

October 19, 2020

First Supplement to Memorandum 2020-14

Written Materials Submitted by Panelists

The Committee on Revision of the Penal Code will hear from a number of invited panelists at its meeting on October 21, 2020.

Some panelists’ written materials are attached to Memorandum 2020-14. Two more sets of materials have been received and are attached to this supplement, as follows:

	<i>Exhibit</i>
• Chief Eric R. Nuñez, President, California Police Chiefs Association (10/16/20)	5
• Chief John Keene, Legislative Chair and Secretary, Chief Probation Officers of California (10/19/20)	6

Respectfully submitted,

Brian Hebert
Executive Director

Exhibit 5

Written Materials from
Chief Eric Nuñez (Los Alamitos)
President
California Police Chiefs Association

(10/16/20)

TO: The Committee on the Revision of the Pena Code

FROM: Chief Eric Nunez, President of the California Police Chief Association

RE: Submission of Comments

Introduction:

California has made major changes to our criminal justice system in the last decade. From early release programs, reductions in sentencing, new procedures, and more, reforms have made significant changes to how we look at crime, punishment, and rehabilitation in our state. Overall, the focus has been to rely less on incarceration, and more heavily on rehabilitative services to change public safety outcomes. The general thought is that many crimes are the result of circumstance – poverty, mental health, substance abuse – and that addressing the underlying root cause is more effective towards turning the tide in criminal behavior than time in custody. While there are many cases this is true, there are more serious crimes and social disorders that for safety require an individual to be removed from our communities. Our laws should have the flexibility, and at the same time distinction, in order to distinguish between the two. To be effective, our state should then ensure the resources are available for necessary programming services and treatment. Unfortunately, despite our work to this point, we have not ensured either are the case.

Lessons from prior reform:

It is critical, as we move forward into recommending further changes to our penal code, that we take time to review the changes we have already made and evaluate the impacts and consequences. This evaluation is made difficult in the fact we have passed so many new laws in a relatively short period of time that it is hard to isolate cause and effect of any one in particular, although that may always be the case to some extent given the general complexities of crime. Regardless, we feel it is important to discuss some of these major changes and the challenges they have presented our communities and law enforcement agencies.

One of the first major policy shifts in our sentencing laws came in the form of a statewide initiative, Proposition 47 in 2014, which reduced penalties on certain drug crimes and theft. Proposition 47 is illustrative of the incomplete and imperfect reform measures that have caused unintended consequences for public safety. The core belief behind this measure was that these drug and theft related offenses are better addressed without lengthy stints in custody; again, the focus should be on addressing the root cause. To do this, Prop 47 directed funding saved from reductions in sentences to stand up more services. It may surprise some that, generally, police chiefs tend to agree with the core concepts contained in Prop 47. Law enforcement does not want to see someone with severe mental health issues or a substance abuse disorder sent to prison – we would all rather see that individual get treated and find good health. However, that would require adequate flexibility, services, and treatments available, none of which have fully materialized during the implementation of this measure.

Again, although the theory behind Proposition 47 was commendable, it was not considerate of several realities. First, despite the savings, there are still not enough services to adequately treat this population of low-level offenders. Many within this group have severe issues that require lengthy and costly treatment programs that are not in existence (this has further been exacerbated by the current pandemic and economic downturn). Next, in certain cases the penalty reduction effectively removed the leverage that is often needed to mandate treatment; often times we now see individuals chose short jail terms over lengthy drug treatment programs with little incentive to complete the program due to lack of consequences. Finally, there is no flexibility within the statutes to separate first time offenders from the repeat offenders, which has resulted in cases across the state where individuals are arrested dozens of times for the same offense with nothing changing – booked, sentenced, released, and repeat. Limits in the ability for District Attorneys to charge and stack multiple cases, jail policies on release of non-violent inmates, and rigidity in statute make it difficult to find solutions in these cases. Ultimately, if our criminal justice system is meant to change or alter criminal behavior, then we have failed in thousands of cases.

