July 21, 2020

Memorandum 2020-10

Alternatives to Incarceration: Updates on Possible Recommendations

At its April 2020 meeting, the Committee heard from panelists about and discussed alternatives to incarceration.[1] This memorandum presents updates and proposals in the following six areas for further discussion, analysis, and possible recommendations:

- Misdemeanor Diversion
- Repeat Felony-Offender Diversion
- Collaborative Courts — Uniform Statute
- Restorative Justice — Mandatory for Serious Cases Involving Young People
- Probation — Length of Terms and Update on Governor's Proposals
- Probation — Eligibility Issues

In addition, some supplemental materials are attached as follows:

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

Summary Proposal

Allow a judge to dismiss misdemeanor charges after an accused person has completed conditions set by the judge. The agreement of the prosecutor is not required.

Current Law

Under current law, judges do not have the authority to dismiss cases for "rehabilitative purposes," so specific authority to do so must be given to them by statute.[2]

Background

At the April 2020 Committee meeting, Judge Daniel Lowenthal of Los Angeles County Superior Court described a pilot program that authorized judges in Los Angeles County from 2015 to 2018 to dismiss misdemeanor charges if a defendant complied with conditions set by the court. In the Los Angeles pilot program, the dismissal could happen over a prosecutor's objection.[3]

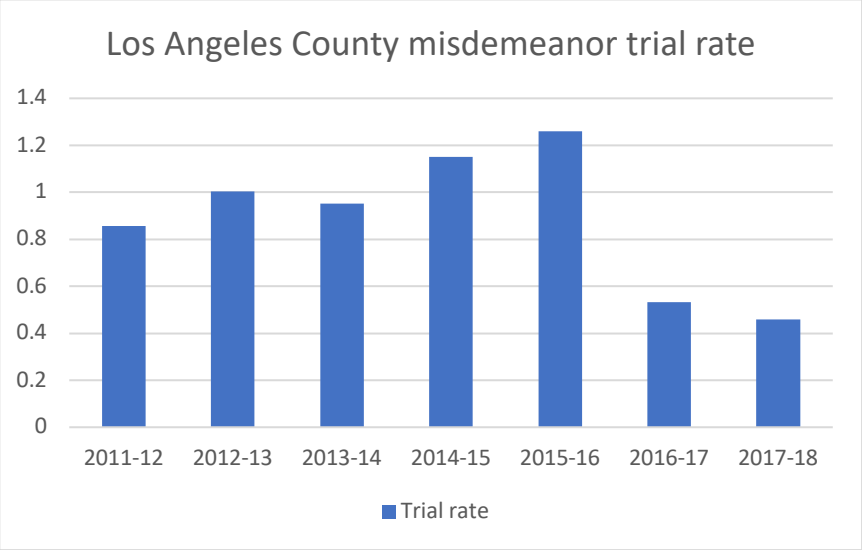
There were numerous exceptions. The defendant could not have a prior misdemeanor conviction within the last ten years, or any felony conviction. Diversion was not allowed for a number of offenses, including violence against a peace officer, vehicular manslaughter, and some child abuse offenses.[4]

Procedurally, this program required a guilty plea, but the court did not enter judgment in the case and would later dismiss proceedings if diversion was successful.[5]

At least 5,600 misdemeanor cases were diverted during the pilot and over 95% of diverted people successfully completed the program.[6] The misdemeanor trial rate also decreased during the time the pilot was in effect. For the time period examined, the trial rate peaked at 1.26% in Fiscal Year 2015–16, which included the

2. *See, e.g.*, People v. Marroquin, 15 Cal. App. 5th Supp. 31 (2017); People v. Municipal Court (Gelardi), 84 Cal. App. 3d 692 (1978).
3. *See* 2014 Cal. Stat. ch. 732 (creating former Penal Code §§ 1001.94-1001.99) (former § 1001.94(b)).
4. *Id.* (former § 1001.98)
5. *Id.* (former § 1001.94(b)).
6. In follow-up after meeting, Judge Lowenthal explained that data was limited because the code used in the court's case management system to indicate that diversion had been unsuccessful had later been overridden. To get around this problem, Judge Lowenthal polled his colleagues and determined there were less than 200 unsuccessful cases. There is no data available on recidivism or other outcomes.

first year of the diversion pilot project.[7] In the chart below, the last two periods are when the misdemeanor pilot was fully established in 2016 and 2017:



Since the Committee's meeting in April, a statewide misdemeanor diversion program has become the subject of pending legislation.[8] This version of the program does not have any of the exclusions that the Los Angeles pilot program did. And, unlike the Los Angeles pilot, it does not require a guilty plea.

That final point is important. Requiring an admission of guilt for enrollment in a diversion program can have profound unintended consequences for non-citizens: in immigration proceedings an admission of guilt can result in deportation, *even if the case is later dismissed as it would be in a diversion program*.[9]

California has a recent history of dealing with unintended consequences resulting from a diversion program. For a number of years, a diversion program aimed at people with substance abuse issues[10] required an admission of guilt which led to people being deported even after their state criminal cases were dismissed.[11] The Legislature later removed the requirement that there be an

7. The source of this information was the Judicial Council's annual Statewide Caseload Trends, which included dispositions for traffic and non-traffic misdemeanors in Los Angeles County. *See, e.g.*, Judicial Council of California, 2019 Court Statistics Report, Statewide Caseload Trends, 2008–09 through 2017–18, 142 (Table 9a), 146 (Table 9c).
8. Assembly Bill 88 (Committee on Budget) (adding Penal Code §§ 1001.95–1001.97).
9. *See, e.g.*, Matter of Adamiak, 23 I&N Dec. 878, 879 (BIA 2006) ("In our decisions addressing the effect of State court orders vacating convictions, we have distinguished between situations in which a conviction is vacated based on post-conviction events, such as rehabilitation, and those in which a conviction is vacated because of a defect in the underlying criminal proceedings."). A letter from Rose Cahn of the Immigrant Legal Resource Center further address this issue is attached as Exhibit A.
10. *See* Penal Code §§ 1000–1000.65
11. *See* Ex. A at 3–4.

admission of guilt to participate in drug diversion[12] and provided a new mechanism for people to once again dismiss cases that had been diverted under the old system.[13] Consideration of any new diversion program should account for immigration and other consequences and avoid the costly path — in both court resources and human lives — that drug diversion took.

