November 10, 2020

Memorandum 2020-16

Updates on Possible Committee Recommendations

Over the last year, the Committee has explored a number of possible recommendations to fulfill its statutory mandate to "simplify and rationalize" criminal law and procedure[1] and to "improve the system of parole and probation."[2] This memorandum provides updates on possible recommendations identified by the Committee in prior meetings and further refined into eight research priorities by the Committee chair and staff. Staff also anticipates that the subject matter of the November 2020 meeting — parole release and resentencings under Penal Code section 1170(d)(1) — will add significantly to this list.

Those eight proposals are as follows:

1. Reduce common traffic misdemeanors to infractions and lower fines and fees.
2. Lower CDCR incarceration rate and improve recidivism outcomes by increasing local control.
3. Eliminate mandatory minimum sentences for all non-violent offenses and expand alternatives to incarceration.
4. Establish a new crime of "aggravated shoplifting."
5. Focus sentencing enhancements on the most dangerous offenses and circumstances.
6. Refine gang enhancements to target violent criminal enterprises and reduce prejudicial evidence before juries.
7. Apply recently repealed sentencing enhancements to everyone.
8. Equalize custody credits for good behavior in jail, prison, and state hospitals.

1. Government Code § 8290.5(a)(1)–(2).
2. Government Code § 8290.5(a)(4).

1. Reduce common traffic misdemeanors to infractions and lower fines and fees.

Current Law

Over 250,000 people are charged with misdemeanors for traffic violations in California annually.[3] Two of the most common traffic offenses — (a) driving without a license and[4] (b) driving on a license suspended for failure to appear in court[5] — can be charged as either infractions or misdemeanors entirely at a prosecutor's discretion. These offenses are largely related to finances and neither involve DUI or dangerous driving.

Summary Staff Proposal

Reclassify (a) driving without a license and (b) driving on a license suspended for failure to appear in court as infractions. One of these offenses, driving on a license suspended for failure to pay a fine or appear in court, may affect more than 600,000 people.

Background

The vast majority of all criminal filings in California are traffic cases — more than 81% or 3.6 million filings a year.[6] Traffic misdemeanors make up 7% (about 260,000) of these cases[7] and have real consequences: people — disproportionately people of color[8] — can be arrested and jailed for them,[9] the fines and fees associated with them can also be significant,[10] and other consequences have long-lasting effects, such as "points" on a license that can result in further suspensions.[11]

Two of the most common traffic misdemeanors have no relationship to unsafe driving: driving on a license suspended for failure to pay a fine or appear in court

3. Judicial Council of California, 2012 Court Statistics Report, Statewide Caseload Trends, 2009–10 through 2018–19, 124–25 (Table 7a).
4. Vehicle Code § 12500.
5. Vehicle Code § 14601.1.
6. Judicial Council of California, 2012 Court Statistics Report, Statewide Caseload Trends, 2009–10 through 2018–19, 124–25 (Table 7a).
7. *Id.*
8. Back on the Road California, *Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California*, April 2016, 4–20.
9. See, e.g., Vehicle Code § 14601.8 (allowing judge to permit "weekend jail" for people convicted under § 14601.1).
10. *Stopped, Fined, Arrested* at 23 (showing that — via thirteen different code provisions — an infraction with a base fine of $100 ends up costing $815 once an initial deadline to pay is missed).
11. Vehicle Code § 12810 (specifying "point violation count").

and driving without a license. Between 2006 and 2017, 4.5 million Californians failed to appear in court or pay fines, and by 2017, more than 600,000 people had their license suspended for one of those reasons.[12] These offense are often the result of poverty, and charging people with them can further ensnare them in the criminal system and a cycle of debt.[13] Prosecutors currently have the discretion to charge these offense as either misdemeanors or infractions.[14]

Staff Proposal

The Committee should consider the following recommendations:

- Reclassifying these offenses as mandatory infractions.
- Reducing fines and fees associated with these offenses.
- Eliminating the accumulation of "points" on a license for these offenses.
- Prosecutions for driving on a license suspended for DUI or reckless driving would *not* be affected.[15]

Reducing these offenses to infractions would likely significantly reduce traffic misdemeanor caseloads throughout the state, reduce the number of people convicted of misdemeanor offenses, and help end destructive cycles of poverty caused by criminalizing behavior unconnected to unsafe driving.

