WL 17098702 (First Appellate District 2022) (holding that the two constitutional sections can be reconciled but that unaffordable cash bail is permissible under Section 12).

<sup>304</sup> *Humphrey*, 11 Cal. 5th at 151.

<sup>305</sup> Committee on Revision of the Penal Code, Meeting on October 11, 2022, Part 1, 0:37:19–0:37:38, 0:45:46–0:46:02.

<sup>306</sup> *Humphrey*, 11 Cal. 5th at 156.

The use of electronic monitoring has significantly expanded in the last few years<sup>307</sup> despite a lack of evidence that it is any more effective than less invasive means of pretrial supervision.<sup>308</sup> The Penal Code should also specify that electronic monitoring is among the most restrictive conditions that can be imposed, a determination that the Legislature already made when providing funding for pretrial services.<sup>309</sup>

- *Ability to pay cash bail:* If after considering all other non-financial conditions, the court concludes that cash bail is required to ensure the person's appearance in court, the court must conduct an ability to pay determination and, as *Humphrey* held, "set bail at a level the arrestee can reasonably afford."<sup>310</sup>

*Humphrey* did not specify how this determination should proceed, so, as suggested by Justice Cuéllar<sup>311</sup>, the Legislature should create rules that ensure a fair and efficient process. The ability to pay determination should rely on the arrested person's sworn statements, as is current practice in similar situations, such as when courts consider whether to lower or waive fines for traffic violations.<sup>312</sup>

The amount the person can reasonably afford should be set at a large percentage – such as 50% – of the person's disposable income, which is calculated after subtracting monthly expenses from monthly income and assets. The court should make findings on the record about how it calculated the amount that can be paid under these standards and presumptively impose no more than that amount unless there are compelling reasons supported by clear and convincing evidence to impose a higher amount that must also be stated on the record.

Courts making bail determinations at or after arraignment should be prevented from relying on the bail schedule – a preset list of cash amounts set by each county – in setting cash bail amounts because doing so is incompatible with *Humphrey*'s command that the court's determination be a "careful consideration of the individual arrestee's circumstances."<sup>313</sup> Judges should also be specifically prohibited from setting cash bail at a level they know the arrested person cannot pay as a way to circumvent the process required to impose a detention order.

In addition to codifying *Humphrey*, courts should have more flexibility to accept cash bail than they do under current law, which limits them to accepting the full amount of cash bail.<sup>314</sup> Currently, the vast majority of people who are able to pay cash bail do so by using a commercial bond company, which typically charges a non-refundable 10% premium.<sup>315</sup> In San Francisco, over 99% of people who post cash bail use a commercial bond agency and bail agencies collected as much as \$10–15 million in premiums in 2017.<sup>316</sup> In Los Angeles, between 2012 and 2016, bail bond agencies collected an estimated \$193 million in premiums from people who paid bail before arraignment.<sup>317</sup> As emphasized to the Committee by Gina Clayton-Johnson, Executive Director of Essie Justice Group, these fees are primarily paid by low-income communities and

307 Alicia Virani, *Pretrial Electronic Monitoring in Los Angeles County: 2015 through 2021*, UCLA School of Law Criminal Justice Program, 2 (February 2022); Alissa Skog & Johanna Laco, *Pretrial Electronic Monitoring in San Francisco*, California Policy Lab (November 2022).

308 Belur et al., *A Systematic Review of the Effectiveness of the Electronic Monitoring of Offenders*, 68 *Journal of Criminal Justice* (2017); James Kilgore, Emmett Sanders, & Kate Weisburd, *The Case Against E-carceration*, Inquest, July 30, 2021.

309 SB 129 (Skinner 2021), Sec. 4, Item 11.

310 *Humphrey*, 11 Cal. 5th at 154.

311 *Committee on Revision of the Penal Code, Meeting on November 29, 2022, Part 1*, 0:22:13–0:24:15.

312 See Judicial Branch of California, Self-Help Guide, *If You Can't Pay Your Traffic Ticket Fine* (directing people to form TR-320/CR-320 – Can't Afford to Pay: Traffic and Other Infractions).

313 *Humphrey*, 11 Cal. 5th at 156.

314 Penal Code § 1295.

315 Pretrial Detention Reform Workgroup, *Pretrial Detention Reform: Recommendations to the Chief Justice*, 30 (October 2017).

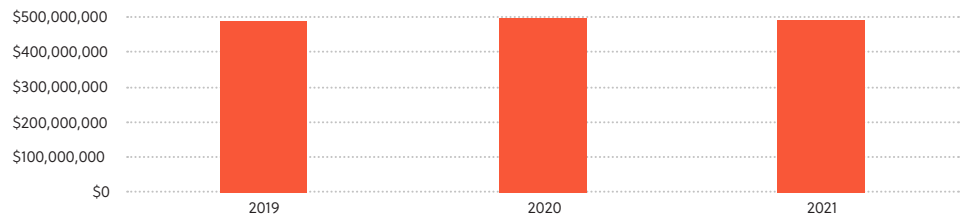
316 Financial Justice Project, San Francisco Office of the Treasurer, *Do the Math: Money Bail Doesn't Add Up for San Francisco*, 6 (June 2017).

317 Isaac Bryan, Terry Allen, Kelly Lytle Hernandez, & Margaret Doolley-Sammuli, *The Price for Freedom: Bail in the City of L.A.*, UCLA Ralph J. Bunche Center for African American Studies, 1 (December 2017).

318 *Committee on Revision of the Penal Code, Meeting on October 11, 2022, Part 3*, 0:43:15–0:44:15; Saneta deVuono-powell, Chris Schweidler, Alicia Walters, & Azadeh Zohrabi, *Who Pays? The True Cost of Incarceration on Families*, Ella Baker Center, Forward Together, Research Action Design, 9 (2015).

319 *Id.*; Gina Clayton-Johnson, Endria Richardson, Lily Mandlin, & Brittany Farr, *Because She's Powerful: The Political Isolation and Resistance of Women with Incarcerated Loved Ones*, Essie Justice Group, 13 (May 2018); Joshua Page, Victoria Piehowski, & Joe Soss, *A Debt of Care: Commercial Bail and the Gendered Logic of Criminal Justice Pedation*, *The Russell Sage Foundation Journal of the Social Sciences* 5(1): 150–172 (2019).

### TOTAL REPORTED CASH BAIL PREMIUMS IN CALIFORNIA (2019–2021)



Source: Presentation by Kendra Zoller, Deputy Legislative Director, California Department of Insurance, to Committee on Revision of the Penal Code, October 11, 2022.

people of color, especially women,<sup>318</sup> who cut back on food, rent, or other bills, or work more hours to pay for their loved one's release.<sup>319</sup>

In many other jurisdictions, courts can accept a percentage of the total bail amount – or no payment at all and simply a promise to pay – and, if the arrested person fails to comply with their obligations, recover the full amount.<sup>320</sup> And if the arrested person does show up to court as required, the amount they paid is refunded.

Even if all of the above reforms are enacted, many issues will remain with California's pretrial system. But these changes would be significant progress to ensuring due process and equal justice in California by requiring that current law and practice comply with *Humphrey's* constitutional commands.

### EMPIRICAL RESEARCH

Cash bail has repeatedly been shown to offer no improvement to people's return to court or their law abiding behavior.<sup>321</sup> A study evaluating data before and after the Philadelphia District Attorney's Office implemented a new bail policy found no evidence that financial incentives increased compliance.<sup>322</sup>

Most people are detained pretrial because they are too poor to pay their bail.<sup>323</sup> Data from May 2022 showed that only 15% of the pretrial population of the Los Angeles County jail system was ordered to be held without bail – the remainder of people would have been released if they could afford cash bail.<sup>324</sup> A Pretrial Detention Workgroup convened by Chief Justice Tani Cantil-Sakauye determined, based on data from three counties in 2015 and 2016, that a large percentage of people in jail are there solely because they cannot pay cash bail.<sup>325</sup> The high proportions of people confined because they could not pay cash bail are consistent with research showing that most Americans would be unable to pay a surprise \$1,000 bill without borrowing money, and a third would be unable to pay an unexpected \$400 bill.<sup>326</sup>

While a possible benefit of pretrial detention is the prevention of someone being rearrested while their case is pending, studies show that any gains are offset by the fact that people detained pretrial are more likely to be rearrested after their case resolves.<sup>327</sup> Data also show that pretrial detention increases the likelihood of a conviction and the severity of a sentence while reducing future employment and access to social safety nets.<sup>328</sup> As Dr. Sandra Susan Smith of the Harvard Kennedy

<sup>320</sup> New York, Kentucky, North Dakota, South Carolina, Ohio, Indiana, and Alaska all allow for release through partially secured or percent bonds, which are payable to the court and are refundable minus a small court fee. Alaska Stat. § 12.30.020; Ky. Rev. Stat. Ann. §§ 431.520, 431.530; N.D.R. Crim. P. 46(a)(2)(K); N.Y. Crim. Proc. Law § 500.10(18)-(19); S.C. Code Ann. § 17-15-15(A).

<sup>321</sup> See e.g., Aurelie Ouss & Megan T. Stevenson, *Does Cash Bail Deter Misconduct?* (January 2022) (working paper); Michael Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option*, Pretrial Justice Institute (2013); Tracey Meares & Arthur Rizer, *The "Radical" Notion of the Presumption of Innocence*, The Square One Project, 26–28 (May 2020).

<sup>322</sup> Ouss & Stevenson, *Does Cash Bail Deter Misconduct?* at 3.

<sup>323</sup> Sandra Susan Smith, *Pretrial Detention, Pretrial Release, & Public Safety*, Arnold Ventures, 4 (July 2022).

<sup>324</sup> Chris Kaiser-Nyman, *Money Bail and the Los Angeles County Jail System*, Vera Institute of Justice, 4 (October 2022).