Other states give judges the discretion that California does not in this context. At least nine other states allow judges to dismiss cases after the defendant has satisfied certain conditions, including in some felony cases.[14] Two states provide models for how a similar program could work in California: Connecticut's "accelerated pretrial rehabilitation"[15] and Nevada's pre-prosecution diversion program, enacted in 2017.[16] Both of these programs do not require an admission of guilt and Connecticut's program is not limited to misdemeanors. There are apparently no studies about recidivism reduction or other outcomes for these programs.

Decisions for the Committee

The Committee should decide whether to recommend a revision to the Penal Code that would give judges the discretion to dismiss misdemeanor cases after the defendant has satisfied conditions set by the judge.

In making this decision, the Committee should consider:

- Should any misdemeanor offenses be excluded from this program?
- Should other offenses — such as low-level felonies — be included?
- Should a guilty plea or other admission of guilt be required?
- To what extent should someone's conviction history or prior diversion resolutions exclude them from the program?

12. AB 208 (Eggman) (2017); 2017 Cal. Stat. ch. 778.
13. *See* Penal Code § 1203.43.
14. These states include Delaware (Del. Code tit. 11, § 4218), Hawaii (Haw. Rev. Stat. § 853-1), Iowa (Iowa Code § 907.3), Maryland (Md. Code, Crim. Proc. § 6-220), Montana (Mont. Code § 46-18-204), Tennessee (Tenn. Code Ann. § 40-35-313), and Texas (Tex. Code Crim. Proc. Art. 42A.101).
15. Conn. Gen Stat. Sec. 54-56e
16. NRS 174.031

Summary Proposal

Allow prosecutors to establish a diversion program aimed at people with prior felony convictions. The program would pair defendants with a coach who has lived experience with the criminal legal system.

Current Law

Current law gives prosecutors the discretion to establish diversion programs that allow people to resolve cases without a criminal conviction.[17]

Background

At the April 2020 meeting, Alameda County District Attorney Nancy O'Malley described one of her office's diversion programs, the Alameda County Justice Restoration Project (ACJRP). This program is aimed at people who already have felony convictions — a unique target as many diversion programs specifically exclude this population. ACJRP's other distinguishing feature is that it relies on coaches who themselves have been through the criminal legal system and usually come from the same cultural background as ACJRP participants. These coaches — along with La Familia, a non-profit that provides mental health and community support services — work closely with people in ACJRP to access treatment, education, and housing assistance.[18]

For the most part, eligibility is limited to a person who is charged with a "realigned" offense who also has a prior conviction for a realigned offense.[19] Some people facing low-level robberies were also allowed to enroll. That eligibility limitation seems to have been the result of funding restrictions; certain state money can only be used for realignment-related county programs.

ACJRP also focused on young people. Enrollment was at first limited to people under the age of 25. Later the eligibility age was raised to 34.

17. *See, e.g.*, Davis v. Municipal Court, 46 Cal.3d 64, 77 (1988).

18. For more background on ACJRP, *see* Third Sector, Alameda County Justice Restoration Project <https://www.thirdsectorcap.org/alameda-2/>; Rebecca McCray, *Can A Prosecutor-Led Program Tackle Recidivism?*, The Appeal, October 31, 2017; Nonprofit Finance Fund, *Voices from PFS Pioneers: Alameda County Justice Restoration Project (ACJRP)*, May 7, 2018 <https://nff.org/blog/voices-pfs-pioneers-alameda-county-justice-restoration-project-acjrp>.

19. A realigned offense is a felony that provides for a sentence of incarceration in county jail, rather than state prison. *See* AB 109 (Committee on Budget), 2011 Cal. Stat. ch. 15.

To enroll in ACJRP, people enter a guilty plea in court. However, judgment is deferred while enrolled in the program. If the program is successfully completed, the case will be dismissed.

ACJRP is managed by a veteran prosecutor in Alameda County who works full-time on the project.

The program is the subject of a randomized control study which will measure recidivism outcomes. Between August 2018 and August 2019, 154 people enrolled in ACJRP and enrollment is now closed. The study of results will not be completed until spring 2022, but preliminary data suggests a 14% reduction in recidivism rates compared to the control group. The program is budgeted at $3.2 million dollars[20] and participants in the program are expected to be enrolled for two years.

Decisions for the Committee

The Committee should consider whether to recommend that the Penal Code be revised to create explicit authorization for prosecutors to establish repeat felony-offender diversion programs similar to ACJRP. This diversion program would be for people who had prior felony convictions and would pair them with peer coaches to help them engage with services including employment training, housing, and mental health treatment.

In making this decision, the Committee should consider:

- What offenses should be eligible for the program?
- How should conviction history be considered: what convictions should make someone eligible for the program, and what should make someone ineligible?
- Should this program be aimed at a specific age range?
- As with misdemeanor diversion, should a guilty plea or other admission of guilt be required?

As noted, eligibility for ACJRP seems to be limited by restrictions on the use of realignment-related funds. Such a restriction is not necessarily an element of a repeat-felony-offender diversion program. If other funding exists, then realignment-related restrictions may not be needed. But the Committee may also wish to consider what changes could be made to these restrictions that may expand access to alternatives to incarceration.