2. Lower CDCR incarceration rate and improve recidivism outcomes by increasing local control.

Current Law

In many cases, people can serve sentences for the same crime in either state prison or county jails. Data provided to the Committee showed that people who served a sentence in jail and on probation had significantly lower recidivism rates

12. Sen. Com. On Public Safety, Analysis of Sen. Bill No. 185 (2017–2018 Reg. Sess.) March 20, 2017, p. 5.

13. See *Stopped, Fined, Arrested*, at 1 ("Rates of driver's license suspensions due to a failure to appear or pay a ticket are directly correlated with poverty indicators and with race. The highest suspension rates are found in neighborhoods with high poverty rates and high percentages of Black or Latino residents.").

14. Penal Code § 19.8(a) (listing Vehicle Code § 12500 (driving without a license) and Vehicle Code § 14601.1 (driving on suspended license) as "subject to subdivision (d) of Section 17"); Penal Code § 17(d) (allowing the offenses in § 19.8(a) to be filed as infractions). A court may also reduce these misdemeanors to infractions with the defendant's consent. Penal Code § 17(d)(2).

15. Other provisions of the Vehicle Code cover these situations. See Vehicle Code §§ 14601 (driving while license is suspended for "reckless driving"); 14601.2 (driving while license suspended because of driving while under the influence); 14601.5 (similar).

(23% fewer felony convictions) compared to that people sentenced to prison for the same crimes.[16]

Summary Staff Proposal

Require counties to maintain custody of any person with less than a year left to serve on their sentence and compensate counties for the added expense.

Background

The vast majority of arrests in California (about 90%) are for misdemeanors and non-violent felonies,[17] and most people facing felony charges receive a sentence of jail, probation, or a split between the two.[18] Less than 20% of felony cases receive prison sentences.[19] As noted, at the July Committee meeting, two researchers presented data comparing recidivism outcomes between jail and prison. The research controlled for a number of variables, including criminal history, length of sentence, and conviction offense. The data showed that people who served a sentence in jail and on probation had significantly lower recidivism rates (23% fewer felony convictions) compared to that people sentenced to prison for the same crimes.[20]

The Committee also learned from CDCR that that 37% of people who arrive at state prison with a determinate sentence serve less than one year in prison. Last year, approximately 9,000 people arrived at CDCR and left in less than a year.[21]

Staff Proposal

The Committee should consider the following recommendations:

- People who would serve short sentences of incarceration in state prison remain in county jail.
- The state should pay counties to maintain custody.

16. The reconviction rate was based on a two-year interval. Data was for 2013–17. As the researchers put it, "After adjusting for differences in characteristics, we find individuals sentenced locally have lower reconviction rates than their prison-sentenced counterparts in all cases but one — jail sentences for burglary." See Committee on Revision of the Penal Code, Meeting on July 23, 2020, <https://youtu.be/dYE0xPyPUZ8>, 10:27–12:05.
17. California Department of Justice, *Crime in California 2019*, July 2020, Tables 23 and 25.
18. *Id.* at Table 38A.
19. *Id.*
20. The reconviction rate was based on a two-year interval. Data was for 2013–17. As the researchers put it, "After adjusting for differences in characteristics, we find individuals sentenced locally have lower reconviction rates than their prison-sentenced counterparts in all cases but one — jail sentences for burglary." See Committee on Revision of the Penal Code, Meeting on July 23, 2020, <https://youtu.be/dYE0xPyPUZ8>, 10:27–12:05.
21. CDCR Office of Research, *Offender Data Points — Offender Demographics For The 24-Month Period Ending June 2019*, October 2020, Table 3.5.

- Counties should be given new tools to manage their correctional population, such as greater flexibility in providing good conduct credits,[22] expanded ability to transfer incarcerated people to other jurisdictions,[23] and incentives to use county parole systems.[24]

3. Eliminate mandatory minimum sentences for all non-violent offenses and expand alternatives to incarceration.

Current Law

Many nonviolent crimes carry mandatory minimum sentences of incarceration (including drug crimes). On the other hand, some violent crimes (including murder) have no mandatory minimum punishment and permit alternatives to incarceration, including probation.