Compounding these problems is the fact these “loopholes” that result in individuals being arrested and released dozens of times have become understood and exploited by the few involved

in this ongoing criminal activity. It is important to draw distinction that these are not necessarily organized groups, but individuals stuck in cycles of substance abuse or poverty that cannot, or are unwilling, to break free for many reasons. There are examples in arrest transcripts from law enforcement agencies across the state where suspects call out “Prop 47” and the lack of penalties directly to the arresting officers. This highlights an important point, that although academic research has analyzed the possible limited effects penalties have as a deterrence, it is also empirically true from our experience that the lack of consequences clearly has an opposite effect. Again, the truth here is complex and somewhere in between both theories, but too often we hear repeated that penalties are not deterrent as justification for reducing sentences without any thought about these unintended consequences. Instead, we need to be thoughtful and careful because moving too far in one direction without providing concrete alternatives that are proven to impact behavior is not only ineffective but may put public safety at risk. This is where we need more research to inform our decisions.

The few comprehensive studies of these described impacts have been done at the macro-level, looking at aggregate crime data from across the state and statewide recidivism levels (see Public Policy Institute of California’s reports on Prop 47), but these studies lack the granularity to fully analyze the plight of these repeat offenders or evaluate what services they are receiving in place of incarceration. Again, conducting that type of analyses is further complicated by the fact we have seen so many additional reform measures passed in subsequent years. Regardless of difficulties, it is critical that we evaluate these impacts and identify what has worked and where there are gaps that need to be addressed.

The issues presented by Prop 47 are emblematic of other reforms we have seen in recent years. Measures to reduce sentencing are not always conditionalized on access to alternatives or requirements that individuals complete specified programming. Many legislators have approached our group in efforts to find ways to compel those with substance or mental health problems into treatment, but those conversations almost always stall when we get to the point of how to then mandate treatment; again, unfortunately, many individuals stuck in the cycle of drug abuse and mental disease will not voluntarily accept treatment. While studies show that the percentage the homeless population who are “service resistant” may be less than what was once

perceived (see NYU study published in 2019 by Christian Wusinich et al titled “If you’re gonna help me, help me: Barriers to housing among unsheltered homeless adults”), but that focuses more on housing and shelter, not long term treatment that is needed in the more severe cases we are focused on. In order to compel someone with a serious disorder into treatment, the decision either must be made for them as done with through legal means (i.e. Welfare and Institutions Code 5150) or conservatorships, which are both flawed and need modernization, or the decision is weighted for them by significant consequences for failing to chose treatment. These considerations are paramount to finding success in building a modern criminal justice system that is more flexible, effective, and provides for the safety of all.

Recommendations for moving forward:

The lessons we have learned from prior reforms should inform our next steps, especially considering the significant impact the work of this committee will produce. Based on our experience, we would request that is Committee consider the following recommendations moving forward:

1. The Committee should evaluate completely the prior reductions in penalties and oversight (i.e. Prop 47, Prop 57, SB 136 from 2019, SB 1393 from 2018, reductions in parole and probation from this previous session, etc.). In reviewing these laws, we should ask if there are alternatives required to compensate for the reductions and how have those alternatives (or lack thereof) impacted individual outcomes.
2. Research what the current services available are for those suffering from mental health and substance abuse across the state in various regions. Are they adequate, or do we need more? Again, if we are going to reduce sentences for specified offenses, we should require treatment or programming that is proven effective in altering the criminal behavior or addresses the root cause of the crimes being committed.
3. Compare California’s penal code and sentencing structure to those of other states. We tend to have lower base terms in California because we utilize more enhancements, and we should understand where we are comparatively and analyze the differences and potential consequences by evaluating other systems.

4. Review options for compelling those with severe mental health and substance abuse disorders into treatment. As stated above, sometimes these individuals are unable to make the appropriate decision to seek treatment on their own, and there needs to be ways for mandating treatment. This is important in order to make sure we are not allowing those suffering and causing quality of life issues in our communities to remain untreated.

I thank you for the opportunity to present these views and for your consideration of the recommendation from a police chief's perspective. CPCA looks forward to continuing to work on these issues together moving forward.

Respectfully,

A handwritten signature in black ink, appearing to read "Eric R. Nunez". The signature is fluid and cursive, with the first name "Eric" and last name "Nunez" clearly legible.