20. BSCC, Pay for Success Grant Program, Legislative Report 2018, 11 <https://www.bscc.ca.gov/wp-content/uploads/PFS-2018-Leg-Report-Final-Draft.pdf>

Summary Proposal

Work with members of the judiciary and other stakeholders to establish centralized standards for how collaboratives courts should operate.

Current Law

The Penal Code does not currently provide comprehensive guidance on how collaborative courts should be administered.

Background

At its April 2020 meeting, the Committee heard from three judges who run collaborative courts; all serve on the Judicial Council's Collaborative Justice Courts Advisory Committee. The judges were unanimous that collaborative courts, when appropriately administered, can be an effective response for people with substance abuse, mental health, and other issues that may be the root cause of their involvement in the criminal legal system.[21]

But California does not have any rules in the Penal Code about how such courts should operate. Many states do provide such guidance, but it is typically developed and administered by the judiciary.[22] For example, in 2015, Washington passed a law that reorganized various statutory provisions addressing "therapeutic courts" — the Washington name for collaborative courts.[23] But that law was only passed after a study, headed by judges, developed recommendations for the statute.[24] The statute that ultimately passed reflected the concerns of judges and others who had years of experience with Washington's therapeutic courts.[25]

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21. See Judicial Council, *Report to the Legislature: Recidivism Reduction Fund Court Grant Program: Final Report, 2019*, December 6, 2019, 1–2.

22. *See, e.g.*, Council of Accountability Court Judges of Georgia, <https://www.gaaccountabilitycourts.org/> (Mission statement: "To provide a unified framework that promotes and improves the quality, accessibility and administration of Accountability Courts."); Michigan Supreme Court, *FY 2019 Problem-Solving Courts Annual Report: Solving Problems, Saving Lives*, 10 (describing "Michigan's Certification of Problem-Solving Courts").

23. *See* RCW Chapter 2.30.

24. *See* Judge Harold D. Clarke III & Judge Michael Finkle, *Recommendations on Therapeutic Courts' Structure and Standards: Report to the Legislature as requested in SB 5797*, December 1, 2013.

25. For example, the statute addressed the Washington-specific problem of cooperation between different jurisdictions and explicitly allowed for such inter-jurisdictional collaboration so that smaller counties could pool resources to establish treatment options necessary for these courts to work. *See* RCW 2.30.050. It also set general eligibility criteria for therapeutic courts, but allowed judges to make exceptions to those rules on a case-by-cases basis. *See* RCW 2.30.030(3) ("Except under special findings by the court, the following individuals are not eligible for participation in therapeutic courts …").

It may make sesnse for California to follow a similar course. Because collaborative courts are complex institutions requiring the cooperation of prosecutors, defense attorneys, judges, treatment providers, and other personnel, attempts to set inflexible standards in the Penal Code could backfire. That danger may be particularly high as court and other budgets shrink in response to the COVID-19 public health emergency.[26] Instead, the Committee may wish to consider working collaboratively with the Judicial Council and others to make recommendations for how the Penal Code could be revised to encourage and strengthen collaborative courts throughout the state.

Decisions for the Committee

The Committee should decide whether to proceed with its own study of a collaborative courts statute or whether to work with other stakeholders in developing a potential recommendation.

RESTORATIVE JUSTICE — MANDATORY FOR SERIOUS CASES INVOLVING YOUNG PEOPLE

Summary Proposal

Restorative justice has great potential, but if the Committee is interested in pursuing a recommendation, more research is needed.

Current Law

While restorative justice is recognized as an appropriate goal for sentencing, there is little other formal recognition of restorative justice in the Penal Code.[27]

Background

Various programs calling themselves restorative justice are available throughout the state. Some are run entirely by prosecutors, others are run by non-profit organizations that have reached agreement with prosecutors to handle a certain set of cases.[28] This experimentation has produced promising results. For

26. *See* California Courts, *What to Know About the Judicial Branch Budget*, June 30, 2020 <https://newsroom.courts.ca.gov/news/what-to-know-about-the-judicial-branch-budget> (noting that "California's more than 400 collaborative courts" were spared from $200 million cuts in the 2020–21 budget).

27. 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.")

28. *See, e.g.*, Rich Ibarra, *State Funds Restorative Justice Pilot Program in San Joaquin County*, CapRadio, July 10, 2019; Community Works, Restorative Community Conferences (RCC) <http://communityworkswest.org/program/rcc/> ("Using Restorative Community Conferencing, an evidence-based restorative justice practice, we collaborate with the District

example, one program in Alameda County was evaluated in comparison to a control group and was found to have a 44% reduction in recidivism. And 91% of victims who participated said they would participate in another conference.[29] Similar findings have been reported elsewhere, particularly for violent cases.[30]

At its April meeting, the Committee heard from sujatha baliga, who until recently ran the Restorative Justice Project at Impact Justice. Ms. baliga advocated for a restorative justice model that had three elements: pre-charge with no court proceedings, prosecutors did not exercise discretion over which cases to refer, and information shared during the process remained confidential.

After the April meeting, Impact Justice's Restorative Justice team submitted two statutes showing how these principles could be put in practice.[31] The first statute specifies that restorative justice — not the traditional adversarial legal system — would be the default response in serious cases where the accused is twenty-five years or younger. Instead of the case going to court, a community-based organization with a verified track record would be responsible for resolving the case with restorative justice. The other statute from Impact Justice creates strong confidentiality for any information that arises during the restorative justice process.

Restorative justice has transformative potential for the legal system. It may save money by reducing incarceration and recidivism while bringing satisfying closure and restitution to victims. And if implemented correctly it may help reduce the role that racial bias can play in prosecutorial charging and other decisions — for example, Impact Justice's proposal makes restorative justice a mandatory process that is not subject to prosecutorial discretion.