<sup>325</sup> The workgroup reported data from three counties: Fresno (15%), San Francisco (53%), and San Mateo (59%). Pretrial Detention Reform Workgroup, *Pretrial Detention Reform: Recommendations to the Chief Justice*, 25, footnote 71 (October 2017). See also Jamie Fellner, John Raphael, "Not In It For Justice": How California's Pretrial Detention and Bail System Unfairly Punishes Poor People, Human Rights Watch, 20–21 (2017) (6 county survey showing that only between 20%–30% of people eligible to pay cash bail do so).

<sup>326</sup> Karen Bennett, *Survey: Less than Half of Americans Have Savings to Cover a \$1,000 Surprise Expense*, Bankrate, January 19, 2022; *Economic Well-Being of U.S. Households in 2021*, Board of Governors of the Federal Reserve System (May 2022).

<sup>327</sup> Sandra Susan Smith, *Pretrial Detention*, at 4–5; Christopher Lowenkamp, *The Hidden Costs of Pretrial Detention Revisited*, Core Correctional Solutions (March 2022); Léon Digard & Elizabeth Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, Vera Institute (April 2019); *Advancing Pretrial Policy and Research, Pretrial Detention: Pretrial Research Summary* (April 2021).

<sup>328</sup> Paul Heaton, *The Expansive Reach of Pretrial Detention*, 98 N.C. L. Rev. 369 (2020); Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, *Journal of Law & Economics*, 60(3), 550 (2017) (probability of being rearrested within 2 years after detention increased by 8% and 12% for the felony sample and misdemeanor sample, respectively); Arpit Gupta, Christopher Hansman, & Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization*, *Journal of Legal Studies*, 45(2) (June 2016) (setting cash bail causes a 12% rise in the likelihood of conviction and a 6–9% rise in being charged with another crime in the future).

<sup>329</sup> Committee on Revision of the Penal Code, Meeting on October 11, 2022, Part 1, 1:01:17–1:01:43.

School told the Committee, the harms caused by pretrial detention occur extremely quickly and even a few hours in pretrial detention can have negative impacts.<sup>329</sup>

## INSIGHTS FROM OTHER JURISDICTIONS

*Comprehensive statewide reform:* New Jersey and New York have both recently implemented substantial changes to their pretrial system. New Jersey Supreme Court Chief Justice Stuart Rabner explained to the Committee that the state's old system resulted in low-risk defendants being held in custody because they were too poor to pay cash bail.<sup>330</sup> When the state shifted to a risk-based system and away from cash bail, New Jersey's pretrial jail population reduced by 40% and the state's rearrest rates remained stable.<sup>331</sup> In the two years after these changes, crime dropped in every category, including a 32% drop in homicides, a 30% drop in burglaries, and a 37% drop in robberies.<sup>332</sup> In 2019, the court appearance rate passed 90% for the first time.<sup>333</sup>

In New York, following sweeping reforms to state bail laws, the failure to appear rate and pretrial re-arrest rates have largely remained stable.<sup>334</sup>

Similar results were found after Harris County, Texas, reformed its misdemeanor bail system.<sup>335</sup>

*Presumption of release:* More than half of states ensure that "liberty is the norm" by codifying a presumption of release, either on recognizance or non-monetary conditions.<sup>336</sup>

*Least restrictive conditions:* Nearly half the states and Washington, D.C. have laws that require courts to impose the least restrictive conditions necessary to ensure a person's return to court and public safety.<sup>337</sup>

*Ability to pay:* At least 13 states have enacted laws that require courts to consider a person's financial circumstances or ability to pay when setting financial conditions of release.<sup>338</sup> For example, Georgia requires a court to consider an arrested person's financial resources and obligations (including to dependents) when setting bail on misdemeanors, although many courts are not complying with the law.<sup>339</sup> And in Massachusetts bail should be set in an amount no higher than what would reasonably assure the appearance of the person in court after taking into account their financial resources.<sup>340</sup> A recent court settlement in Shelby County, Tennessee (which includes Memphis) specifies that cash bail amounts should only be imposed at a level determined by a bail calculator provided by the Vera Institute.<sup>341</sup>

*Court acceptance of a percentage of the cash bail amount:* As Insha Rahman of the Vera Institute explained to the Committee, some states provide greater flexibility in the use of money to secure release.<sup>342</sup> Four states have prohibited the for-profit bail industry — Illinois, Kentucky, Wisconsin, and Oregon — and instead rely on systems that allow people to pay deposits directly to the courts when cash bail is set.<sup>343</sup> (And starting next year, Illinois will be the first state to entirely eliminate cash bail.)<sup>344</sup> Other states use this system alongside commercial bail and some states simply allow a promise to pay.<sup>345</sup> Research has shown that this type of system is no less effective than the commercial bail bond industry in ensuring appearance in court and is less destructive to people's personal finances because the money is returned at the

330 Committee on Revision of the Penal Code, Meeting on October 11, 2022, Part 1, 0:34:04–0:34:38.

331 New Jersey Courts, *Criminal Justice Reform Annual Report 2020*, 18, 8–9.

332 Rebecca Ibarra, *Crime Rates Plunge in New Jersey, And Bail Reform Advocates are Gloating*, WNYC News, November 28, 2018.

333 *Id.* at 10.

334 New York City Comptroller, *NYC Bail Trends Since 2019*, 2 (March 2022); New York State Division of Criminal Justice Services, *Supplemental Pretrial Release Data Summary Analysis: 2019–2021*, slides 23–27, September 21, 2022.

335 Monitoring Pretrial Reform in Harris County, *Fourth Report of the Court-Appointed Monitor*, March 3, 2022; Matt Keyser, *Misdemeanor Cases Steadily Declining Following Bail Reform in Harris County*, National Partnership for Pretrial Justice, March 21, 2022.

336 Salerno, 481 U.S. at 755; National Conference of State Legislatures, *Legal Presumptions to Guide Courts Making Pretrial Determinations (2020)*.

337 National Conference of State Legislatures, *Legal Presumptions to Guide Courts Making Pretrial Determinations (2020)*.

338 National Conference of State Legislatures, *Pretrial Release: Financial Conditions of Release*, February 22, 2021.

339 Andrea Woods et al., *Boots and Bail on the Ground: Assessing the Implementation of Misdemeanor Bail Reforms in Georgia*, 54 *Georgia Law Review* 1236 (2020).

340 Mass. Ch. 276 § 57.

341 Shelby County Criminal Court, *Standing Bail Order*, 12 (pages 2–3), 1.4 (page 4), August 15, 2022. See also Sandra van den Heuvel, Anton Robinson, and Insha Rahman, *A Means to an End: Assessing the Ability to Pay Bail*, Vera Institute, 4–6 (December 2019) (describing bail calculator).

342 Committee on Revision of the Penal Code, Meeting on October 11, 2022, Part 4, 0:42:37–0:46:28.

343 Timothy R. Schnacke, Michael R. Jones, Claire M.B. Brooker, *The History of Bail and Pretrial Release*, Pretrial Justice Institute, 19, September 23, 2010.

344 See Michael Friedrich, *Illinois Prepares for Historic Abolition of Cash Bail*, Arnold Ventures, October 3, 2022.

345 At least New York, Kentucky, North Dakota, South Carolina, Ohio, Indiana, and Alaska all allow for release through partially secured or percent bonds, which are payable to the court and are refundable minus a small court fee. Alaska Stat. § 12.30.020; Ky. Rev. Stat. Ann. §§ 431.520, 431.530; N.D.R. Crim. P. 46(a)(2)(f); N.Y. Crim. Proc. Law § 500.10(18)-(19); S.C. Code Ann. § 17-15-15(A). Several other states allow for unsecured bonds, in which a person simply promises to be liable for an amount of money if they fail to appear. Colo. Rev. Stat. § 16-4-104(1); Md. Rule 4-216.1(c); Minn. R. Crim. P. 6.02(1); 234 Pa. Code Rule 524(C)(3); Va. Code § 19.2-123(A)(2a).

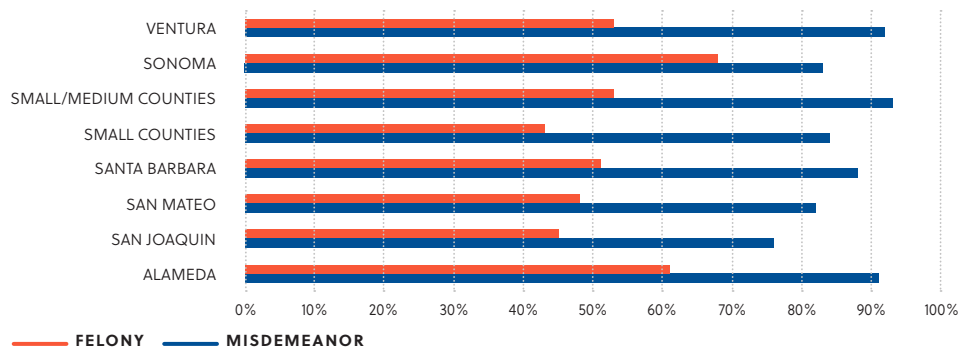
346 Jones, *Unsecured Bonds at 3*; Insha Rahman, *Against the Odds: Experimenting with Alternative Forms of Bail in New York City's Criminal Courts*, Vera Institute of Justice (September 2017); Claire M.B. Brooker, Michael R. Jones, & Timothy R. Schnacke, *The Jefferson County Bail Project: Impact Study Found Better Cost Effectiveness for Unsecured Recognizance Bonds Over Cash and Surety Bonds*, Pretrial Justice Institute (June 2014).

conclusion of a case, unlike with commercial bail bonds where the premium paid to the company is non-refundable.<sup>346</sup>