Summary Staff Proposal

Eliminate mandatory minimum sentences for all non-violent offenses by removing restrictions on probation eligibility and other mandatory terms of incarceration.

Background

The Committee heard from San Mateo Chief of Probation John Keene at its April meeting that probation eligibility should be determined by a consideration of all relevant information and not only what offense is charged.[25] But probation eligibility in California does not follow this or any coherent theory. Many violent offenses — including murder[26] — are eligible for probation, but a number of non-violent offenses are not.[27] Instead of a judge having the discretion to impose a sentence tailored to the facts of each case, their hands are often tied by being forced to impose mandatory minimum sentences. With the current patchwork system,

22. Penal Code § 4019 caps credit-earning in jails at 50% and jail administrators have no ability to offer higher rates of good conduct credit.
23. Penal Code § 4155.5(a) allows such transfers for people convicted of misdemeanor and felony offenses sentenced under Penal Code § 1170(h) but does not allow it for people sentenced to state prison.
24. Penal Code § 3075(a) creates a "board of parole commissioners" in each county that is empowered to release people early from jail and supervise them for up to three years. Penal Code § 3081(b). It appears that very few counties currently have robust county parole systems.
25. Committee on Revision of the Penal Code, Meeting on April 23, 2020, <https://www.youtube.com/watch?v=aIvwcUX_J14>, 42:27–44:39.
26. See, e.g., People v. Denner, 2019 WL 5927604, *6 (3d District 2019) ("A conviction of second degree murder without more does not render defendant ineligible for probation.").
27. See, e.g., Penal Code § 1203.07(a)(1) (forbidding probation sentence for possession for sale offense for heroin in excess of 14.25 grams).

around 20% of all probation sentences are for violent offenses[28] while about 23% of the current prison population is incarcerated on a non-violent offense.[29]

Staff Proposal

The Committee should consider the following recommendation:

- Eliminate mandatory minimums for all non-violent offenses and give judges greater discretion to set sentences by repealing the prohibitions or strong presumptions against probation for non-violent offenses.

Expanding judges' discretion in this fashion would likely result in an increased use of alternatives to incarceration through probation and reduced incarceration in county jail and state prisons.

4. Establish a new crime of "aggravated shoplifting."

Current Law

Shoplifting is ordinarily a mandatory misdemeanor with a maximum sentence of six months in county jail.[30] However, if there is any altercation with store personnel (including a verbal one) the offense becomes robbery under *People* v. *Estes*.[31] Robbery carries a sentence of 2 to 5 years in state prison,[32] is classified as a violent felony, and is a strike offense,[33] which affects credit-earning and future punishment.

Summary Staff Proposal

Establish a new offense of "aggravated shoplifting" that would apply in some situations where robbery is currently charged. This new offense would enhance ordinary shoplifting from a misdemeanor to a possible felony if there was an altercation with store personnel. It would not apply to any situation that involved use of a weapon or serious injury. Those offenses would remain chargeable as traditional robberies. The offense would be a non-violent/non-serious "wobbler," which would allow a prosecutor the discretion to charge it as a misdemeanor or felony.

28. California Department of Justice, *Crime in California 2019*, July 2020, Table 40.
29. This information comes from a roster of the CDCR population as of June 2020.
30. Penal Code § 459.5(a) (shoplifting under $950).
31. 147 Cal. App. 3d 24 (1983).
32. Penal Code § 213(a)(2).
33. Penal Code § 667.5(c)(9).

Background

At both the Committee's September and October 2020 meetings, multiple panelists noted that so-called "*Estes* robberies" — shoplifting that involves a minor altercation with a security guard — may be treated too harshly in California's system. Under the *Estes* case, these situations can and often are charged as robberies, which are violent felonies and strike offenses that dramatically increase later punishment.

This harsh treatment results from the Penal Code's very broad approach to robbery, which uses a core definition that has not been changed since 1872[34] and does little to differentiate between offenses of different seriousness levels.[35] Staff examined the law of fifteen other states and found that, unlike California, fourteen of them had a system of robbery statutes that created increasingly-serious degrees of robbery based on how the offense was committed.[36]

Staff Proposal

The Committee should consider the following recommendations:

- Creation of a new offense — aggravated shoplifting — that would cover many *Estes* robberies. This new offense would apply to any shoplifting where there is an altercation with a store employee but where no weapon or serious injury was involved.
- The offense could be designated a wobbler — meaning prosecutors have the discretion to charge it as a misdemeanor or felony and, if the offense was charged as a felony, judges could reduce it to a misdemeanor in appropriate cases.