Placing restorative justice system into the Penal Code as a primary method for resolving cases would be a significant departure from the current adversarial system. But it has support in international practice: for the past thirty years New Zealand's juvenile justice system has relied on restorative justice resolutions.[32]

Attorney in Alameda and San Francisco counties to divert youth facing criminal charges from traditional juvenile justice systems into a process where they will meet the needs of those who have been harmed by their actions.").

29. baliga, Henry, and Valentine, *Restorative Community Conferencing: A Study of Community Works West's Restorative Justice Youth Diversion Program in Alameda County*, Summer 2017, 7, 9.

30. *See, e.g.*, Lawrence W. Sherman et. Al, *Are Restorative Justice Conferences Effective in Reducing Repeat Offending? Findings from a Campbell Systematic Review*, J. Quant. Crimnology (March 2014) 31:1–24.

31. These statutes are attached as Exhibit B.

32. *See* Arvind Dilawar, *Can New Zealand Provide the U.S. With a Model for Juvenile Justice Reform?*, Pacific Standard, September 4, 2018 <https://psmag.com/social-justice/can-new-zealand-provide-the-u-s-with-a-model-for-juvenile-justice-reform> (restorative justice "is used as the standard mechanism for processing serious cases where a youth does not deny their charges").

Staff, however, could not locate any jurisdiction in the United States that centers restorative justice as the primary method of resolving criminal cases, especially serious ones. In addition to further researching that question, there are other practical issues that could be explored, including whether courts should be involved this process, and what role defense counsel should play.

Decisions for the Committee

The Committee should decide whether restorative justice should remain on the Committee's agenda. If it does, staff will develop a research agenda and proposed recommendation.

PROBATION — LENGTH OF TERMS AND UPDATE ON GOVERNOR'S PROPOSALS

Summary Proposal

Limit probation terms in felony and misdemeanor cases to two years.

Current Law

In felony cases, probation terms can be at least five years, and can be as long as the maximum possible term of imprisonment.[33] In misdemeanor cases, terms can be at least three years and can be as long as the maximum possible term of imprisonment.[34]

Background

The Committee chair asked staff to keep the Committee updated on the Governor's probation proposals made in the January 2020 budget. In that budget, the Governor made three substantive proposals:

(1) Limit probation terms in both felony and misdemeanor cases to two years. This proposal was supported by the Chief Probation Officers of California.[35]
(2) Require active supervision for some people on misdemeanor probation. Most people currently on misdemeanor probation are not actively supervised.
(3) Provide a clearer path to early termination for people on probation.[36]

33. Penal Code § 1203.1(a).
34. Penal Code § 1203a.
35. Karen A. Pank and Lenore Anderson, *Gov. Newsom's probation plan can reduce crime, make California communities safer*, Sacramento Bee, Mar. 6, 2020.
36. Governor's Proposed Budget Summary — 2020–21, January 10, 2020, 141. The proposals also changed the funding formula that the state uses to incentive counties to reduce returns to

The Governor's May Budget Revise removed all of these proposals.[37] But one of the proposals — the limit on probation terms — is the subject of pending legislation by the Committee's Assembly Member, Sydney Kamlager. Assembly Bill 1950 (Kamlager) generally caps felony probation at two years and misdemeanor probation at one year. It has passed the Assembly and is pending in the Senate.

Decisions for the Committee

If AB 1950 does not become law, the Committee may wish to consider making a recommendation with similar effect. The Committee may also wish to consider the Governor's proposal to provide a clearer path for early discharge from probation supervision. As the Governor's January budget proposal explains, these policies "conform[] with research that suggests that the maximum time needed to engage probationers in behavior change and reduce the likelihood of reoffending is no more than two years, while also creating incentives for individuals to engage in treatment and services early on."[38] If California adopted these proposals, it would be a leader in the nation — it appears that only two other states have similar limits on probation length.[39]

incarceration for people supervised by county probation departments. *See* RN# 20 08867 (2/6/20) (trailer bill language). The change was to make the amount of money largely a flat payment instead of tying it to the return-to-incarceration rate that is currently used. The proposal also provided additional money ($60 million a year for three years and $30 million in 2023–24) to pay for increased misdemeanor supervision.

37. Governor's Budget, May Revision — 2020–21, 89.

38. Governor's Budget Summary — 2020–21, January 10, 2020, 141. *See also* Pew Charitable Trusts, *Policy Reforms Can Strengthen Community Supervision*, April 2020, 29 ("By capping probation and parole terms at two years and prioritizing people with the highest need, agencies can minimize the potential harm to low-risk individuals who do not require routine supervision. It also limits individuals' potential to commit minor rule violations that can result in incarceration or other consequences.").

39. *See* Alexis Lee Watts, *Probation In-Depth: The Length of Probation Sentences*, Robina Institute of Criminal Law and Criminal Justice (March 2016), 1 (Washington caps felony probation terms at 1 year; Florida at 2 years). More states set similar caps on misdemeanor probation. *See id.* at 2 (6 months: Florida; 1 year: Indiana, Maine, Minnesota, Washington).

Summary Proposal

Create a presumption of probation-only sentences for some offenses. Allow probation as an option for some offenses where it is currently prohibited.

Current Law

The Penal Code addresses probation eligibility in four ways:

(1) Probation is mandatory for any "nonviolent drug possession offense."[40]

(2) Probation is available with no presumption either way for a large number of offenses.[41]

(3) Probation is presumptively unavailable for certain aggravated offenses "[ex]cept in unusual cases in which the interests of justice would best be served if the person is granted probation."[42]

(4) Probation is forbidden for certain aggravated offenses or in certain situations.[43]

Some offenses also require that a jail term be a manatory condition of probation.[44] A more specific inventory of offenses or situations where probation is presumptively unavailable or forbidden is attached as Exhibit C.