**ADDITIONAL CONSIDERATIONS**

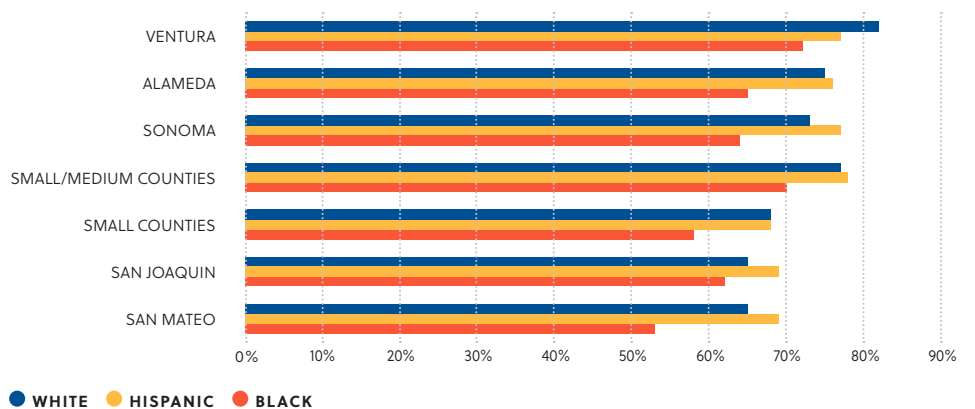
- The Committee notes that many arrested people are released from custody before seeing a judge in court, with some people securing release through cash bail set by a county bail schedule. Bail schedules, which are set by local judges, have been held unconstitutional by federal courts in San Francisco and Sacramento when used to determine who can be released from custody before seeing a judge.<sup>347</sup> A third lawsuit in state court challenging the practice was recently filed in Los Angeles County.<sup>348</sup> While bail schedules are relied on throughout the state, their constitutionality is increasingly in doubt – particularly because they conflict with *Humphrey*'s holding that release

**CALIFORNIA ARRESTEES RELEASED WITHIN 2 COURT DAYS (OCTOBER 2019–DECEMBER 2021)**



Source: Judicial Council of California, SB 36: Pretrial Pilot Program Aggregated Data Report, July 2022, Tables 1a and 1b. Los Angeles, Tulare, and Sacramento Counties were excluded because they did not report standardized data. Small counties\* are Calaveras, Modoc, Tuolumne, and Yuba. \*Small/Medium Counties\* are Kings, Napa, and Nevada-Sierra.

**PROPORTION OF CALIFORNIA ARRESTEES RELEASED WITHIN TWO DAYS BY RACE (OCTOBER 2019–DECEMBER 2021)**



Source: Judicial Council of California, SB 36: Pretrial Pilot Program Aggregated Data Report, July 2022, Tables 3a–3c. Los Angeles, Tulare, and Sacramento Counties were excluded because they did not report standardized data. Includes arrests for both misdemeanor and felony offenses.

347 *Buffin v. City and County of San Francisco*, Northern District of California, Case No. 15-cv-04959; *Welchen v. Bonta*, Eastern District of California, Case No. 16-cv-00185. The federal Ninth Circuit Court of Appeals has yet to consider the merits of the issue.  
 348 *Urquidí v. City of Los Angeles*, Los Angeles County Superior Court, Case No. 22STCP04044 (complaint filed November 14, 2022). See also Sam Levin, "If I could buy freedom, I would": LA residents who can't afford bail sue to change system," *The Guardian*, November 14, 2022.

determinations must be individualized – and courts and the Legislature should consider how to end reliance on the schedules in the pre-arraignment context.

- The Legislature should also consider expanding California’s existing administrative release laws which could safely reduce the number of people booked into jail and subject to pretrial detention. These laws currently apply to most misdemeanors – except domestic violence, stalking, and similar offenses – and require police officers to give people citations and a notice to appear in court without booking them into jail.<sup>349</sup> The law also contains exceptions that allow police officers to book people into jail for a number of reasons, including if the person presents an immediate public safety risk or there is reason to believe the person will fail to appear in court.<sup>350</sup>

The majority of arrests in California (about 70%) are for misdemeanors, with nonviolent felonies accounting for approximately 20% of arrests and violent felonies only 10%.<sup>351</sup> Administrative release could be expanded to nonviolent felony offenses, with appropriate exclusions, such as for assault crimes and sex offenses. Many states allow such policies for some felony offenses.<sup>352</sup> In New Jersey, 68% of all arrests are handled with a similar practice.<sup>353</sup>

349 Penal Code § 853.6.

350 Penal Code § 853.6(i)(1)–(12).

351 California Department of Justice, *Crime in California 2021*, Tables 28 & 31.

352 *Citation In Lieu of Arrest*, National Conference of State Legislatures (October 2018).

353 *New Jersey Courts, Criminal Justice Reform Annual Report 2020*, 14 (statistics on use of “complaint-summons”).

354 See, e.g., *Advancing Pretrial Policy & Research, Pretrial Assessment Tools* (April 2020); Alissa Fishbane, Aurelie Ouss, Anuj K. Shah, *Behavioral Nudges Reduce Failure to Appear for Court*, Science, 379:682, (November 2020); Russell Ferri, *Desk Appearance Tickets and Appearance Rate — The Benefits of Court Date Reminders*, New York City Criminal Justice Agency (July 2019); Joanna Thomas & Abdaziz Ahmed, *Court Date Notifications: A Summary of the Research and Best Practices for Building Effective Reminder Systems*, New York City Criminal Justice Agency, 29–30 (March 2021).

355 Grace Toohey, Alexandra E. Petri, *A Text Asked Millions of Californians To Save Energy*, Los Angeles Times, September 7, 2022.

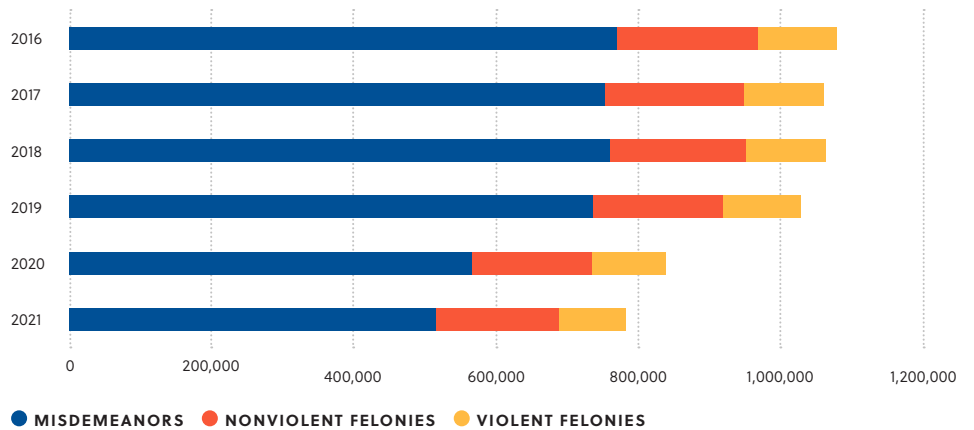
356 Thomas & Ahmed, *Court Date Notifications*, at 30 (equivalent of 1,000 annual jail beds saved by use of reminders by a county in Arizona).

357 N.Y. Crim. Proc. Law § 1580.80(2); Thomas & Ahmed, *Court Date Notifications*, 28–29 (describing programs in Louisville, KY, King County, WA, Multnomah County, OR, Hennepin County, MN, and Jefferson County, CO). See also Vittorio Nastasi, et al., *Addressing Mass Supervision in the United States: How Text Message Reminders Can Help Reduce Technical Violations of Community Supervision*, Reason Foundation (November 2022) (state-wide program in Arkansas).

358 Alex Chohlas-Wood, Madison Coots, Joe Nudell, Emma Brunskill, Todd Rogers & Sharad Goel, *Automated Court Date Reminders Reduce Arrest Warrants: Evidence from a Field Experiment* (working paper).

359 Emily Owens, CarlyWill Sloan, *Can Text Messages Reduce Incarceration in Rural and Vulnerable Populations?* (September 2022) (working paper).

**CALIFORNIA ADULT ARRESTS BY OFFENSE TYPE (2016–2021)**



Source: California Department of Justice, *Crime in California 2021*, Tables 18 & 19.

- Court reminders via text message or phone call are a proven way to increase appearance in court.<sup>354</sup> California has used text messages to provide other public services, such as reminders to use less electricity during heat waves,<sup>355</sup> and should use the same technology to help people get to court. Doing so would improve appearance rates and reduce costs by resolving cases more quickly.<sup>356</sup> Many jurisdictions around the country have used reminders to increase appearance rates in court and they are required by law in New York.<sup>357</sup> A random control study in Santa Clara County involving more than 1,500 people found that automated text message reminders resulted in a 25% reduction in bench warrants over a 28-day period.<sup>358</sup> A similar study in Shasta County found a 10% improvement in appearance rates for people who were not unhoused.<sup>359</sup>



- The state and local governments should continue to encourage the use of supportive pretrial services for people who have been arrested.<sup>360</sup> Such programs, which supervise people on pretrial release and link them with treatment, housing, and other resources, may lead to better appearance and lower rearrest rates.<sup>361</sup>

<sup>360</sup> See, e.g., SB 129 (Skinner 2021) Section 4, Items 9–18 (funding for programs that “promote the safe, efficient, fair, and timely pretrial release of individuals booked into jail”); Motion by Los Angeles County Supervisors Sheila Kuehl and Hilda L. Solis, *Program Implementation Support for Pretrial Services* (approved November 15, 2022).

<sup>361</sup> See, e.g., Ricardo Basurto-Davila, Irene Vidyanti & Chun Liu, *Data Collection to Support Pretrial Reform*, Los Angeles County Chief Information Officer, 7 September 2021 (people released pretrial who received support services had lower failure to appear and rearrest rates than the overall population released pretrial); New York City Mayor’s Office of Criminal Justice, *Supervised Release Annual Scorecard 2020*, (87% of people in program returned to court; only 13% were rearrested for a felony).

