

July 16, 2020

Memorandum 2020-8

Short Sentences: Overview

At its July 2020 meeting, the Committee on Revision of the Penal Code will address short sentences of incarceration.¹ This memorandum gives general background on short sentences and collects possible recommendations that the Committee may wish to consider. For purposes of this memorandum and the Committee meeting, a “short sentence” includes any sentence to state prison or county jail resulting in three years of incarceration or less.

A supplement to this memorandum, which will be released shortly, will present written submissions from panelists for the meeting.

Background

Low-level and non-violent offenses constitute the vast majority of convictions in California:

- Over 90% of convictions in California were for misdemeanors and non-violent felonies.²
- Over 70% of felony convictions were for non-violent offenses, most of which resulted in sentences to county jails.³
- 17% of felony convictions resulted in sentences to state prison.⁴

This memorandum focuses on three aspects of criminal sentences that are particularly relevant for short sentences. First, where will the sentence be served: in a local county jail or in state prison? Second, how much time will actually be served after various credit schemes are applied? Finally, are there alternative

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

2. Judicial Council of California, 2019 Court Statistics Report, Statewide Caseload Trends, 2008–09 through 2017–18, 100 (all traffic and non-traffic misdemeanor dispositions); California Department of Justice, *Crime in California 2019*, July 2020, Table 38A (felony convictions). The comparison of data between Fiscal Year 2017–18 and calendar year 2019 is inexact, but the figure given above is indicative of general trends.

3. California Department of Justice, *Crime in California 2019*, July 2020, Table 38A (60.22% of dispositions (45,228) were “split sentences” with jail and mandatory probation supervision components; 12.31% of dispositions (9,255) were jail-only sentences).

4. *Id.* The remaining dispositions are: 7% (5,336) probation-only sentences, .9% (686) fine, and 2.23% (1,680) “other,” which “includes no sentence given, sentence suspended, and sentence stayed.” Three people were sentenced to death.

custody programs that give jail and prison administrators flexibility in managing their incarcerated populations?

Where Is a Sentence Served?

The classic rule in criminal law is that the length of an incarceratory sentence determines whether it is served in local jail or state prison. A sentence less than a year is typically served in county jail and anything longer is served in a state prison.⁵ This is *not* the rule in California. Instead, following 2011's Public Safety Realignment,⁶ each felony offense in the Penal Code specifies whether a sentence of incarceration should be served in jail or in prison.⁷ In the Penal Code alone, sentences of incarceration for more than 400 felony offenses must be served in local jails.⁸

These "realigned" offenses have in common that none of them are serious, violent, or require registration as a sex offender. But there are many other non-serious, non-violent, non-sex offenses (which are often referred to as "triple nons" because the Penal Code does not classify these offenses as violent, serious, or requiring registration as a sex offender) that still require a sentence to be served in state prison, not county jail.⁹ And even if a jail sentence is specified in the offense, someone with a past conviction for a serious, violent, or sex offense will nonetheless have to go to prison — no matter how old the other conviction is.¹⁰ Finally, if a sentence for a realigned offense also includes an enhancement that references state prison, the entire sentence must be served in prison.¹¹ This final restriction likely only affects a few dozen people each year and is the subject of pending legislation (Assembly Bill 88 (Committee on Budget)).¹²

After Realignment, county jails — in addition to their pre-trial populations, which spans all types of offenses — tend to have people serving shorter sentences for less serious offenses while prison tends to have people serving longer sentences for more serious offenses. But that is not always the case: after Realignment, someone can serve a lengthy sentence in county jail if sentences for multiple

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

6. AB 109 (Committee on Budget), 2011 Cal. Stat. ch. 15.

7. J. Richard Couzens and Tricia A. Bigelow, *Felony Sentencing After Realignment*, May 2017 <https://www.courts.ca.gov/partners/documents/felony_sentencing.pdf> 6–8.

8. *CJER Felony Sentencing Handbook*, Penal Code Table (2020).