Background

At its April 2020 meeting the Committee expressed interest in exploring more deeply the rules for who is eligible for probation in California. A review of those rules shows two areas for potential change: creating a presumption of probation-only sentences for some offenses and allowing probation as an option for offenses where it is currently forbidden.

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40. Penal Code § 1210.1(a).

41. Penal Code § 1203(b). For realigned offenses, if a probation-only sentence is denied, there is a presumption for a "split sentence" — one that has incarceration in jail followed by mandatory supervision by the probation department. *See* Penal Code § 1170(h)(5)(A). In determining whether the presumption for a split sentence has been overcome, courts are guided by Cal Rules of Ct 4.415.

42. *See, e.g.*, Penal Code § 1203(e). In considering whether the presumption has been overcome, courts are guided by Cal Rules of Ct 4.413.

43. *See, e.g.*, Penal Code § 667(c)(2) (probation not available if defendant has prior strike conviction); § 1203.06(a) (use of firearm during certain offenses); § 1203.065(a) (specified sex offenses).

44. *See, e.g.*, Penal Code § 208(c) (kidnapping) ("In all cases in which probation is granted, the court shall, except in unusual cases where the interests of justice would best be served by a lesser penalty, require as a condition of the probation that the person be confined in the county jail for 12 months. If the court grants probation without requiring the defendant to be confined in the county jail for 12 months, it shall specify its reason or reasons for imposing a lesser penalty.").

The Penal Code does not currently have any offenses that carry a presumption of a probation-only sentence. At least twelve other states do have such a presumption, including eight that have created or expanded such systems in the last ten years.[45] These states differ on how they approach the presumption — some states base it entirely on the offense while others consider the offense and defendant's criminal history.

A study of the effect of presumptive probation in North Dakota showed promising effects in the two years after the law was changed in 2013:

- Wide coverage: almost 70% of felony convictions were subject to presumptive probation.[46]
- Increased use of probation: The probation placement rate for offenses subject to presumptive probation increased from 69% to 80%.[47]
- 16% reduction in people sent to prison.[48]
- Felony convictions increased 26% — though this was driven by increased prosecutions for ingestion of a controlled substance, which is not a felony in most other states.[49]

In addition to this presumption for probation, the Committee may wish to consider recommending that more offenses be eligible for probation in the first place. For example, a number of drug related offenses remain ineligible for probation sentences.[50]

Decisions for the Committee

The Committee should decide whether to recommend that the Penal Code be revised to include presumptions for probation for some offenses and to remove prohibitions on probation for other offenses.

In making this decision, the Committee should consider:

- What offenses should be subject to the presumption? Staff has asked the Chief Probation Officers of California for data on the most common

45. *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); 730 ILCS 5/5-6-1(a) (general presumption of probation in Illinois).

46. Brian Elderbroom et al., *Assessing the Impact of South Dakota's Sentencing Reforms*, Urban Institute, May 2016, 5.

47. *Id.* at 1.

48. *Id.* at 2.

49. *Id.* at 8–9.

50. Penal Code § 1203.07(a). Recently-introduced legislation, SB 378 (Weiner), would also largely remove these prohibitions on probation.

offenses that lead to probation sentences, which may help the Committee consider this issue.

- How should a court determine whether the presumption should be overcome? As one example, the South Dakota statute described above allows the presumption for probation to be overcome if "aggravating circumstances exist that pose a significant risk to the public and require a departure from presumptive probation under this section."[51]
- What offenses should no longer have probation forbidden as an appropriate sentence? The entire list can can be seen in Exhibit C, 5–7. Drug-related offenses may be a useful starting point.

Respectfully submitted,

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51. SDCL 22-6-11

Exhibit A

Letter from Rose Cahn, Immigrant Legal Resource Center

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June 25, 2020

California Committee on Revision of the Penal Code

Re: **Need for Pretrial Diversion Programs Following a Plea of "Not Guilty" Rather Than a Plea of "Guilty"**

Dear Members of the Committee,

The Immigrant Legal Resource Center (ILRC) is a national nonprofit, headquartered in San Francisco, CA, with over forty years of expertise in the complex interplay between immigration and criminal law. The ILRC has extensively analyzed, written about, taught, and advised on the immigration effect of California crimes and sentences. We have worked closely to educate and advise California public defenders, prosecutors, superior court judges, and stakeholders in delinquency proceedings about immigration consequences. Among other forms of technical assistance, we provide regular trainings to California Judicial Council, the California Public Defender Association, the California District Attorney Association, and the County Welfare Directors Association about the unique needs of system-impacted noncitizens.

In the past six years, the ILRC has helped to draft and advocate for the passage of several California laws that affect this area. See, for example, California Penal Code §§ 18.5, 1016.2, 1016.3, 1203.43, 1473.7 and the amendment of Penal Code § 1000, reforming pretrial drug diversion.[1]

Understanding the immigration consequences of the criminal code is especially important in California, which has the largest noncitizen population in the United States, both in percentage of the population and in total numbers. Over 25% of people residing in California were born in another country. Mixed immigration status households are the norm; over 50% of all children in our state reside in a household headed by at least one foreign-born person, and the great majority of these children are U.S. citizens.[2]

Immigration law has evolved over time so that now "[t]he 'drastic measure' of deportation or removal, *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948), is [] virtually inevitable for a vast number of noncitizens convicted of

[1] You can access our advisories about these new laws available at www.ilrc.org/crimes.
[2] US Census 2010, *available at* https://www.census.gov/quickfacts/CA (last accessed June 2020).