Eric R. Nunez
President, CPCA

Exhibit 6

Written Materials from
Chief John Keene
Legislative Chair and Secretary
Chief Probation Officers of California

(10/19/20)



CHIEF PROBATION OFFICERS OF CALIFORNIA

Committee on Revision of the Penal Code

Submitted by: Chief Probation Officers of California (CPOC)

Probation Chiefs appreciate the very important discussion on supporting and improving public safety through lasting rehabilitative change and preventing victimization. We strongly hold the sentiment that California must promote policies and practices that enhance the safety of all Californians through equity, justice, data, and research.

In the past decade, California has undergone a significant amount of reform in the justice arena and CPOC has been intimately involved in shaping many of these reforms. We have historically refrained from taking positions on direct sentencing policy due to our role in advising the courts. However, we have actively participated in policy around the penal code that can impact successful outcomes for those that encounter the justice system to enhance the safety in our communities.

What is Probation?

Probation officers are California peace officers pursuant to Penal Code 830.5 and enforce court orders. Probation Departments have a unique role in California because the probation infrastructure bridges the critical linkages between California courts, the communities we serve and both state and local corrections. Probation Departments are part of local county government as well as the state court system, which allows for the hallmarks of probation - innovation, local responsiveness and targeted community engagement – to be possible. Probation protects the community, supports the court, assists victims and helps rehabilitate offenders.

As a criminal justice sanction, probation is an alternative to incarceration that still holds people convicted of crimes accountable, but with the goal of successfully moving people out of the system by overseeing their rehabilitation using evidence-based rehabilitation strategies. Evidence-based practices are supported by scientific research to reduce recidivism. It is also important to highlight that probation is a community services model which brings together many facets to best address the behavior of the individual through linkages to programs and services that create rehabilitative change. These services often include workforce development, substance use treatment, mental health services, family engagement, and education among others. Probation's multi-dimensional approach to community safety includes:

- Holding clients accountable through community supervision.
- Preventing crime by changing criminal thinking.
- Objectively assessing the law and facts for individuals coming before the Court.
- Restoring victims and preventing future victimization.
- Rehabilitating our clients with evidence-informed strategies that change their behavior.



- Ensuring secure and effective detention services and successful reentry.

Probation's Role in Recent Major State Reforms

California Community Corrections Performance Incentives Act of 2009 (SB 678)

SB 678 sought to incentivize reduced revocations to state prison without implications for public safety and focus funding on local implementation of evidence-based practices in county Probation Departments. This legislation and incentive funding have significantly improved probation services. It has also improved longer-term changes to the way probation operates and how violations of probation are handled. Prior to SB 678, 40% of new admissions into California prisons – about 20,000 inmates – were offenders who had failed felony probation at the local level.

Improving outcomes for this population of offenders improves public safety and reduces the prison population. This legislation has not only had a positive impact on recidivism but has also been a catalyst for lasting successful outcomes for offenders – the true way to safer communities.

AB 109: Criminal Justice Realignment

In 2011, CPOC supported Governor Brown as he signed AB 109 to realign certain responsibilities for lower-level offenders, and adult parolees, from state to local jurisdictions. Under Realignment, newly convicted low-level offenders without current or prior serious or violent offenses stay in county jail to serve their sentence. Local Probation Departments took on the responsibility for monitoring these offenders upon release as well as offenders with certain offenses who are released from state prison. Overall, this resulted in a population decrease of about 25,000 in California state prisons. The Probation Chief serves as the chair to the local planning committee which designs each county's response to shift in responsibilities under this reform.

Proposition 47

While we were neutral on this policy change, we have worked to find ways to replace some of the linkages between treatment and supervision that were removed. By changing several felonies to misdemeanors, we have less opportunity to use our traditional case management to connect and incentivize programming and treatment. Funding for treatment is often available through the law change but without specialized misdemeanor supervision caseloads probation is unable to make those connections to all that may benefit.

The Governor's January 2020-21 budget recognized the importance of these linkages and proposed \$60 million annually for three years and \$30 million in 2023-24, to supervise and provide probation services for misdemeanants, with the aim of improving public safety by reducing recidivism of these individuals. The proposal's intent was to align existing evidence-based practices used with the felony probation population to the misdemeanor population, with a focus on supervision and services based on risk and needs assessments.