9. See *id.*

10. Penal Code § 1170(h)(3).

11. See *People v. Vega*, 222 Cal. App. 4th 1374 (2014).

12. See California Department of Finance, *California State Budget Summary 2020–21*, 85 (noting that if this rule were to be changed, CDCR estimates that "the prison population [would be reduced] by around 150 inmates on an ongoing basis.").

offenses are added together or certain sentencing enhancements are applied.¹³ Similarly, California’s state prisons may have people serving short sentences if their offense conviction has not been realigned to require a county jail sentence — even if the offense conviction is a non-serious, non-violent, non-sex one.¹⁴ And even someone convicted of a realigned offense may be required to go to state prison for a short sentence because of their conviction history.¹⁵ In Fiscal Year 2014–15 (the most recent data available), the California Department of Corrections and Rehabilitation (“CDCR”) released more than 30,000 people whose length of stay had been three years or less — 77% of all releases.¹⁶ And 13% of releases that year (5,092 people) had been at CDCR for six months or less.

Why does this matter? At a basic level, jails and prisons have different purposes. Most jails were constructed to hold people immediately after arrest and awaiting resolution of any possible criminal charges. This means that jails have tremendous churn — in larger jails, hundreds or thousands of people may cycle through in a matter of days.¹⁷ Jails were also not built to provide rehabilitative programs during long-term stays.

But prisons are designed and run with those exact goals in mind. That focus on longer sentences may mean that people incarcerated in prisons for a short amount of time are not be able to take advantage of any positive programming, either because of long wait lists or simply because the program will last longer than the person’s sentence. For example, before the COVID-19 public health emergency, once someone arrived at prison from local custody, it could take up to four months before they were reviewed and transferred to more permanent housing from a

13. We anticipate receiving current data about long county jail sentences from the California State Sheriffs Association but have not yet received it. In the meantime, they have provided data from October 2016. At that time, the longest jail sentence was a 42 year sentence from Los Angeles County. Statewide, 156 people were serving jail sentences over 10 years, with the most common offense for this sentence length being drug trafficking. And 1401 people statewide were serving jail sentences between 5 and 10 years. *See* Letter of Cory Salzillo & Cathy Coyne, Re: Updated Survey of Long Term Offenders in Jail, October 17, 2016.

14. As of December 31, 2018, almost 11% of CDCR’s population (13,847 people) was serving a prison sentence for a triple-non offense and had no prior convictions for a violent or serious offense. *See* CDCR Office of Research, *Offender Data Points — Offender Demographics For The 24-Month Period Ending December 2018*, January 2020, Table 1.23.

15. As of December 31, 2018, 6% of CDCR’s population (7,706 people) was serving a prison sentence for a triple-non offense and had a prior serious or violent felony conviction. *See* CDCR Office of Research, *Offender Data Points — Offender Demographics For The 24-Month Period Ending December 2018*, January 2020, Table 1.23

16. CDCR, Appendix to the Recidivism Report for Offenders Released from the California Department of Corrections and Rehabilitation in Fiscal Year 2014-15, January 2020, Table 20.

17. *See* Anna Flagg & Joseph Neff, *Why Jails Are So Important in the Fight Against Coronavirus*, N.Y. Times, March 31, 2020.

reception center.¹⁸ And even once enrolled in programming, that programming may be of limited value, at least as measured strictly from a recidivism point of view.¹⁹

Aside from these functional differences, jails are run by local county sheriffs who also have other law enforcement responsibilities; prisons are administered by a state agency whose primary purpose is running prisons. As a result, people serve jail sentences in the county where they were convicted but people in prison are often in locations far from family and other community connections.²⁰

Finally, there is evidence that the differences between jails and prison matter for recidivism outcomes. At its July meeting, the Committee will hear about recent research that people sentenced to jail and probation in California have better recidivism outcomes than people sentenced to prison.²¹

Credits — Time Off for Good Conduct and Other Positive Behavior

Many people serving a sentence for a criminal offense are eligible to have time taken off their sentence if they follow the rules. Such “good conduct” credits encourage incarcerated people “to conform to prison regulations, to refrain from criminal and assaultive conduct, and to participate in work and other rehabilitative activities.”²² And completion of additional programming, such as

18. CDCR Ombudsman, *What To Expect — Reception and Classification Process* <<https://www.cdcr.ca.gov/ombuds/ombuds/entering-a-prison-faqs/>>. California’s 2020–21 budget reports that CDCR plans on reducing reception center time to “as few as 30 days instead of 90 to 120 days.” California Department of Finance, *California State Budget Summary 2020–21*, 81–82.