crimes." *Padilla v. Kentucky*, 559 U.S. 356 (2010). Immigration law can function in bizarre and counterintuitive ways; some misdemeanors and infractions carry deportation consequences, while some felony strike offenses do not carry any immigration impact whatsoever. Some of the most immigration damaging misdemeanors or infractions include Pen. C. §§ 245(a) (assault with a deadly weapon); 273.5 (domestic violence); 422 (criminal threats); and 484 (petty theft); and Health & Safety Code §§ 11358 (cultivation of marijuana); 11350 (possession of a controlled substance); 11377 (possession of a controlled substance). Examples of common immigration neutral dispositions, whether classified as felonies or misdemeanors, include Pen. C. §§ 32 (accessory after the fact); 136.1(b)(1) (witness dissuasion); 207 (kidnapping) 236 (false imprisonment); 242 (assault); 243(e) (domestic assault); 459 (burglary).[3]

We understand that the Committee is currently considering recommendations regarding diversion. We write to underscore the critical distinction for noncitizen defendants of pretrial diversion, as compared to post-guilty plea diversion. In short, regardless of what state law may provide:

- Any state diversion program that requires a guilty plea followed by any program requirement (e.g., to attend a class, pay a fine, or complete probation conditions) is a conviction for immigration purposes, leading, in many cases, to mandatory deportation, regardless of the classification of the charged offense. This is true even if the guilty plea is later vacated for rehabilitative purposes as it can be in post-plea diversion program.[4]
- In contrast, a state diversion program that diverts the person after a plea of not guilty, or before any plea, is not a conviction for immigration purposes.

This is because federal immigration law has its own statutory definition of when a conviction occurs, which is not dependent on the convicting jurisdiction's characterization. Federal statute provides that in the case of alternative dispositions even where there is no formal judgment of conviction there nonetheless is a conviction for immigration purposes as long as (a) there is a plea or judicial finding of guilt or of facts sufficient for guilt, and (b) the judge imposes any penalty, punishment, or restraint.[5] A later dismissal of the plea or conviction does not matter for federal immigration law if that dismissal is done for rehabilitative purposes as it would be in a diversion program.[6]

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[3] For a list of immigration neutral offenses see *Public Facing Chart: Selected Immigration Defenses for Selected California Crimes*, *available at* https://www.ilrc.org/sites/default/files/resources/pub_facing_ca_chart-20190312v2.pdf (last accessed June 2020).

[4] *See Matter of Roldan*, 22 I&N Dec. 512, 523 (1999) (holding that that an immigrant would still be deportable "notwithstanding a subsequent state action purporting to erase all evidence of the original determination of guilt through a rehabilitative procedure.").

[5] See 8 USC 1101(a)(48)(A) and see, e.g., *Matter of Mohamed*, 27 I&N Dec. 92 (BIA 2017).

[6] See *Matter of Adamiak*, 23 I&N Dec. 878, 879 (BIA 2006) ("In our decisions addressing the effect of State court orders vacating convictions, we have distinguished between situations in which a conviction is vacated based on post-conviction events, such as rehabilitation, and those in which a conviction is vacated because of a defect in the underlying criminal proceedings.").

California diversion statutes such as drug diversion under Penal Code § 1000 et. seq (as of January 1, 2018) and mental health diversion under Penal Code § 1001.36 do not require a guilty plea. Therefore, a successful diversion participant in these programs does not have a "conviction" for immigration purposes. But programs such as drug diversion under Penal Code § 1210 (Proposition 36), or the former deferred entry of judgment, Penal Code § 1000 et seq. (1997-2017), do require a guilty plea and do create a conviction for immigration purposes, even for successful participants who are found to have satisfactorily completed all requirements, and whose criminal charges therefore are "dismissed." Individuals who participate in these programs are deportable, even if the offense charged was classified as an infraction or misdemeanor.

The importance of this can be illustrated by the process of changing Penal Code § 1000 from a post-guilty plea "deferred entry of judgment" ("DEJ") program, to a post-not guilty plea pretrial diversion program. Between 1997 and 2017, all defendants who were offered DEJ were informed that if they successfully completed all requirements, they would have no conviction "for any purpose," have no arrest record, and could not be denied any legal benefit based on the incident. See former Penal Code §§ 1000.1(d), 1000.3, 1000.4 (1997-2017). However, in direct conflict with that statutory promise, noncitizens who successfully completed the program emerged with an extremely damaging "drug conviction" for immigration purposes. We estimate that this caused thousands of noncitizen Californians to be deported,[7] and it may have caused U.S. citizens to be denied other federal benefits. To address this, the Legislature took two steps:

- In 2015, the Legislature passed AB 1352 to undo some of the damage that was done to DEJ participants based on the misadvice set out in former Penal Code § 1000. This bill created Penal Code § 1203.43, a post-conviction relief vehicle that permits a person who completed DEJ requirements to vacate their guilty plea for cause, based on the misadvice about reach of a DEJ dismissal. Immigration authorities require vacaturs to be based on legal or procedural defect to eliminate convictions for immigration purposes.[8] Since Penal Code § 1203.43 became law in 2016, thousands of Californians have obtained this relief; over 1,000 such applications were filed in Santa Clara County alone.
- In 2017, the Legislature passed AB 208, which changed Penal Code § 1000 from DEJ to a true pretrial, no guilty plea, diversion statute. That is the program in effect today.

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[7] See Human Rights Watch, *A Price Too High: Detention and Deportation of Immigrants in the US for Minor Drug Offenses* (June 2015), *available at* https://www.hrw.org/report/2015/06/16/price-too-high/us-families-torn-apart-deportations-drug-offenses.