Proposition 57

CPOC supported this policy specifically to improve implementing evidence-based rehabilitation programs in prisons to incentivize offenders to participate in programs via a credit earning structure for program completion. While in many cases this means that some people will be on PRCS supervision sooner, this also creates a continuum of programming and incentives while in prison which is a critical time to begin their rehabilitative effort and provides the groundwork for their reentry into communities under our supervision.

EMERGING ISSUES

Transitional Age Youth

While legally adults and therefore covered under the penal code, scientists have discovered young offenders age 18-25 are still undergoing significant cognitive brain development which can give us important information on how best to change their thinking and achieve more effective rehabilitation. Research shows this age group can be better served by the juvenile justice system with corresponding age appropriate intensive services. As such, in order to address the criminogenic and behavioral needs of this age group, it is important that developmentally appropriate services are provided.

In recognition of this brain development research, in 2016 Governor Brown signed SB 1004 (Hill) which authorized the counties of Alameda, Butte, Napa, Nevada and Santa Clara to voluntarily enact a pilot program that allows young adult offenders age 18-21 to be treated and housed in a juvenile detention facility, instead of adult county jail. SB 1106 (Hill) in 2018 added the County of Ventura.

The program is a deferred entry of judgement program, is entirely voluntary on behalf of the defendant, and allows the person to have their charges dismissed upon successful completion. The focus of the program is on providing age appropriate services for a short period of time in a juvenile facility, in lieu of custody time in county jail, and then focusing on transitioning the person into the community with supports and services.

In 2019 CPOC sponsored a bill, SB 889 (Skinner) that would have made improvements to the juvenile justice system through individualized treatment and rehabilitation plans based on specific risk and protective factors, but also would allow for 18 and 19 year old youth to be served in the juvenile system with age-appropriate intensive serves. These young adults would also have the benefits of record sealing to help eliminate the added barrier to gaining employment or housing. This bill did not move forward due to a Covid impacted legislative session.

Pre-trial Services

Senate Bill 10 (Hertzberg, Stats. 2018, Ch. 244) authorizes a change to California's pretrial release system from a money-based system to a risk-based release and detention system. SB 10 assumes

that a person will be released on his or her own recognizance or supervised own recognizance with the least restrictive nonmonetary condition or combination of conditions that will reasonably assure public safety and the defendant's return to court.

As experts in assessing and mitigating risk, we believe SB 10 gives a good framework to a pre-trial system that will maximize public safety, maximize return to court and mitigate the highest risk. Probation has the experience and expertise in assessment that will be critical to make this reform for public safety and allow as few disruptions to positive social engagement for low risk offenders.

Additionally, the Governor's 2019-20 State Budget included \$75 million for pretrial projects in local trial courts. The Judicial Council awarded funding to 16 pretrial projects throughout the state. Each of the pretrial pilot projects incorporate release decisions made by judicial officers prior to arraignment—or at arraignment if a hearing is required—informed by a risk assessment conducted by county probation departments. SB 36 (Hertzberg, Statutes of 2009, Chapter 589) was also enacted in 2019 and set forth requirements to validate pretrial risk assessment tools as well as the collection and reporting of specified data and outcomes in pretrial release.

Regardless of what happens with the pending election on Prop 25 which is a referendum of SB 10, there are programs currently run by probation which help courts address the issue of pretrial detention.

Re-entry Services and Supervision

In addition to probation supervision (sentence in lieu of incarceration), probation also supervises people in the community post their incarceration (PRCS or Mandatory Supervision) which requires more focus on re-entry needs. Linkages between the detention entity (jails or prison) and the rehabilitation programming offered during incarceration needs to be coordinated to provide seamless re-entry that supports not only community safety but also successful and sustainable transition to life outside of the criminal justice system.

As the Committee on Revision of the Penal Code continues its review and discussion on the Penal Code, we believe there are several important considerations and lenses through which discussions should be viewed:

1. We must promote policies and practices that enhance the safety of all Californians through equity, justice, data, and research.
2. We should continue to look to extensive research on Evidence-Based Practices says that better outcomes are achieved by using intermediate and graduated sanctions that are commensurate with the violation.
3. Quality training should continue to be a focus and investment.
4. We should continue to use data and research to evaluate and consider policy changes.