Update on SB 483

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# Additional Analysis and Data on Past Committee Recommendations

## Additional Analysis and Data on Past Committee Recommendations

### UPDATE ON SB 483

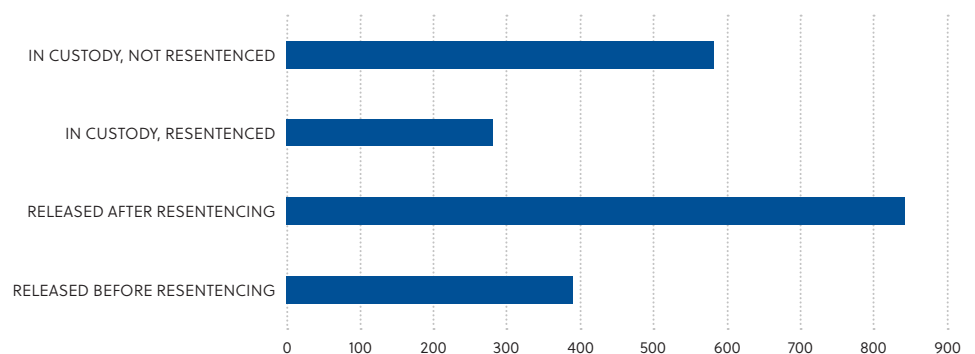
In its 2020 Annual Report, the Committee recommended retroactive application of SB 136 (Weiner) and SB 180 (Mitchell), which repealed certain 1- and 3-year sentence enhancements.<sup>362</sup> At the time, more than 14,000 people had prison sentences lengthened by these enhancements.<sup>363</sup> The Committee noted the racially disproportionate application of the enhancements and suggested an administrative resentencing process to quickly and efficiently remove the enhancements from people’s sentences.<sup>364</sup>

In 2021, the Legislature and Governor enacted SB 483 (Allen) to implement the Committee’s recommendation and created a court process to review and potentially remove the enhancements from the sentences of people currently incarcerated in jail or prison.

To facilitate resentencing, the law set a March 1, 2022, deadline for local jails and the California Department of Corrections and Rehabilitation to send courts lists of people who were potentially eligible for immediate release if the enhancements were removed from their sentences.<sup>365</sup> Resentencings for these people were to be completed before October 1, 2022.<sup>366</sup> The list from CDCR had more than 2,000 people on it.<sup>367</sup> But follow-up data from CDCR indicates that 28% of the eligible people had not been resentenced by the October 1 deadline and remained in custody. Another 19% were released before resentencing could be completed by October 1 and likely served longer terms of incarceration than they would have if the enhancements had been removed.

A second list of people from CDCR – those who have the enhancements but are serving longer sentences – has more than 7,000 names on it. Under SB 483, these people must be resentenced by December 31, 2023.<sup>368</sup>

#### SB 483 RESENTENCING STATUS FOR PEOPLE IMMEDIATELY ELIGIBLE FOR RELEASE



Source: CDCR Office of Research. Data reflects information received by CDCR as of September 30, 2022.

The number of people in each category who are serving their sentences in local jails is unknown, but is likely much smaller than the CDCR numbers.<sup>369</sup>

The Legislature, courts, and other stakeholders should take steps to ensure that all people have access to the resentencing procedures mandated by SB 483.

<sup>362</sup> Committee on Revision of the Penal Code, *2020 Annual Report*, 48–51.

<sup>363</sup> Analysis of data provided by CDCR Office of Research.

<sup>364</sup> *Id.*

<sup>365</sup> Penal Code §§ 1172.7(b); 1172.75(b).

<sup>366</sup> Penal Code §§ 1172.7(c); 1172.75(c).

<sup>367</sup> This data from CDCR was provided to the Committee by the Ella Baker Center and the Office of the State Public Defender. The data was the list of people in CDCR custody as of February 16, 2022, who would have been potentially eligible for immediate release if the enhancements were removed. It included information for 2,095 separate case numbers accounting for 1,989 unique people. The analysis in this report is at the case number level, not the person level.

<sup>368</sup> Penal Code §§ 1172.7(c); 1172.75(c).

<sup>369</sup> The 1 year enhancement stopped being imposed in 2020 and the 3 year enhancement stopped being imposed in 2018. People serving sentences in jail tend to have much shorter sentences than those in prison, so many of the people who had sentences with the 1 and 3 year enhancement had probably been released before SB 483 would have provided any relief.

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# 2022 Administrative Report

## 2022 Administrative Report

The following report summarizes the Committee's activities during the past year from an administrative standpoint and briefly describes the Committee's future plans.

### CREATION OF THE COMMITTEE

On January 1, 2020, the Committee on Revision of the Penal Code was formed.<sup>370</sup>

For administrative and budgetary purposes, the Committee was located within the California Law Revision Commission. There is no substantive overlap in the work of the Committee and the Commission. By law, no person can serve on both the Commission and the Committee simultaneously.<sup>371</sup> Neither body has any authority over the substantive work of the other<sup>372</sup> and they each have different statutory duties.<sup>373</sup>

The Committee has 7 members. Five are appointed by the Governor for 4-year terms.<sup>374</sup> One is an Assemblymember selected by the speaker of the assembly; the last is a Senator selected by the Senate Committee on Rules.<sup>375</sup> The Governor selects the Committee's chair.<sup>376</sup>

### FUNCTION AND PROCEDURE OF THE COMMITTEE

The principal duties of the Committee are to make recommendations that:

1. Simplify and rationalize the substance of criminal law.
2. Simplify and rationalize criminal procedure.
3. Establish alternatives to incarceration that will aid in the rehabilitation of offenders.
4. Improve the system of parole and probation.<sup>377</sup>

The Committee is required to prepare an Annual Report for submission to the Governor and the Legislature.<sup>378</sup>

The Committee conducts its deliberations in public meetings, subject to the Bagley-Keene Open Meeting Act.<sup>379</sup> In 2022, it held 6 meetings, 2 of which were 2-day meetings. Due to the COVID-19 pandemic, meetings were conducted entirely by teleconference, except for the May meeting, which was conducted in person at the State Library.<sup>380</sup>

<sup>370</sup> Government Code § 8280(b).

<sup>371</sup> See Government Code § 8281.5(d).

<sup>372</sup> Government Code § 8290(c).

<sup>373</sup> Compare Government Code §§ 8289, 8290 (duties of Commission) with Government Code § 8290.5 (duties of Committee).

<sup>374</sup> Government Code § 8281.5(a), (c).

<sup>375</sup> Government Code § 8281.5(a).

<sup>376</sup> Government Code § 8283.

<sup>377</sup> Government Code § 8290.5(a).

<sup>378</sup> Government Code § 8293(b).

<sup>379</sup> Government Code §§ 11120–11132.

<sup>380</sup> This was made possible by Executive Orders N-1-22 and Government Code § 11133 (added by 2022 Cal. Stat. ch. 48 (SB 189) § 20, on June 30, 2022).

## **PERSONNEL OF THE COMMITTEE**

At the time of this Report in 2022, the following persons were members of the Committee:

### **CHAIR**

Michael Romano

### **LEGISLATIVE MEMBERS**

Senator Nancy Skinner

Assemblymember Isaac Bryan

### **GUBERNATORIAL APPOINTEES**

Hon. Peter Espinoza

Hon. Thelton E. Henderson

Hon. Carlos Moreno

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

Thomas M. Nosewicz

*Legal Director*

Rick Owen

*Senior Staff Counsel*

Joy F. Haviland

*Senior Staff Counsel*

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

Lizzie Buchen

Lara Hoffman

Natasha Minsker

The following people from the California Policy Lab provide data analysis and research support to the Committee:

Mia Bird

Omair Gill

Johanna Laco

Molly Pickard

Steven Raphael

Nefara Riesch

Alissa Skog

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

Brian Hebert  
*Executive Director*

Debora Larrabee  
*Chief of Administrative Services*

Megan Hayenga  
*Office Assistant*

This Report was designed by Taylor Le.

### **PLANNED ACTIVITIES FOR 2023**

In 2023, the Committee expects to follow the same general deliberative process that it used in past years. It will hold public meetings with speakers representing groups that have an interest in reform of the criminal legal system. At those meetings, the Committee will identify, debate, and develop recommendations for policies that improve public safety, reduce unnecessary incarceration, improve equity, and address racial disparities.

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

### **ACKNOWLEDGEMENTS**

Many individuals and organizations participated in Committee meetings in 2022 or otherwise contributed towards this Report. The Committee is deeply grateful for their assistance.

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

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

### **KEYNOTE SPEAKER**

Mariano-Florentino Cuéllar  
*President, Carnegie Endowment for International Peace; former Associate Justice, California Supreme Court*

**PANELISTS**

(in alphabetical order)

Judge Brett Alldredge  
*Tulare County Superior Court*

Matt Alsdorf  
*Associate Director, Center for Effective Public Policy*

Judge Thomas M. Anderson  
*Nevada County Superior Court*

David Angel  
*Assistant District Attorney, Santa Clara County*

Bill Armstrong  
*President, California Bail Agents Association*

Judge James N. Bianco  
*Los Angeles County Superior Court*

Sue Burrell  
*Policy Director Emeritus, Pacific Juvenile Defender Center*

Stephanie Campos-Bui  
*Deputy Director, Policy Advocacy Clinic, UC Berkeley School of Law*

Dr. Gena Castro Rodriguez  
*Assistant Professor, University of San Francisco & Director, Survivor Policy, Prosecutors Alliance of California*

Erwin Chemerinsky  
*Dean and Jesse H. Choper Distinguished Professor of Law, UC Berkeley School of Law*

Jeff Clayton  
*Executive Director, American Bail Coalition*

Gina Clayton-Johnson  
*Executive Director, Essie Justice Group*

Judge J. Richard Couzens (Ret.)  
*Placer County Superior Court*

Ryan Couzens  
*Assistant Chief Deputy District Attorney, Yolo County*

Ralph Diaz  
*President & CEO, Stand Up for Victims*



Mariam El-Menshawi  
*Director, California Victims Legal Resource Center*

Cymone Fuller  
*Co-Director, Impact Justice Restorative Justice Project*

Judge George Eskin (Ret.)  
*Santa Barbara County Superior Court*

Lynda Gledhill  
*Executive Officer, California Victim Compensation Board*

Aditi Goel  
*Senior Program Manager, Sixth Amendment Center*

Professor Neil Gowensmith  
*University of Denver's Forensic Institute for Research, Service, and Training*

Matthew Greco  
*Deputy District Attorney, San Diego County*

Delaney Green  
*Clinical Teaching Fellow, UC Berkeley School of Law Policy Advocacy Clinic*