[8] See *Matter of Mohamed*, 27 I&N Dec. 92 (BIA 2017) (finding that a Texas pretrial diversion program that required an admission of guilt resulted in a conviction for immigration purposes notwithstanding the subsequent dismissal of the guilty plea); *Matter of Roldan,* 22 I&N Dec. 512, 528 (1999) (finding petitioner deportable on the basis of a charge that had been dismissed based on a state rehabilitative statute, holding that "state rehabilitative actions which do not vacate a conviction on the merits or on any ground related to the violation of a statutory or constitutional right in the underlying criminal proceeding are of no effect in determining whether an alien is considered convicted for immigration purposes."); *Matter of Pickering*, 23 I&N Dec. 621, 624 (2003) ("[I]f a court with jurisdiction vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a "conviction" within the meaning of section 101(a)(48)(A). If, however, a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the respondent remains "convicted" for immigration purposes.)

Why did the Legislature make these changes? First, the Legislature wanted to protect the due process rights of California defendants and ensure that they did not agree to plead guilty and enter diversion based on misrepresentation. Successful completion of diversion promises erasure of criminal records, and that is simply inaccurate for noncitizens unless the program does not require a guilty plea.

Second, the Legislature was concerned that the lack of any feasible diversion program for the large noncitizen population resulted in clogging the courts, and inhibited access to much needed diversion programing. Immigrant defendants who understood the adverse immigration consequence of DEJ had to turn down DEJ offers, and instead engaged in aggressive plea negotiation strategies appropriate to a far more serious charge. These individuals were forced to turn down potentially helpful DEJ programming in exchange for a non-deportable disposition.

Finally, there was growing consensus about the need to stem the human and economic toll caused from even "dismissed" diversion convictions. Mass deportations fracture communities and deplete state resources. It is estimated that from 2008 to 2015, approximately 50,000 parents of U.S. citizen children who reside in California were deported. Besides the human cost, removing these parents from their children has a fiscal impact on courts handling dependency, delinquency, foreclosure, bankruptcy, and other proceedings, and on the welfare system and other social services.

As this Committee considers reforms to diversion, in order to preserve access for noncitizen defendants, it is imperative that the diversion program be pre-arrest, pre-charge, or pre-trial (after a plea of not guilty), without requiring an admission of guilt. If that is not done, the statute must contain some warning that it will result in a conviction for noncitizens and potentially U.S. citizens who apply for certain federal benefits.

If it is useful, ILRC staff would be happy to provide any additional information to the Committee or consult on this or any other matter about the penal code's impact on noncitizens.

Sincerely,

Rose Cahn

Rose Cahn
Senior Staff Attorney

Exhibit B

Proposed restorative justice statutes from Impact Justice

Proposed CA Legislation: RJD as the Presumptive Response to Youth Wrongdoing

Preamble: *Whereas*, unless the public interest requires otherwise, criminal proceedings should not be instituted against a minor if there is an alternative means of dealing with the matter; *whereas*, a minor who commits an offense should be kept in the community so far as that is practicable and consonant with the need to ensure the safety of the public; *whereas*, any sanctions imposed on a minor who commits an offense should take the form most likely to maintain and promote the development of the minor and take the least restrictive form appropriate in the circumstances; *whereas*, any measures for dealing with wrongdoing by a minor should, so far as it is practicable, address the causes underlying the minor's offending; and *whereas*, in making a determination of the measures for dealing with offenses committed by minors, serious consideration should be given to the interests, needs, and views of any victims of the offense:

(a) (1) In any case in which a young person is alleged to have violated, when he or she was 25 years of age or younger, any felony criminal statute or gross or aggravated misdemeanor statute, pre-charge restorative justice diversion shall be the presumptive and sole approach for addressing that young person's alleged violation so long as *all* of the following conditions are met:

(A) The violation involved at least one, identifiable victim; and

(B) Within the county in which the violation occurred:

(i) There is a community-based organization, with 501(c)(3) status or a fiscal sponsor, that has operated a pre-charge, restorative justice diversion program for a minimum of three, consecutive years; and

(ii) That community-based organization has successfully completed pre-charge, restorative justice diversion processes for at least 50 youth per year for the previous, two years; and

(iii) A study completed within the last 12 months that tracks outcomes for youth at least two years after completing the program has found that that community-based organization's pre-charge, restorative justice diversion program has achieved at least a 20% reduction in the recidivism rate for individuals who complete the pre-charge, restorative justice diversion program, when compared to the county's overall juvenile recidivism rate. The study must also find that a majority of victims who participate in the pre-charge, restorative justice diversion program are satisfied with the process, based on evaluation surveys; and

(iv) That study was conducted by a third-party evaluator

a) For purposes of this section only, "recidivism" shall be defined as subsequent petitions filed.

(2) The district attorney or other appropriate prosecuting officer may make a motion challenging the presumption described in section (a)(1) above by filing a petition with the relevant county's juvenile or criminal court.

(3) Following submission and consideration of the petition, and of any other relevant evidence that the petitioner or the minor may wish to submit, the court shall decide whether the young person's case should be processed through a court of jurisdiction, rather than being diverted to pre-charge restorative justice diversion. In making its decision, the court shall consider the criteria including but not limited to those specified in subparagraphs (A) and (B). If the court orders a transfer of jurisdiction, the court shall recite the basis for its decision in an order entered upon the minutes.

(A) Capacity of the community-based organization operating the pre-charge, restorative justice diversion program to take the case, based on the number of program facilitators at that community-based organization and the number of open, restorative justice diversion cases each facilitator has at the time the prosecuting officer's petition is filed

(B) Whether the young person will remain in the county in which the alleged violation occurred, or have sufficient and reliable transportation to the county in which the alleged violation occurred, for the entire duration of the pre-charge, restorative justice diversion process.

Proposed CA Legislation: Restorative Justice Privileged Communication

Synopsis: Amends the [ ]. Defines “party,” “communication,” “harm” and “restorative justice process.” Provides that communications received by a party in preparation for, during, or after a restorative justice process are inadmissible in court unless the privilege is: waived by the party or parties about whom the communication concerns; subject to certain exemptions; or used in furtherance of a criminal act.