19. California State Auditor, *California Department of Corrections and Rehabilitation: Several Poor Administrative Practices Have Hindered Reductions in Recidivism and Denied Inmates Access to In-Prison Rehabilitation Programs*, January 2019, 1–3 (noting that some programs have not resulted in reductions in recidivism, CDCR has not appropriately placed people on waiting lists, and CDCR “agree[d] with [the auditor’s] findings”).

20. See CDCR Ombudsman, *What To Expect — Reception and Classification Process* <<https://www.cdcr.ca.gov/ombuds/ombuds/entering-a-prison-faqs/>>. (“The inmate’s family location is taken into consideration, however being placed near family is not guaranteed due to many other factors.”); Penal Code § 6350(c) (“The locations of prisons and lack of services to assist visitors impedes visiting.”); Penal Code § 5068 (“when reasonable, the director shall assign a prisoner to the institution of the appropriate security level and gender population nearest the prisoner’s home, unless other classification factors make such a placement unreasonable”).

21. These findings have not yet been published and the Committee will hear from the two researchers, Mia Bird and Ryken Grattet, behind this work. For earlier work by one of them on this topic, see Mia Bird, Justin Goss & Viet Nguyen, *Recidivism of Felony Offenders in California*, Public Policy Institute of California, June 2019. For other recent research on sentence length and recidivism, see United States Sentencing Commission, *Retroactivity & Recidivism: The Drugs Minus Two Amendments*, July 2020, 1 (finding “no statistically significant difference in the recidivism rates of offenders released early pursuant to retroactive application of [certain drug-sentence reductions] and a comparable group of offenders who served their full sentences”).

22. See, e.g., *People v. Brown*, 54 Cal. 4th 314, 317 (2012).

obtaining a GED, can lead to further “earned credits.”²³ As a result of Proposition 57 in 2016, CDCR expanded the credit-earning rules in prison, and is apparently currently considering further expansions.²⁴

Credit rules are complex and the exploration in this memorandum is necessarily incomplete but will begin to give the Committee a sense of the landscape.²⁵ The amount of time off that someone can receive typically turns on the nature of their current conviction, but conviction history can also play a role, as can whether someone is serving a sentence in jail or prison. The general rule in jail is that good conduct credits — with major exceptions for violent and other grave offenses — allow someone to be released after serving half their sentence.²⁶ Prison follows that same general rule, but there are more stringent eligibility limits and some expansions.²⁷

The upshot of the different credit rules for jails and prisons is that people convicted of the same offenses may spend more time incarcerated because of where they are locked up. In some cases, there are perverse incentives to delay transfer to prison and stay longer in county jail where there may be fewer services.²⁸ In other cases, people with serious mental health issues may do double the time of people who do not have such issues.²⁹ And there are other disparities that have little to do with public safety or rehabilitation.³⁰

23. CDCR, Proposition 57: Credit-Earning For Inmates Frequently Asked Questions (FAQ) <<https://www.cdcr.ca.gov/blog/proposition-57-credit-earning-for-inmates-frequently-asked-questions-faq/>>.

24. *Id.*; California Department of Finance, California State Budget Summary 2020–21, 82.

25. *See, e.g.,* *People v. Adrian*, 191 Cal. App. 3d 868, 875 (1987) (“As we have noted, in what is surely an understatement, ‘credit determination is not a simple matter.’” (internal citations omitted)).

26. Penal Code § 4019.

27. *See* 15 CCR § 3043.2.