Andrew Gulcher  
*Regional Supervising Investigator, California Department of Insurance*

Paul Heaton  
*Professor of Law and Academic Director, Quattrone Center for the Fair Administration of Justice*

Chief Probation Officer David Koch  
*Sonoma County*

Judge Steven Leifman  
*Associate Administrative Judge, Miami-Dade County Court*

Galit Lipa  
*Executive Director, Indigent Defense Improvement Division, Office of the State Public Defender*

Judge Juliet J. McKenna  
*Associate Judge, Superior Court of the District of Columbia*

Rachel Michelin  
*President & CEO, California Retailers Association*

Thomas Morgan  
*CDCR Victim-Offender Dialogue Participant*

Professor Daniel Murrie  
*University of Virginia's Institute of Law, Psychiatry, and Public Policy*

Michelle Parris  
*Program Director, Vera Institute of Justice*

Theresa Pasquini  
*Co-author of Housing That Heals*

Kim Pederson  
*Senior Attorney, Disability Rights California*

Maria Ponomarenko  
*Co-Founder and Counsel, NYU Policing Project*

Chief Justice Stuart Rabner  
*New Jersey Supreme Court*

Insha Rahman  
*Vice President, Advocacy and Partnerships, Vera Institute of Justice*

Steven Raphael  
*Professor of Public Policy, UC Berkeley & Co-Chair California Racial Identity and Profiling Advisory (RIPA) Board*

Stephanie Regular  
*Chair of California Public Defender Association's Mental Health and Civil Commitment Committee*

Jeff Reisig  
*District Attorney, Yolo County & Past-President, California District Attorneys Association*

Lizabeth Rhodes  
*Director, LAPD Office of Constitutional Policing*

Judge Lisa Rodriguez  
*San Diego County Superior Court & Vice Chair, Judicial Council of California Criminal Law Advisory Committee*

Alison Shames  
*Director, Center for Effective Public Policy*

Chauncey Smith  
*Senior Manager of Criminal Justice, Catalyst California*

Sandra Susan Smith  
*Daniel & Florence Guggenheim Professor of Criminal Justice, Harvard Kennedy School and Director, Malcolm Wiener Center for Social Policy*

Tiffanie Synnott  
*Supervising Public Defender, Sacramento County*

Aswad Thomas  
*National Director, Crime Survivors for Safety and Justice*

Irene Vidyanti  
*Principal Analyst, Los Angeles County Office of the Chief Information Officer*

Carlie Ware  
*PARR Team Supervisor, Santa Clara County Public Defender*

Dr. Katherine Warburton  
*Statewide Medical Director, California Department of State Hospitals*

Kate Weisburd  
*Associate Professor of Law, The George Washington University Law School*

Jordan Woods  
*Professor of Law, University of Arizona – James E. Rogers College of Law*

Mike Young  
*Assistant Chief, CDCR Office of Victim and Survivor Rights & Services*

Kendra Zoller  
*Deputy Legislative Director, California Department of Insurance*

#### **PHILANTHROPIC AND OTHER SUPPORT**

The Committee is grateful to Arnold Ventures for providing generous support for the Committee's research and data analysis with the California Policy Lab. The Committee also extends special thanks to the personnel at the California Department of Corrections and Rehabilitation Department of Research, the California Department of Justice Research Department, the Department of State Hospitals, and the Judicial Council of California who assisted the Committee's data-gathering efforts. The Committee also received generous support from staff and faculty at Stanford Law School in developing our recommendations and drafting this report.

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# Appendix

## Appendix A: Biographies of 2022 Committee Members

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

Assemblymember Isaac Bryan, of Los Angeles, has been a member of the Assembly since 2021 and represents the 54th Assembly District, which includes, among other neighborhoods, Baldwin Hills, Crenshaw, Century City, Culver City, and Westwood. Prior to his election, Assemblymember Bryan served as the founding Director of the UCLA Black Policy Project, a think tank dedicated to advancing racial equity through policy analysis, served as the first Director of Public Policy at the UCLA Ralph J. Bunche Center, and Director of Organizing for the Million Dollar Hoods project. Assemblymember Bryan has authored several influential policy reports and led several campaigns at the intersection of racial, economic, and social justice. He earned a master's degree in public policy from the University of California, Los Angeles.

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

Thelton E. Henderson, of Berkeley, has been Distinguished Visiting Professor of Law at the University of California, Berkeley since 2017. Henderson served as a U.S. District Court Judge at the U.S. District Court for the Northern District of California from 1980 to 2017. He was Assistant Dean at Stanford Law School from 1968 to 1976 and a Professor at Golden Gate Law School from 1977 to 1980. Henderson was Director of the East Bayshore Neighborhood Legal Center from 1966 to 1968. Henderson was a Corporal in the U.S. Army, serving as a Clinical Psychology Technician from 1956 to 1958. He earned a juris doctor degree from the University of California, Berkeley School of Law.

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

City Attorney's Office from 1975 to 1979. Moreno earned a juris doctor degree from Stanford Law School.

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

## Appendix B: Unused Offenses Data

To conduct this analysis, the California Policy Lab used a list of felony offenses taken from the California Center for Judicial Education and Research (CJER) *Felony Sentencing Handbook*. The offense list was limited to (1) felonies (2) in the Penal Code, (3) that were not wobblers. It also did not include attempt offenses or 29 offenses that the CJER list categorized with more than one Penal Code section, such as Penal Code § 459/461(a) (burglary in the first degree).

This list of offenses was then cross-referenced with the California Department of Justice's Law Enforcement Code Table to obtain the numeric code assigned to each offense by the Department of Justice Criminal Justice Information Services (CJIS) Division. Six offenses did not have a corresponding CJIS code and were excluded from the analysis. The final offense list contained 299 separate felony offenses with corresponding CJIS codes. Those CJIS codes were then matched with criminal disposition data in California's Automated Criminal History System to generate the results below. The offense names are those used in the CJER list.

### **OFFENSES WITHOUT ANY CONVICTIONS (2012–2021)**

Limited to Non-Wobbler Felonies in the Penal Code

Penal Code §	Offense Name
38	Knowledge and concealment of treason
85	Bribing legislator
92	Bribing judicial officer or juror
93	Judicial officer or juror accepting bribe
109	Assisting escape of inmate from training school/reformatory, etc.
110	Send/carry into training school/reformatory items for escape
117	Certifying false jury list
155	Selling or concealing property by defendant or judgment debtor
156	Producing spurious heir
157	Substituting child
165	Giving or offering bribe to official
214	Train robbery
265	Abduction to force marriage or defilement
311.7	Requiring acceptance of obscene matter as condition for receiving other merchandise w/2 prior conviction of ch 7.5
337.2	Touting w/prior conviction
337.7	Use of illegal/forged credential or license in touting w/prior conviction
425	Officer's failure to pay over public funds
500	Receiving money of \$950 or more for transmittal to foreign countries
528	Marriage by impersonation
533	Selling land twice
534	Spouse selling land/property by false pretense
610	Tampering w/signal lights
617	Injuring or destroying other's written instrument
639	Bribing financial institution employee to obtain credit/loan
641	Bribing telegraph/telephone agent

2772	Interference w/prisoner or delivery of forbidden items to prisoner
2790	Interference w/prisoner or delivery of forbidden items to prisoner
4550	Rescue or attempted rescue of prisoner convicted of capital crime
11412	Religious terrorism
11418(A)(1)	Possession, production, or transfer of weapons of mass destruction
11418(A)(2)	Possession, production, or transfer of weapons of mass destruction w/designated prior conviction
11418(B)(4)	Use of weapon of mass destruction to cause damage to or substantial loss in the value of stock animals or crops
11418(C)	Use of weapon of mass destruction to damage public natural resources
11418(D)(1)	Use of recombinant technology to create new pathogens for use in any crime defined in Pen C §11418(b)
11418(D)(2)	Use of recombinant technology to create new pathogens for use in any crime defined in Pen C §11418(c)
11419(A)	Possession of restricted biological agents
141(C)	Prosecutor tampering or falsifying evidence
151(A)(2)	Advocating injury/death of peace officer resulting in injury/death
154(B)	Defrauding creditors by selling or concealing property of value greater than \$250
182(A)(6)	Conspiracy against public official
186.26(B)	Use of threats of physical violence on two or more occasions within 30-day period to coerce, induce, or solicit another person to participate in criminal street gang
18715(A)(4)	Possession of destructive device or explosive in public or private place, or on transit vehicle
18725(A)	Carrying or placing destructive device or explosive on transit vehicle or in baggage
26180(B)	Making false statements on gun license application
266B	Abduct by force for illicit relation
266G	Placing wife in house of prostitution
287(C)(3)	Oral copulation by threat of retaliation
287(D)(1)(A)	Oral copulation in concert by force/fear of bodily injury
287(D)(1)(B)	Oral copulation in concert by force/fear of bodily injury
287(D)(1)(C)	Oral copulation in concert by force/fear of bodily injury
287(D)(3)	Oral copulation in concert by force/fear of bodily injury, minor victim 14 years of age or older
287(K)	Oral copulation by threat to use authority of public official
298.2(A)(1)	Facilitating wrongful collection of, or tampering w/DNA blood specimen or print impression
29800(A)(2)	Possession of firearm by person w/2 prior conviction of brandishing firearm under Pen C §417(a)(2)
350(C)	Manufacture, sale, or possession for sale of counterfeit mark causing death or GBI
399(A)	Owner or person having control allowing vicious animal at large resulting in death
4574(B)	Smuggling tear gas into prison or jail
502.7(G)	Theft of telephone or telegraph services w/prior conviction within 5 years
593A	Malicious damage to timber/trees
597.5(A)	Dog fighting



598C(A)	Conducting transaction involving horse with intent to kill horse for human consumption
598D(A)	Sale of horsemeat for human consumption w/prior conviction
636(A)	Electronic eavesdropping on privileged conversation
639A	Financial institution employee soliciting/accepting bribe
653J	Solicitation of minor to commit certain felonies
653T(A)	Interfering w/emergency radio transmission resulting in serious bodily injury or property loss in excess of \$10,000