(a) This Section is intended to encourage the use of restorative justice processes by providing a privilege for such participation and ensuring that anything communicated during the process is strictly confidential, and will not be used against the parties in any future court proceedings without their informed consent. This Section further intends to codify that the privilege within a restorative justice process shall only be waived by informed consent of the party or parties about whom the participation or communication concerns. The California Legislature affords this privilege in recognition of restorative justice as a powerful tool in addressing the needs of victims, offenders, and the larger community in the process of repairing the fabric of community peace.

(b) As used in this Section:

> “Party” means anyone who participates in a restorative justice process or shares information pertaining to the subject matter of the restorative justice process, including the individual who facilitates the process.
>
> “Communication” means any information received or shared by a party in preparation for, during, or related to a restorative justice process.
>
> “Harm” means anything reasonably regarded as loss, disadvantage, injury, damage or pain.
>
> “Restorative justice process” means a convening, such as victim-offender dialogue, group conferencing, peace circle, or other conflict resolution sessions, in which parties who have caused harm, parties who have been harmed, or community stakeholders collectively gather to identify harm, repair harm to the extent possible, address trauma, reduce the likelihood of further harm, or strengthen community ties by focusing on the needs and obligations of all parties involved through a participatory process.

(c) If a restorative justice process is convened, neither the fact that it has been convened, nor anything said or done during the process, is admissible in any court, unless this privilege is:

> (1) waived, in court or in writing, by the party or parties about whom the information relates;
> (2) subject to one or more of the exemptions in subsection (e); or
> (3) used in furtherance of a criminal act.

Any waiver is limited to the participation and communication of that party only, and the participation or communications of any other participants remain confidential and privileged unless waived by the other parties. This information is not subject to discovery or disclosure in any judicial or extrajudicial proceedings.

(d) Evidence that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely because it was discussed or used in a restorative justice process.

(e) No party to a restorative justice process shall reveal information relating to the process unless the party or parties about whom the information relates waives this privilege in court or in writing, or the disclosure is otherwise permitted by this Section.

(1) Nothing with respect to this privilege shall preclude a party to a restorative justice process from revealing information:

(i) if that person reasonably believes it is necessary to prevent death or great bodily harm;
(ii) to comply with other law;
(iii) to report on a restorative justice process session taking place in order to comply with a court-related program; however, this report shall be limited to the fact that a process has taken place, an opinion regarding the success of the process, and if further proceedings are to follow. The specific communications elicited in the process shall not be reported to the court unless waived by the appropriate parties; or

(2) Any party to a restorative justice process who, by reason of his or her employment or profession, is legally required to report information shall not be relieved of that duty based on this privilege.

Exhibit C
Probation eligibility catalog

Probation Eligibility Catalog

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

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

I. Eligible Only in Unusual Case

A. Serious Nature of Present Offense

1. Sex Offenses

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

2. Drug Offenses

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

3. Burglary Offenses

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

4. Arson Offenses

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

5. Escape Offenses

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

6. Offenses by Public Officials

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

7. Weapon Offenses

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

8. Solicitation of a Minor

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

9. Failure To Register as Sex Offender

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

10. Unlawful Transfer of Firearm or Deadly Weapon

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

B. Aggravated Nature of Present Offense

1. Armed With Deadly Weapon

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

2. Deadly Weapon Use

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

3. Great Bodily Injury

1203(e)(3)	Willfully inflicted great bodily injury or torture in any offense
1203(e)(10)	Inflicted great bodily injury or death by discharging a firearm from or at a vehicle

4. Excessive Theft

115(c)(2)	Conviction in one proceeding of more than one violation of Pen C § 115, attempt to record false or forged instrument, with intent to defraud, when violations resulted in cumulative financial loss exceeding $100,000
1203.045(a)	Theft exceeding $100,000
1203.048(a)	Computer-related crimes (Pen C § § 502, 502.1(b)) w/taking or damage exceeding $100,000
1203.049(a)	Fraudulent appropriation or unauthorized use, transfer, sale, or purchase of CalFresh benefits committed by means of electronic transfer in violation of Welf & I C § 10980(f) or (g) and amount exceeds $100,000

5. Elderly Victim

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

C. Prior Convictions

115(c)(1)	Prior conviction of Pen C § 115, attempt to record false or forged instrument, w/present conviction of that section in a separate proceeding
1203(e)(4)	Two prior felony convictions
1203(e)(5)	One prior felony conviction and present conviction of one of specified felonies
1203(e)(6)	One prior felony conviction involving deadly weapon use or arming or infliction of GREAT BODILY INJURY
1203.073(b)(5)	Prior and present conviction of certain offenses involving methamphetamine

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

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

III. Not Eligible

A. Serious Nature of Present Offense

1. Arson Offenses

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

2. Sex Offenses

667.61(h)	Conviction of specified serious sex offenses committed under designated aggravated circumstances
1203.065(a)	Conviction of specified serious sex offenses
1203.066(a)(1)	Violation of Pen C § 288 (lewd act w/child) or § 288.5 (continuous sexual abuse of child) by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury
1203.066(a)(6)	Violation of Pen C § 207, § 209, or § 209.5 (kidnapping) for the purpose of committing a violation of Pen C § 288 or § 288.5

3. Drug Offenses

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

4. Destructive Device Offenses

12311	Any violation of Pen C § § 12303-12312

B. Aggravated Nature of Present Offense

1. Firearm Use

1203.06(a)(1)	Personal use of a firearm in committing or attempting one of specified felonies
12022.53(g)	Personal use or discharge of firearm in committing or attempting one of specified felonies

2. Great Bodily Injury

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

3. Minor Victim

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

4. Elderly or Disabled Victim

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

5. Offense Committed While on Parole

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

6. Offense Committed While on Probation

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

C. Prior Convictions

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

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