28. People with a current non-violent conviction who also have a prior “strike” conviction (one that is serious or violent) receive very different good conduct credit in jail than in prison. In jail, they will receive 50% credit. *Compare* Penal Code § 4019 *with* Penal Code § 2933.1(c). But when they go to prison — which is mandatory because of the prior strike conviction — these same people will receive only 33% credit. 15 CCR § 3043.2(b)(3).

29. In jail, good conduct credits are not available for someone who has been found incompetent to stand trial and is in custody at a state hospital. *See* Penal Code § 4019(a)(8) (limiting good conduct credits for people found incompetent to stand trial to those confined only to “county jail treatment facilit[ies]”); *People v. Waterman*, 42 Cal. 3d 565, 571 (1986). Because of this, someone’s mental health issues may require them to serve double the time incarcerated than someone who committed the same offense but did not have mental health issues. (In addition, transfers to the state hospital for potential restoration to competency present their own vexing issues. *See, e.g.,* *People v. Kareem A.*, 259 Cal. Repr. 3d 545, 550 (Ct. App. 2020) (noting that “approximate average wait time for an [incompetent to stand trial] defendant to gain admission into a DSH facility in 2016 was between 70 and 90 days”).

30. For example, people whose current offense is violent receive more good conduct credit in prison than they do in jail. *Compare* 15 CCR § 3043.2(a)(2) (20% in prison) *with* Penal Code § 2933.1(c) (15% in jail). *See also* Penal Code §§ 2933.2(c) & 2933.5(a)(2) (eliminating any jail good

Another important distinction between credits in this context is that the Penal Code specifies the credit rules for jails, but is largely silent on the rules for prison. Proposition 57 amended the California Constitution to give CDCR authority over credit rules in prison, which are determined by administrative regulation.³¹

Alternative Custody Programs

In addition to shortening their length of stay with credits, some people incarcerated in jails are able to secure early or partial release from custody through alternative custody programs such as home detention and work release.³² Each county also has the authority to establish a “county parole” system (also known as “sheriff’s parole”), which allows for release and supervision of people serving jail sentences.³³ There is limited statewide data on the use of such programs.³⁴

Jail administrators, with the authorization of the presiding judge of each county, may also reduce sentences by up to 30 days when a facility becomes overcrowded.³⁵ And a number of jails — likely covering more than half of the jail population — are under federal consent decrees related to overcrowding that may give sheriffs additional authority to release people.³⁶

CDCR has an Alternative Custody Program that uses electronic monitoring to allow some people to serve the last year of their sentence in a private residence or a residential treatment program.³⁷ CDCR also allows a limited number of people

conduct credit in certain circumstances). Earned-credit amounts (time off for completing educational and other programming) are higher in CDCR than in jails. *Compare* 15 CCR § 3043.3–3043.6 *with* Penal Code § 4019.4(a)(2). The authority of jail administrators to award additional credits for participation in in-custody work or job training programs is limited to those who have received a sentence — people waiting to resolve their cases are not eligible. *See* Penal Code § 4019.1(a).

31. Cal. Const., art. I, § 32(a)(2) (“Credit Earning: The Department of Corrections and Rehabilitation shall have authority to award credits earned for good behavior and approved rehabilitative or educational achievements.”) & (b) (“The Department of Corrections and Rehabilitation shall adopt regulations in furtherance of these provisions, and the Secretary of the Department of Corrections and Rehabilitation shall certify that these regulations protect and enhance public safety.”).

32. Penal Code §§ 1203.016, 4024.2.

33. Penal Code § 3076(b).

34. *See* Brandon Martin & Ryken Grattet, *Alternatives to Incarceration in California*, Public Policy Institute of California, April 2015, 3–4 (data from October 2011–March 2014 showed a few hundred people on alternative custody each month).

35. The presiding judge in each county must renew this authorization every 30 days. Penal Code § 4024.1(a). This accelerated credit may not exceed 10% of an imposed sentence. Penal Code § 4024.1(e).