**OFFENSES WITHOUT ANY ARRESTS (2012-2021)**

Limited to Non-Wobbler Felonies in the Penal Code

Penal Code §	Offense Name
157	Substituting child
311.7	Requiring acceptance of obscene matter as condition for receiving other merchandise w/2 prior conviction of ch 7.5
337.2	Touting w/prior conviction
337.7	Use of illegal/forged credential or license in touting w/prior conviction
639	Bribing financial institution employee to obtain credit/loan
2772	Interference w/prisoner or delivery of forbidden items to prisoner
11418(A)(2)	Possession, production, or transfer of weapons of mass destruction w/designated prior conviction
11418(B)(4)	Use of weapon of mass destruction to cause damage to or substantial loss in the value of stock animals or crops
11418(C)	Use of weapon of mass destruction to damage public natural resources
11418(D)(1)	Use of recombinant technology to create new pathogens for use in any crime defined in Pen C §11418(b)
11418(D)(2)	Use of recombinant technology to create new pathogens for use in any crime defined in Pen C §11418(c)
11419(A)	Possession of restricted biological agents
141(C)	Prosecutor tampering or falsifying evidence
350(C)	Manufacture, sale, or possession for sale of counterfeit mark causing death or GBI
399(A)	Owner or person having control allowing vicious animal at large resulting in death
502.7(G)	Theft of telephone or telegraph services w/prior conviction within 5 years
593A	Malicious damage to timber/trees
598D(A)	Sale of horsemeat for human consumption w/prior conviction
639A	Financial institution employee soliciting/accepting bribe

**OFFENSES WITH ARRESTS BUT NO CONVICTIONS (2012–2021)**

Limited to Non-Wobbler Felonies in the Penal Code

Penal Code §	Offense Name
38	Knowledge and concealment of treason
85	Bribing legislator
92	Bribing judicial officer or juror
93	Judicial officer or juror accepting bribe
109	Assisting escape of inmate from training school/reformatory, etc.
110	Send/carry into training school/reformatory items for escape
117	Certifying false jury list
155	Selling or concealing property by defendant or judgment debtor
156	Producing spurious heir
165	Giving or offering bribe to official
214	Train robbery
265	Abduction to force marriage or defilement
425	Officer's failure to pay over public funds
500	Receiving money of \$950 or more for transmittal to foreign countries
528	Marriage by impersonation
533	Selling land twice
534	Spouse selling land/property by false pretense
610	Tampering w/signal lights
617	Injuring or destroying other's written instrument
641	Bribing telegraph/telephone agent
2790	Interference w/prisoner or delivery of forbidden items to prisoner
4550	Rescue or attempted rescue of prisoner convicted of capital crime
11412	Religious terrorism
11418(A)(1)	Possession, production, or transfer of weapons of mass destruction
151(A)(2)	Advocating injury/death of peace officer resulting in injury/death
154(B)	Defrauding creditors by selling or concealing property of value greater than \$250
182(A)(6)	Conspiracy against public official
186.26(B)	Use of threats of physical violence on two or more occasions within 30-day period to coerce, induce, or solicit another person to participate in criminal street gang
18715(A)(4)	Possession of destructive device or explosive in public or private place, or on transit vehicle
18725(A)	Carrying or placing destructive device or explosive on transit vehicle or in baggage
26180(B)	Making false statements on gun license application
266B	Abduct by force for illicit relation
266G	Placing wife in house of prostitution
287(C)(3)	Oral copulation by threat of retaliation
287(D)(1)(A)	Oral copulation in concert by force/fear of bodily injury
287(D)(1)(B)	Oral copulation in concert by force/fear of bodily injury
287(D)(1)(C)	Oral copulation in concert by force/fear of bodily injury

287(D)(3)	Oral copulation in concert by force/fear of bodily injury, minor victim 14 years of age or older
287(K)	Oral copulation by threat to use authority of public official
298.2(A)(1)	Facilitating wrongful collection of, or tampering w/DNA blood specimen or print impression
29800(A)(2)	Possession of firearm by person w/2 prior conviction of brandishing firearm under Pen C §417(a)(2)
4574(B)	Smuggling tear gas into prison or jail
597.5(A)	Dog fighting
598C(A)	Conducting transaction involving horse with intent to kill horse for human consumption
636(A)	Electronic eavesdropping on privileged conversation
653J	Solicitation of minor to commit certain felonies
653T(A)	Interfering w/emergency radio transmission resulting in serious bodily injury or property loss in excess of \$10,000

**OFFENSES WITHOUT ANY CONVICTIONS (2017–2021)**

Limited to Non-Wobbler Felonies in the Penal Code

Penal Code §	Offense Name
109	Assisting escape of inmate from training school/reformatory, etc.
110	Send/carry into training school/reformatory items for escape
11412	Religious terrorism
11418(A)(1)	Possession, production, or transfer of weapons of mass destruction
11418(A)(2)	Possession, production, or transfer of weapons of mass destruction w/designated prior conviction
11418(B)(4)	Use of weapon of mass destruction to cause damage to or substantial loss in the value of stock animals or crops
11418(C)	Use of weapon of mass destruction to damage public natural resources
11418(D)(1)	Use of recombinant technology to create new pathogens for use in any crime defined in Pen C §11418(b)
11418(D)(2)	Use of recombinant technology to create new pathogens for use in any crime defined in Pen C §11418(c)
11419(A)	Possession of restricted biological agents
116	Tampering w/jury list
117	Certifying false jury list
141(C)	Prosecutor tampering or falsifying evidence
146E(B)	Disclosure of address/phone number of peace officer or family member resulting in bodily injury to these persons
151(A)(2)	Advocating injury/death of peace officer resulting in injury/death
154(B)	Defrauding creditors by selling or concealing property of value greater than \$250
155	Selling or concealing property by defendant or judgment debtor
156	Producing spurious heir
157	Substituting child
165	Giving or offering bribe to official
181	Involuntary servitude or sale of person
182(A)(6)	Conspiracy against public official
186.26(B)	Use of threats of physical violence on two or more occasions within 30-day period to coerce, induce, or solicit another person to participate in criminal street gang
18715(A)(4)	Possession of destructive device or explosive in public or private place, or on transit vehicle
18725(A)	Carrying or placing destructive device or explosive on transit vehicle or in baggage
192(C)(3)	Vehicular manslaughter where collision knowingly caused for financial gain
214	Train robbery
247(A)	Discharge firearm at unoccupied aircraft
26180(B)	Making false statements on gun license application
265	Abduction to force marriage or defilement
266B	Abduct by force for illicit relation

266G	Placing wife in house of prostitution
2772	Interference w/prisoner or delivery of forbidden items to prisoner
2790	Interference w/prisoner or delivery of forbidden items to prisoner
286(C)(3)	Sodomy by threat of retaliation
286(J)	Sodomy by victim's belief that accused is someone known to the victim other than the accused
286(K)	Sodomy by threat to use authority of public official
287(C)(3)	Oral copulation by threat of retaliation
287(D)(1)(A)	Oral copulation in concert by force/fear of bodily injury
287(D)(1)(B)	Oral copulation in concert by force/fear of bodily injury
287(D)(1)(C)	Oral copulation in concert by force/fear of bodily injury
287(D)(3)	Oral copulation in concert by force/fear of bodily injury, minor victim 14 years of age or older
287(K)	Oral copulation by threat to use authority of public official
298.2(A)(1)	Facilitating wrongful collection of, or tampering w/DNA blood specimen or print impression
29800(A)(2)	Possession of firearm by person w/2 prior conviction of brandishing firearm under Pen C §417(a)(2)
311.2(A)	Sale or distribution of obscene material w/prior conviction of Pen C §311.2(a), §311.5, §313.1, or ch 7.5
311.5	Advertising obscene matter w/prior conviction of Pen C §311.2(a), §311.5, §313.1, or ch 7.5
311.7	Requiring acceptance of obscene matter as condition for receiving other merchandise w/2 prior conviction of ch 7.5
337	Official granting aid/license for illegal gaming for remuneration
337.2	Touting w/prior conviction
337.7	Use of illegal/forged credential or license in touting w/prior conviction
350(C)	Manufacture, sale, or possession for sale of counterfeit mark causing death or GBI
375(D)	Release harmful substance in public place which may result in serious illness or permanent injury
38	Knowledge and concealment of treason
386(A)	Willful construction or maintenance of inoperable or unsafe fire protection system
399(A)	Owner or person having control allowing vicious animal at large resulting in death
425	Officer's failure to pay over public funds
432	Fraudulent possession of blank licenses/receipts
4503	Prisoner holding hostage in prison
4533	Officer aiding or abetting escape of prisoner
454	Commission of Pen C §451(d) or §452 within area of insurrection or emergency
4550	Rescue or attempted rescue of prisoner convicted of capital crime
4574(B)	Smuggling tear gas into prison or jail
478	Counterfeiting
500	Receiving money of \$950 or more for transmittal to foreign countries
502.7(G)	Theft of telephone or telegraph services w/prior conviction within 5 years
519	Extortion
528	Marriage by impersonation

533	Selling land twice
534	Spouse selling land/property by false pretense
593A	Malicious damage to timber/trees
597.5(A)	Dog fighting
598C(A)	Conducting transaction involving horse with intent to kill horse for human consumption
598D(A)	Sale of horsemeat for human consumption w/prior conviction
610	Tampering w/signal lights
617	Injuring or destroying other's written instrument
625C	Tampering w/transit vehicle with intent to cause GBI
636(A)	Electronic eavesdropping on privileged conversation
639	Bribing financial institution employee to obtain credit/loan
639A	Financial institution employee soliciting/accepting bribe
641	Bribing telegraph/telephone agent
653F(C)	Solicit commission of Pen C §264.1, §288, or §289
653J	Solicitation of minor to commit certain felonies
653T(A)	Interfering w/emergency radio transmission resulting in serious bodily injury or property loss in excess of \$10,000
76	Threatening life of or threatening serious bodily harm to government official w/prior conviction
85	Bribing legislator
92	Bribing judicial officer or juror
93	Judicial officer or juror accepting bribe