Up to 7,000 cases may be affected by this new offense annually, according to rough calculations based on the number of unarmed commercial robberies each

34. Penal Code § 211.

35. California law does provide a first-degree robbery offense, but that classification turns on *where* a robbery occurs, not *how* it occurs. See Penal Code § 212.5(a)–(b) (robbery is of the first degree if victim is operating or riding public transportation, if robbery occurs in an inhabited dwelling, or if victim recently accessed ATM). See also Penal Code § 215 (offense of car-jacking, which is robbery of a car from the owner's or a passenger's immediate presence).

36. The states are Alabama, Alaska, Arizona, Colorado, Florida, Illinois, Massachusetts, New York, Oregon, Texas, Utah, Vermont, Washington, and West Virginia. See Ala. Code §§ 13-8-41–13.8.43; Alaska Stat. §§ 11.41.500–11.41.510; Ariz. Rev. Stat. §§ 13-1902–13-1904; Colo. Rev. Stat. §§ 18-4-301–18-4-303; Fla. Stat. Ann. §§ 812.13, 812.131; 720 Ill. Stat. Ann. §§ 5/18-1–5/18-6; Mass. Stat. Ann. Ch. 265 §§ 17-21; N.Y. Penal Law §§ 160.00–160.15; Or. Rev. Stat. §§ 164.395, 164.405, 164.415; Tex. Penal Code Ann. § 29; Utah Code Ann. §§ 76-6-301–76-6-302; Vt. Stat. Ann. § 608; Wash. Stat. Ann. § 9A.56.190; W. Va. Code § 61-2-12. Only Nevada had a single degree of robbery. See Nev. Rev. Ann. § 200.380.

year.[37] Creation of this offense would also bring California in line with many other states that distinguish between the seriousness of these types of situations.

5. Focus sentencing enhancements on the most dangerous offenses and circumstances.

Current Law

Penal Code section 1385 permits trial judges to dismiss most enhancements when sentencing a defendant if dismissal is "in furtherance of justice."[38] There is no further statutory guidance or definition of this standard, and the California Supreme Court has called it an "amorphous concept."[39]

Summary Staff Proposal

Establish guidelines and presumptions that give judges greater guidance in exercising their discretion under Penal Code section 1385 to impose sentence enhancements in the most dangerous cases and dismiss sentencing enhancements when mitigating circumstances exist.

Background

Judges currently have the discretion to dismiss almost all sentencing enhancements when fashioning a sentence, including those required by the Three Strikes law, the Street Terrorism Enforcement and Protection Act (gang enhancements), and the other most-commonly used sentencing enhancements. Sentencing enhancements are major drivers of long sentences and 80% of all people in prison have at least one enhancement.[40]

But this discretion may be underused because the Penal Code does not currently provide guidance on how courts should exercise this discretion. The current standard is simply that judges should use this power "in furtherance of

37. This estimate was calculated by taking the number of commercial robberies in 2019 (14,093) and applying the proportion of all robberies that are unarmed (about 55%) and rounding down significantly. California Department of Justice, *Crime in California 2019*, July 2020, Table 6.

38. Penal Code § 1385(a).

39. People v. Superior Court (Romero), 13 Cal. 4th 497, 530 (1996).

40. Ryken Grattet, *Sentence Enhancements: Next Target of Corrections Reform?*, PPIC Blog, September 27, 2017 <https://www.ppic.org/blog/sentence-enhancements-next-target-corrections-reform/> ("As of September 2016, 79.9% of prisoners in institutions operated by the California Department of Corrections and Rehabilitation (CDCR) had some kind of sentence enhancement; 25.5% had three or more.").

justice."[41] And the California Supreme Court has also provided limited direction, noting that the statute embodies an "amorphous concept."[42]

Staff Proposal

The Committee should consider the following recommendation:

- Establish guidelines and presumptions (but not requirements) in Penal Code section 1385 that enhancements should be dismissed in certain mitigating circumstances. For example, if a prior conviction was more than five years old, if the prior was obtained when the defendant was a juvenile, if the offense was the result of a mental health issue, or if there is an apparent disparate racial impact.[43]

Encouraging courts to use Penal Code section 1385 would provide appropriate reinforcement to courts' long-existing discretion in this area. In the appropriate case, it would result in reductions in unnecessary incarceration and a corrective to widely-acknowledged disparities in the criminal legal system and would ensure that sentencing enhancements are focused on the most dangerous offenses.