36. *See* Sarah Lawrence, *Court-Ordered Population Caps in California County Jails*, Stanford Criminal Justice Center, December 2014, 6 (at time of report, 19 county jail systems had court-ordered population caps and housed 65% of jail inmates in California).

37. Penal Code § 1170.05; 15 CCR §§ 3078–3078.6. There are a number of restrictions on who is eligible for this program, including exclusions for people serving a sentence for a serious or violent offense. *See* Penal Code § 1170.05(d)(1)&(2); 15 CCR § 3078.2(c); 15 CCR § 3078.3(a)(1)&(2).

to serve the final portion of their sentence in Male Community Reentry Program (MCRP) and Custody to Community Transitional Reentry Program (CCTRP) placements, which allow people to live in a community facility while under CDCR's supervision.³⁸ As of July 15, 2020, 48 people were in the Alternative Custody Program, 395 in an MCRP, and 249 in a CCTRP.³⁹

CDCR also operates minimum-security "fire camps," where incarcerated people help respond to emergencies.⁴⁰ People in fire camps receive the maximum amount of good conduct credits, which can result in significant reductions to the time someone has to serve.⁴¹

And in response to the COVID-19 public health emergency, CDCR has established a program to allow some people out of prison six months early,⁴² as well as giving a large number of incarcerated people three months of earned credits,⁴³ which may help make up for a portion of the credits that people cannot earn as many programs have been suspended.

38. CDCR, Male Community Reentry Program <<https://www.cdcr.ca.gov/rehabilitation/mcrp/>>; CDCR, Custody to Community Transitional Reentry Program <<https://www.cdcr.ca.gov/adult-operations/custody-to-community-transitional-reentry-program/>>. MCRPs allow for the final 15 months of a sentence to be served in the community while CCTRPs allow for the final 30 months of a sentence.

39. CDCR, Weekly Report of Population, As of Midnight July 15, 2020 <<https://www.cdcr.ca.gov/research/wp-content/uploads/sites/174/2020/07/Tpop1d200715.pdf>>. As of January 1, 2020, there were 145 people on ACP, 343 in a CCTRP, and 623 in an MCRP. See CDCR, Weekly Report of Population, As of Midnight January 1, 2020 <<https://www.cdcr.ca.gov/research/wp-content/uploads/sites/174/2020/01/Tpop1d200101.pdf>>.

40. See CDCR, Conservation (Fire) Camps <<https://www.cdcr.ca.gov/facility-locator/conservation-camps/>>. There are 43 such camps spread across 27 counties housing approximately 3,000 incarcerated people. *Id.*

41. 15 CCR §§ 3043.2(a)(4)(B)–(C) & 3043.2(5)(B)–(C).

42. CDCR, Expedited Releases <<https://www.cdcr.ca.gov/covid19/expedited-releases/>>. These releases are limited to people who are not serving a sentence for a violent, serious, or domestic violence offense, not required to register as a sex offender, and who have been evaluated as not having a high risk for violence, and who have a post-release housing plan. See Joint Case Management Statement, *Plata v. Newsom*, Case No. 01-1351, Dkt. No. 3356, June 18, 2020, 2. The authority for the releases is Government Code Section 8658. *Id.* That section of the Government Code provides, in relevant part, that "In any case in which an emergency endangering the lives of inmates of a state, county, or city penal or correctional institution has occurred or is imminent, the person in charge of the institution may remove the inmates from the institution. He shall, if possible, remove them to a safe and convenient place and there confine them as long as may be necessary to avoid the danger, or, if that is not possible, may release them."

43. CDCR, Updates <<https://www.cdcr.ca.gov/covid19/updates/>> (noting that on July 9, 2020, "CDCR Secretary Diaz extend[ed] 12 weeks of Progressive Programming Credits for incarcerated people to help mitigate the impact on access to programs and credit earnings. Approximately 3,100 people could achieve enough credit to meet their earliest possible release date."); Letter of Sec. Ralph Diaz, July 9, 2020 (explaining that these "Positive Programming Credits" were a form of "Extraordinary Conduct Credits" authorized in 15 CCR § 3043.6).