**OFFENSES WITHOUT ANY ARRESTS (2017-2021)**

Limited to Non-Wobbler Felonies in the Penal Code

Penal Code §	Offense Name
11418(A)(2)	Possession, production, or transfer of weapons of mass destruction w/designated prior conviction
11418(B)(4)	Use of weapon of mass destruction to cause damage to or substantial loss in the value of stock animals or crops
11418(C)	Use of weapon of mass destruction to damage public natural resources
11418(D)(1)	Use of recombinant technology to create new pathogens for use in any crime defined in Pen C §11418(b)
11418(D)(2)	Use of recombinant technology to create new pathogens for use in any crime defined in Pen C §11418(c)
11419(A)	Possession of restricted biological agents
138	Witness soliciting or receiving bribe
141(C)	Prosecutor tampering or falsifying evidence
146E(B)	Disclosure of address/phone number of peace officer or family member resulting in bodily injury to these persons
154(B)	Defrauding creditors by selling or concealing property of value greater than \$250
157	Substituting child
266D	Receiving money for placing person in custody for cohabitation
266G	Placing wife in house of prostitution
2772	Interference w/prisoner or delivery of forbidden items to prisoner
311.7	Requiring acceptance of obscene matter as condition for receiving other merchandise w/2 prior conviction of ch 7.5
313.1	Distribution of harmful matter to minors w/prior conviction of Pen C §313.1 or ch 7.5
337.2	Touting w/prior conviction
337.7	Use of illegal/forged credential or license in touting w/prior conviction
350(C)	Manufacture, sale, or possession for sale of counterfeit mark causing death or GBI
399(A)	Owner or person having control allowing vicious animal at large resulting in death
4550	Rescue or attempted rescue of prisoner convicted of capital crime
500	Receiving money of \$950 or more for transmittal to foreign countries
502.7(G)	Theft of telephone or telegraph services w/prior conviction within 5 years
534	Spouse selling land/property by false pretense
593A	Malicious damage to timber/trees
597.5(A)	Dog fighting
598C(A)	Conducting transaction involving horse with intent to kill horse for human consumption
598D(A)	Sale of horsemeat for human consumption w/prior conviction
639	Bribing financial institution employee to obtain credit/loan
639A	Financial institution employee soliciting/accepting bribe
641	Bribing telegraph/telephone agent



**OFFENSES WITH ARRESTS BUT NO CONVICTIONS (2017-2021)**

Limited to Non-Wobbler Felonies in the Penal Code

Penal Code §	Offense Name
311.2(A)	Sale or distribution of obscene material w/prior conviction of Pen C §311.2(a), §311.5, §313.1, or ch 7.5
337	Official granting aid/license for illegal gaming for remuneration
76	Threatening life of or threatening serious bodily harm to government official w/prior conviction
29800(A)(2)	Possession of firearm by person w/2 prior conviction of brandishing firearm under Pen C §417(a)(2)
478	Counterfeiting
192(C)(3)	Vehicular manslaughter where collision knowingly caused for financial gain
182(A)(6)	Conspiracy against public official
528	Marriage by impersonation
298.2(A)(1)	Facilitating wrongful collection of, or tampering w/DNA blood specimen or print impression
287(D)(1)(A)	Oral copulation in concert by force/fear of bodily injury
519	Extortion
653F(C)	Solicit commission of Pen C §264.1, §288, or §289
266B	Abduct by force for illicit relation
247(A)	Discharge firearm at unoccupied aircraft
286(C)(3)	Sodomy by threat of retaliation
85	Bribing legislator
18725(A)	Carrying or placing destructive device or explosive on transit vehicle or in baggage
287(C)(3)	Oral copulation by threat of retaliation
653T(A)	Interfering w/emergency radio transmission resulting in serious bodily injury or property loss in excess of \$10,000
181	Involuntary servitude or sale of person
386(A)	Willful construction or maintenance of inoperable or unsafe fire protection system
165	Giving or offering bribe to official
287(D)(3)	Oral copulation in concert by force/fear of bodily injury, minor victim 14 years of age or older
287(D)(1)(C)	Oral copulation in concert by force/fear of bodily injury
4503	Prisoner holding hostage in prison
4574(B)	Smuggling tear gas into prison or jail
110	Send/carry into training school/reformatory items for escape
311.5	Advertising obscene matter w/prior conviction of Pen C §311.2(a), §311.5, §313.1, or ch 7.5
18715(A)(4)	Possession of destructive device or explosive in public or private place, or on transit vehicle
156	Producing spurious heir
265	Abduction to force marriage or defilement
116	Tampering w/jury list

425	Officer's failure to pay over public funds
186.26(B)	Use of threats of physical violence on two or more occasions within 30-day period to coerce, induce, or solicit another person to participate in criminal street gang
636(A)	Electronic eavesdropping on privileged conversation
109	Assisting escape of inmate from training school/reformatory, etc.
11418(A)(1)	Possession, production, or transfer of weapons of mass destruction
11412	Religious terrorism
286(K)	Sodomy by threat to use authority of public official
533	Selling land twice
454	Commission of Pen C §451(d) or §452 within area of insurrection or emergency
155	Selling or concealing property by defendant or judgment debtor
625C	Tampering w/transit vehicle with intent to cause GBI
4533	Officer aiding or abetting escape of prisoner
214	Train robbery
92	Bribing judicial officer or juror
286(J)	Sodomy by victim's belief that accused is someone known to the victim other than the accused
617	Injuring or destroying other's written instrument
287(K)	Oral copulation by threat to use authority of public official
93	Judicial officer or juror accepting bribe
375(D)	Release harmful substance in public place which may result in serious illness or permanent injury
117	Certifying false jury list
287(D)(1)(B)	Oral copulation in concert by force/fear of bodily injury
38	Knowledge and concealment of treason
610	Tampering w/signal lights
151(A)(2)	Advocating injury/death of peace officer resulting in injury/death
653J	Solicitation of minor to commit certain felonies
2790	Interference w/prisoner or delivery of forbidden items to prisoner
26180(B)	Making false statements on gun license application
432	Fraudulent possession of blank licenses/receipts

**OFFENSES WITHOUT ANY CONVICTIONS (2019–2021)**

Limited to Non-Wobbler Felonies in the Penal Code

Penal Code §	Offense Name
109	Assisting escape of inmate from training school/reformatory, etc.
110	Send/carry into training school/reformatory items for escape
11412	Religious terrorism
11418(A)(1)	Possession, production, or transfer of weapons of mass destruction
11418(A)(2)	Possession, production, or transfer of weapons of mass destruction w/designated prior conviction
11418(B)(3)	Use of weapon of mass destruction to damage or disrupt food or source of drinking water
11418(B)(4)	Use of weapon of mass destruction to cause damage to or substantial loss in the value of stock animals or crops
11418(C)	Use of weapon of mass destruction to damage public natural resources
11418(D)(1)	Use of recombinant technology to create new pathogens for use in any crime defined in Pen C §11418(b)
11418(D)(2)	Use of recombinant technology to create new pathogens for use in any crime defined in Pen C §11418(c)
11419(A)	Possession of restricted biological agents
115.5(B)	Making false sworn statement to notary public regarding real property document
116	Tampering w/jury list
117	Certifying false jury list
129	False return under oath
138	Witness soliciting or receiving bribe
141(C)	Prosecutor tampering or falsifying evidence
146E(B)	Disclosure of address/phone number of peace officer or family member resulting in bodily injury to these persons
151(A)(2)	Advocating injury/death of peace officer resulting in injury/death
154(B)	Defrauding creditors by selling or concealing property of value greater than \$250
155	Selling or concealing property by defendant or judgment debtor
156	Producing spurious heir
157	Substituting child
165	Giving or offering bribe to official
181	Involuntary servitude or sale of person
182(A)(6)	Conspiracy against public official
186.26(B)	Use of threats of physical violence on two or more occasions within 30-day period to coerce, induce, or solicit another person to participate in criminal street gang
18715(A)(2)	Possession of destructive device or explosive in public or private place, or on transit vehicle
18715(A)(4)	Possession of destructive device or explosive in public or private place, or on transit vehicle
18725(A)	Carrying or placing destructive device or explosive on transit vehicle or in baggage

192(C)(3)	Vehicular manslaughter where collision knowingly caused for financial gain
210	Pose as kidnapper to extort
214	Train robbery
247(A)	Discharge firearm at unoccupied aircraft
261(A)(7)	Rape accomplished by threat of use of authority of public official to incarcerate, arrest, or deport victim
26180(B)	Making false statements on gun license application
265	Abduction to force marriage or defilement
266B	Abduct by force for illicit relation
266G	Placing wife in house of prostitution
2772	Interference w/prisoner or delivery of forbidden items to prisoner
2790	Interference w/prisoner or delivery of forbidden items to prisoner
286(C)(3)	Sodomy by threat of retaliation
286(J)	Sodomy by victim's belief that accused is someone known to the victim other than the accused
286(K)	Sodomy by threat to use authority of public official
287(C)(3)	Oral copulation by threat of retaliation
287(D)(1)(A)	Oral copulation in concert by force/fear of bodily injury
287(D)(1)(B)	Oral copulation in concert by force/fear of bodily injury
287(D)(1)(C)	Oral copulation in concert by force/fear of bodily injury
287(D)(3)	Oral copulation in concert by force/fear of bodily injury, minor victim 14 years of age or older
287(K)	Oral copulation by threat to use authority of public official
288.4	Arranging meeting w/minor for lewd purpose w/prior conviction of offense listed in Pen C §290(c)
289(G)	Sexual penetration w/foreign or unknown object, by threat to use authority of public official
290.018(D)	Failure to register by designated mentally disordered sex offender including person who had petition sustained in juvenile adjudication for sex offense but found not guilty by reason of insanity w/prior conviction
298.2(A)(1)	Facilitating wrongful collection of, or tampering w/DNA blood specimen or print impression
29800(A)(2)	Possession of firearm by person w/2 prior conviction of brandishing firearm under Pen C §417(a)(2)
311.2(A)	Sale or distribution of obscene material w/prior conviction of Pen C §311.2(a), §311.5, §313.1, or ch 7.5
311.5	Advertising obscene matter w/prior conviction of Pen C §311.2(a), §311.5, §313.1, or ch 7.5
311.7	Requiring acceptance of obscene matter as condition for receiving other merchandise w/2 prior conviction of ch 7.5
313.1	Distribution of harmful matter to minors w/prior conviction of Pen C §313.1 or ch 7.5
337	Official granting aid/license for illegal gaming for remuneration
337.2	Touting w/prior conviction
337.4	Touting in excess of \$950
337.7	Use of illegal/forged credential or license in touting w/prior conviction