6. Refine gang enhancements to target violent criminal enterprises and reduce prejudicial evidence before juries.

Current Law

Gang enhancements can increase sentences in the range of two years to life, based on the seriousness of the underlying offense.[44] 92% of people currently serving a prison sentence for a gang enhancement are Black or Latinx.[45] Gang enhancements can be applied to nonviolent crimes and misdemeanors.

41. Penal Code § 1385(a).

42. People v. Superior Court (Romero), 13 Cal. 4th 497, 530 (1996). California rules of court provide some additional guidance: "the court may consider the effect that striking the enhancement would have on the status of the crime as a strike, the accurate reflection of the defendant's criminal conduct on his or her record, the effect it may have on the award of custody credits, and any other relevant consideration." Cal. Rules of Court, Rule 4.428(b). The California Supreme Court has also explained that "courts will exercise this power in a careful and thoughtful manner. The wise use of this power will promote the administration of justice by ensuring that persons are sentenced based on the particular facts of the offense and all the circumstances. It enables the punishment to fit the crime as well as the perpetrator." People v. Williams, 30 Cal. 3d 470, 489 (1981).

43. Enhancement-specific presumptions could also be created. For example, a gun enhancement could be presumptively struck if the firearm was not loaded or was inoperable.

44. Penal Code § 186.22(b)(1)–(5).

45. Abené Clayton, *92% Black or Latino: the California Laws that Keep Minorities in Prison*, The Guardian, November 26, 2019.

In addition, expert testimony, typically from police officers, can satisfy most elements required to prove a gang enhancement without direct evidence of gang involvement or intent.

Summary Staff Proposal

Modify the gang enhancement to focus on violent and organized groups. Revise the definitions and trial procedures to ensure defendants charged with gang enhancements receive fair trials based on reliable evidence.

Background

At the Committee's September 2020 meeting, panelists identified several problems with how gang enhancements have been implemented. Perhaps most concerning was that 92% of people serving a prison sentence for a gang enhancement were Black or Latinx.[46] While some have suggested that this percentage is an accurate reflection of gang demographics, survey data indicates that the demographics of gang membership are instead representative of the demographics of the communities in which they are found.[47] A related study found that self-identification of gang membership was near equal among White, Black, and Latinx youth.[48]

While the gang enhancement was designed to focus on "violent street gangs" and on "patterns of criminal gang activity and upon the *organized nature* of street gangs,"[49] the statutory definitions that must be satisfied to prove the enhancement are not tailored to achieve this focus. For instance, in order to prove that a group is a "criminal street gang," the prosecution must show that the group has one of approximately 30 enumerated offenses as one of its "primary activities."[50] These offenses, the commission of which can be established by expert witness testimony,[51] include a number of non-violent property crimes.[52] And while it must be shown that a group engages in a "pattern of criminal activity" to meet the definition of a criminal street gang, the frequency of offenses committed by the group's members, not proof of organization of activitywhether they are directed ,

46. *Id.*
47. James C. Howell, *Gang Prevention: An Overview of Research and Programs*, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin, 3 (Dec. 2010).
48. *Id.*
49. Penal Code § 186.21 (emphasis added).
50. Penal Code § 186.22(f).
51. See People v. Gardeley, 14 Cal. 4th, 605, 620 (1996); People v. Sengpadychith, 26 Cal. 4th 316, 324 (2001).
52. For list of predicate offenses, see Penal Code § 186.22(e)(1)–(30).

satisfies this element.[53] Indeed, while the criminal activity must have been committed by a defendant's specific gang subset, there is no requirement that the defendant actually even know the person who committed the crime.[54] Even the crime in the charged case can also be considered as evidence of a group's primary activities and as evidence of a pattern of criminal activity.[55]