Areas for Further Exploration

Short sentences present challenging policy issues because of the sheer volume of people involved, the difficulty of balancing preventing unnecessary incarceration, promoting rehabilitation, and preserving public safety. But several potential proposals are apparent. At the Committee meeting on June 24, 2020, Caitlin O’Neil of the Legislative Analyst’s Office summarized several possible approaches that could reduce the prison population.⁴⁴ This section of the memorandum builds on proposals relevant to short sentences.

Realignment

The Committee may want to consider whether sentences for additional offenses should be specified for jail or for prison, including whether some of the intricacies of the Realignment rules — such as the mandatory prison sentences caused by someone’s criminal history or specific sentencing enhancements — should be adjusted.

Credits

The Committee may wish to explore whether the current credit-earning schemes for prison and jail should be adjusted, including expanding the amount of credit that people can earn, ensuring that people serving sentences receive the same opportunities for credit-earning regardless of whether they are in jail or prison, and ensuring that credit-earning opportunities are the same for people in jail whether they are pretrial or convicted.

Alternative Custody Programs

The Committee may wish to consider whether CDCR and local sheriffs should have similar tools for managing their populations. Should CDCR have the same flexibility as sheriffs to release people on home detention, work release, or electronic monitoring so that CDCR could offer something like “day parole” (where someone is released during the day but must return to custody in the evening) to incarcerated people? Should CDCR’s current COVID-related six-month early-release program be made permanent or expanded?⁴⁵

44. See Committee on Revision of the Penal Code, Meeting on June 24, 2020, <<https://www.youtube.com/watch?v=vbpjiV0wMyg>>, 55:27–58:48. Ms. O’Neil made plain that her office was not endorsing any of these proposals and was providing them only for informational purposes.

45. Pennsylvania recently enacted a (non-COVID-19-related) short sentence parole law that grants presumptive parole release to people whose minimum term of imprisonment is two years or less. See 61 Pa. C.S. § 6137.1. This scheme is not directly transferable to California because short sentences in California do not typically involve discretionary parole release.

On the county-level, are the existing alternative custody programs used by sheriffs in need of revision? Should all county sheriffs — not just those who operate jails under federal consent decrees — have greater ability to release people under supervision when conditions warrant it? Can the Penal Code be modified to encourage greater use of county parole?

Presumptive Probation

Unlike other states,⁴⁶ California does not have any offenses that carry a presumption of a probation-only sentence.⁴⁷ As it may be doing in the context of alternatives to incarceration, the Committee could explore creating such presumptions, which may result in fewer people serving short sentences.

Further Limits on Who Counties Can Send to Prison

The state could follow the model of juvenile justice realignment⁴⁸ and more directly limit the number of people that each county can send to state prison.

Financial Incentives to Reduce Incarceration and Recidivism

The state could also follow the funding model of Senate Bill 678 (Leno) (2009),⁴⁹ which gave counties financial incentives to reduce the number of people on probation that were returned to incarceration,⁵⁰ and give similar incentives to counties that reduced recidivism and incarceration rates.

Respectfully submitted,

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

47. The only exception appears to be nonviolent drug possession offenses, which, following Proposition 36 in 2000, must receive mandatory probation sentences. See Penal Code § 1201.1(a).

48. See The Annie E. Casey Foundation, *California Considers Final Closure of its State Youth Corrections System*, March 16, 2012 <<https://www.aecf.org/blog/california-considers-final-closure-of-its-state-youth-corrections-system/>> (“California made headlines in 2007 with a heralded juvenile justice reform that banned all commitments of non-violent juveniles to its discredited state youth prison system.”).

49. 2009 Cal. Stat. ch. 608.

50. See Mia Bird & Ryken Grattet, *SB 678: Incentive-Based Funding and Evidence-Based Practices Enacted by California Probation Are Associated with Lower Recidivism Rates and Improved Public Safety*, California Probation Resource Institute, March 2020, 6.