350(C)	Manufacture, sale, or possession for sale of counterfeit mark causing death or GBI
375(D)	Release harmful substance in public place which may result in serious illness or permanent injury
38	Knowledge and concealment of treason
386(A)	Willful construction or maintenance of inoperable or unsafe fire protection system
399(A)	Owner or person having control allowing vicious animal at large resulting in death
425	Officer's failure to pay over public funds
432	Fraudulent possession of blank licenses/receipts
4503	Prisoner holding hostage in prison
4533	Officer aiding or abetting escape of prisoner
4535	Carrying items into prison/jail useful for escape
454	Commission of Pen C §451(d) or §452 within area of insurrection or emergency
4550	Rescue or attempted rescue of prisoner convicted of capital crime
4574(B)	Smuggling tear gas into prison or jail
478	Counterfeiting
479	Possessing or receiving counterfeit coin/bullion, etc.
500	Receiving money of \$950 or more for transmittal to foreign countries
502.7(G)	Theft of telephone or telegraph services w/prior conviction within 5 years
519	Extortion
522	Extorting signature to transfer property
528	Marriage by impersonation
533	Selling land twice
534	Spouse selling land/property by false pretense
588A	Depositing injurious substance on highway with intent to commit GBI
593A	Malicious damage to timber/trees
597.5(A)	Dog fighting
598C(A)	Conducting transaction involving horse with intent to kill horse for human consumption
598D(A)	Sale of horsemeat for human consumption w/prior conviction
610	Tampering w/signal lights
617	Injuring or destroying other's written instrument
625C	Tampering w/transit vehicle with intent to cause GBI
636(A)	Electronic eavesdropping on privileged conversation
639	Bribing financial institution employee to obtain credit/loan
639A	Financial institution employee soliciting/accepting bribe
641	Bribing telegraph/telephone agent
653F(C)	Solicit commission of Pen C §264.1, §288, or §289
653J	Solicitation of minor to commit certain felonies
653T(A)	Interfering w/emergency radio transmission resulting in serious bodily injury or property loss in excess of \$10,000
76	Threatening life of or threatening serious bodily harm to government official w/prior conviction
85	Bribing legislator
86	Legislator accepting bribe
92	Bribing judicial officer or juror
93	Judicial officer or juror accepting bribe

**OFFENSES WITHOUT ANY ARRESTS (2019–2021)**

Limited to Non-Wobbler Felonies in the Penal Code

Penal Code §	Offense Name
11418(A)(2)	Possession, production, or transfer of weapons of mass destruction w/designated prior conviction
11418(B)(4)	Use of weapon of mass destruction to cause damage to or substantial loss in the value of stock animals or crops
11418(C)	Use of weapon of mass destruction to damage public natural resources
11418(D)(1)	Use of recombinant technology to create new pathogens for use in any crime defined in Pen C §11418(b)
11418(D)(2)	Use of recombinant technology to create new pathogens for use in any crime defined in Pen C §11418(c)
11419(A)	Possession of restricted biological agents
117	Certifying false jury list
138	Witness soliciting or receiving bribe
141(C)	Prosecutor tampering or falsifying evidence
146E(B)	Disclosure of address/phone number of peace officer or family member resulting in bodily injury to these persons
151(A)(2)	Advocating injury/death of peace officer resulting in injury/death
154(B)	Defrauding creditors by selling or concealing property of value greater than \$250
157	Substituting child
266D	Receiving money for placing person in custody for cohabitation
266G	Placing wife in house of prostitution
2772	Interference w/prisoner or delivery of forbidden items to prisoner
2790	Interference w/prisoner or delivery of forbidden items to prisoner
311.7	Requiring acceptance of obscene matter as condition for receiving other merchandise w/2 prior conviction of ch 7.5
313.1	Distribution of harmful matter to minors w/prior conviction of Pen C §313.1 or ch 7.5
337.2	Touting w/prior conviction
337.4	Touting in excess of \$950
337.7	Use of illegal/forged credential or license in touting w/prior conviction
350(C)	Manufacture, sale, or possession for sale of counterfeit mark causing death or GBI
399(A)	Owner or person having control allowing vicious animal at large resulting in death
425	Officer's failure to pay over public funds
432	Fraudulent possession of blank licenses/receipts
4550	Rescue or attempted rescue of prisoner convicted of capital crime
500	Receiving money of \$950 or more for transmittal to foreign countries
502.7(G)	Theft of telephone or telegraph services w/prior conviction within 5 years
534	Spouse selling land/property by false pretense
548	Defrauding insurer
593A	Malicious damage to timber/trees
597.5(A)	Dog fighting

598C(A)	Conducting transaction involving horse with intent to kill horse for human consumption
598D(A)	Sale of horsemeat for human consumption w/prior conviction
639	Bribing financial institution employee to obtain credit/loan
639A	Financial institution employee soliciting/accepting bribe
641	Bribing telegraph/telephone agent

**OFFENSES WITH ARRESTS BUT NO CONVICTIONS (2019–2021)**

Limited to Non-Wobbler Felonies in the Penal Code

Penal Code §	Offense Name
288.4	Arranging meeting w/minor for lewd purpose w/prior conviction of offense listed in Pen C §290(c)
311.2(A)	Sale or distribution of obscene material w/prior conviction of Pen C §311.2(a), §311.5, §313.1, or ch 7.5
337	Official granting aid/license for illegal gaming for remuneration
29800(A)(2)	Possession of firearm by person w/2 prior conviction of brandishing firearm under Pen C §417(a)(2)
76	Threatening life of or threatening serious bodily harm to government official w/prior conviction
479	Possessing or receiving counterfeit coin/bullion, etc.
182(A)(6)	Conspiracy against public official
287(D)(1)(A)	Oral copulation in concert by force/fear of bodily injury
478	Counterfeiting
528	Marriage by impersonation
18715(A)(2)	Possession of destructive device or explosive in public or private place, or on transit vehicle
519	Extortion
653F(C)	Solicit commission of Pen C §264.1, §288, or §289
192(C)(3)	Vehicular manslaughter where collision knowingly caused for financial gain
298.2(A)(1)	Facilitating wrongful collection of, or tampering w/DNA blood specimen or print impression
247(A)	Discharge firearm at unoccupied aircraft
287(C)(3)	Oral copulation by threat of retaliation
290.018(D)	Failure to register by designated mentally disordered sex offender including person who had petition sustained in juvenile adjudication for sex offense but found not guilty by reason of insanity w/prior conviction
286(C)(3)	Sodomy by threat of retaliation
18725(A)	Carrying or placing destructive device or explosive on transit vehicle or in baggage
287(D)(1)(C)	Oral copulation in concert by force/fear of bodily injury
261(A)(7)	Rape accomplished by threat of use of authority of public official to incarcerate, arrest, or deport victim
85	Bribing legislator
287(D)(3)	Oral copulation in concert by force/fear of bodily injury, minor victim 14 years of age or older
266B	Abduct by force for illicit relation
181	Involuntary servitude or sale of person
4503	Prisoner holding hostage in prison
4574(B)	Smuggling tear gas into prison or jail
18715(A)(4)	Possession of destructive device or explosive in public or private place, or on transit vehicle



289(G)	Sexual penetration w/foreign or unknown object, by threat to use authority of public official
311.5	Advertising obscene matter w/prior conviction of Pen C §311.2(a), §311.5, §313.1, or ch 7.5
210	Pose as kidnapper to extort
110	Send/carry into training school/reformatory items for escape
386(A)	Willful construction or maintenance of inoperable or unsafe fire protection system
11418(A)(1)	Possession, production, or transfer of weapons of mass destruction
186.26(B)	Use of threats of physical violence on two or more occasions within 30-day period to coerce, induce, or solicit another person to participate in criminal street gang
286(J)	Sodomy by victim's belief that accused is someone known to the victim other than the accused
533	Selling land twice
4535	Carrying items into prison/jail useful for escape
4533	Officer aiding or abetting escape of prisoner
653T(A)	Interfering w/emergency radio transmission resulting in serious bodily injury or property loss in excess of \$10,000
588A	Depositing injurious substance on highway with intent to commit GBI
625C	Tampering w/transit vehicle with intent to cause GBI
265	Abduction to force marriage or defilement
286(K)	Sodomy by threat to use authority of public official
129	False return under oath
522	Extorting signature to transfer property
454	Commission of Pen C §451(d) or §452 within area of insurrection or emergency
287(D)(1)(B)	Oral copulation in concert by force/fear of bodily injury
165	Giving or offering bribe to official
375(D)	Release harmful substance in public place which may result in serious illness or permanent injury
617	Injuring or destroying other's written instrument
93	Judicial officer or juror accepting bribe
86	Legislator accepting bribe
11412	Religious terrorism
26180(B)	Making false statements on gun license application
155	Selling or concealing property by defendant or judgment debtor
214	Train robbery
287(K)	Oral copulation by threat to use authority of public official
610	Tampering w/signal lights
38	Knowledge and concealment of treason
11418(B)(3)	Use of weapon of mass destruction to damage or disrupt food or source of drinking water
116	Tampering w/jury list
156	Producing spurious heir
109	Assisting escape of inmate from training school/reformatory, etc.
115.5(B)	Making false sworn statement to notary public regarding real property document
636(A)	Electronic eavesdropping on privileged conversation
653J	Solicitation of minor to commit certain felonies
92	Bribing judicial officer or juror