The use of police officers as expert witnesses in gang enhancement prosecutions has also been problematic. Their testimony is used to satisfy many, if not all, of the elements in a gang prosecution. Officers are allowed to cast their opinions broadly and to testify about the existence of a gang,[56] what its primary activities are,[57] whether it engages in a pattern of criminal activity,[58] and whether a particular person or group of persons are members.[59] They are even permitted to opine on whether a particular crime was committed for the benefit of, at the direction of, or in association with a criminal street gang.[60]

The use of gang enhancements can also result in unfair trials. Evidence of gang participation can be extremely prejudicial for a defendant in cases where there is a reasonable doubt as to guilt.[61]

Staff Proposal

Revising the gang enhancement presents special challenges. Because the law was amended by Proposition 21 in 2000, some aspects of the law can only be changed by another voter initiative or a two-thirds vote in the Legislature. With that in mind, the Committee should consider the following recommendations:

53. See *In re* Nathaniel C., 228 Cal. App. 3d 990, 1002–03 (1991) (two instances of same offense, or same incident with multiple participants committing one or more specified offenses are sufficient).
54. People v. Prunty, 62 Cal. 4th 59, 67–68 (2015).
55. People v. Sengpadychith, 26 Cal. 4th 316, 324 (2001); People v. Duran, 97 Cal.App.4th 1448, 1464-1465 (2002).
56. See People v. Gardeley, 14 Cal.4th 605, 620 (1996) (existence of group of three or more who identify with common name, symbol, or sign). An officer can even opine that a group *is* a criminal street gang under § 186.22, subdivision (e). People v. Hill, 191 Cal. App. 4th 1104, 1112 (2011).
57. People v. Sengpadychith, 26 Cal. 4th 316, 324 (2001).
58. People v. Albillar, 51 Cal. 4th 47, 53 (2010).
59. See, e.g., People v. Castenada, 23 Cal. 4th 743, 745–746 (2000).
60. People v. Vang, 52 Cal. 4th 1038, 1041 (2011).
61. Eisen, et al., *Examining the Prejudicial Effects of Gang Evidence*, 13 J. Forensic Psychol. Pract. 1 (2013); Eisen, et al., *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?*, 62 UCLA L. Rev. Disc. 2 (2014).

- Revise how gangs are defined.
    - Add language requiring a violent and organized group.
    - Remove non-violent property crimes from the list of predicate felonies.
    - Require the defendant to know the person responsible for the predicate offenses.
    - Disallow the present offense as proof of a "pattern of criminal activity."
- Strengthen evidentiary procedures.
    - Require direct or circumstantial evidence to prove elements, rather than expert testimony.
    - Require that evidence relating to a gang enhancement allegation be presented at a bifurcated hearing to address its prejudicial impact.
    - Add presumptions to Penal Code section 1385, including a presumption that the gang enhancement be dismissed if the underlying offense is not violent.

7. Apply recently repealed sentencing enhancements to everyone.

Current Law

The legislature recently repealed two sentencing enhancements — a one-year enhancement for a prior prison or jail sentence and a three-year enhancement for a prior drug conviction — in some cases. But the repeal only applied to future cases and did not apply to most people already in jail or prison.

Summary Staff Proposal

Apply the repeal to all cases by allowing jails and CDCR to administratively remove repealed sentencing enhancements from the terms of incarcerated people.

Background

In the last few years, the Legislature has recognized that some sentencing enhancements based on old convictions do not advance public safety and lead to unnecessary incarceration. In particular, the enhancements that added a year of incarceration for each prior prison or jail term[62] or added three years to a sentence for some prior drug convictions have been largely repealed.[63] But the repeal of

62. SB 136 (Weiner) (2019). The enhancement now only applies to a prior conviction for a "sexually violent offense as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code." Penal Code § 667.5(b).

63. SB 180 (Mitchell) (2017). The only prior drug convictions that still trigger this enhancement are those involving minors. See Health & Safety Code § 11370.2.

those enhancements was limited only to new cases — people who were already serving time on them generally could not benefit.[64]

In 2019, CDCR estimated that around 10,000 people had the one-year prior prison or jail term enhancement.[65] A significant number of people serving sentences in jail are also likely to have this enhancement. The three-year enhancement related to prior drug convictions is less common,[66] but drug-related sentences have been reported by the California State Sheriffs Association as a common reason for people serving long sentences in jail.[67]

Staff Proposal

The Committee should consider the following recommendations:

- Eliminate the repealed sentencing enhancements for everyone regardless of when they were convicted.
- Establish a mechanism to remove the sentence enhancements administratively without requiring the additional expense of a trip to court.

8. Equalize custody credits for good behavior in jail, prison, and state hospitals.

Current Law

People in prison and jail are eligible for different amounts of custody credits off of their sentences, even if convicted of the same crimes with the same criminal histories.

Summary Staff Proposal

Equalize credits for good behavior between jail and prison.

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64. See generally Penal Code § 3; People v. McKenzie, 9 Cal. 5th 40 (2020); *In re* Estrada, 63 Cal. 2d 740, 744 (1965). See, e.g., People v. Chamizo, 32 Cal. App. 5th 696, 700–01 (2019) (three-year prior drug conviction enhancement).

65. Sen. Rules Committee, Analysis of Sen. Bill No. 136 (2019–2020 Reg. Sess.) Sept. 13, 2019, p. 3. Other estimates are higher. See Editorial Board, *SB1392 and SB1393 Are Needed Fixes to California's Overuse of Sentence Enhancements*, Orange County Register, April 24, 2018 ("According to the California Department of Corrections and Rehabilitation, the one- and five-year enhancements, respectively, impacted 16,177 and 19,677 sentences as of Dec. 1, 2017.").

66. Ryken Grattet, *Sentence Enhancements: Next Target of Corrections Reform?*, PPIC Blog, September 27, 2017 <https://www.ppic.org/blog/sentence-enhancements-next-target-corrections-reform/> ("The repeal would affect just 2.3% of the people who entered prison between October 2015 and September 2016.").

67. Letter of Cory Salzillo & Cathy Coyne, Re: Updated Survey of Long Term Offenders in Jail, October 17, 2016 ("Most common crimes for those sentenced to 5–10 years = vehicle theft, drug trafficking, receiving stolen property, identity theft, commercial burglary. ¶ Largest number of crimes for over 10 years = drug trafficking. However, over 10 years is not exclusively drug trafficking.").

Background

Current law provides for "good conduct credits," which allow people to reduce the length of their incarceration if they follow the rules in jail or prison. Current law also creates "earned credit" opportunities, where completion of specific programming, such as obtaining a GED, results in an additional reduction in incarceration. Both of these types of credit differ based on whether the person is confined in jail or prison.

For example, people with non-violent convictions but with a prior strike conviction get 50% off their sentence in jail but only 33% off in prison.[68] And people with non-violent convictions and the lowest custody level in prison get 66% off their sentence, but no more than 50% off in jail.[69] People who are found incompetent to stand trial get no good conduct credit for time spent incarcerated in a state hospital, which means people with severe mental health issues may spend more time locked up than people without those issues.[70] And jail "milestone" credits — time off for completing certain programming, like obtaining a GED or other educational achievements — is limited to six weeks a year, while CDCR currently allows twelve weeks annually.[71]

Staff Proposal

The Committee should consider the following recommendation:

- Require that all credits be applied equally, no matter where someone is incarcerated.
- Provide jails the power to award more generous credit so that they have more flexibility in managing their population. (CDCR already has this flexibility under Proposition 57, but jails are limited to the credit-earning specified in the Penal Code.)
- Award people who are confined to state hospitals because they are incompetent to stand trial the same credits they would receive as if they were confined in a county jail.

Equal application of custody credits in jail and prison would give incarcerated people further incentive for positive behavior, which may reduce violence and other disruptive behavior in these settings. It would also likely reduce unnecessary

68. Compare Penal Code § 4019 with 15 CCR § 3043.2(b)(3).
69. Compare Penal Code § 4019 with 15 CCR § 3043.2(b)(5)(A).
70. 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).
71. Compare Penal Code § 4019.4(a)(2) with 15 CCR § 3043.3–3043.6.

incarceration because almost every person who is locked up is eligible to earn good conduct credit.

CONCLUSION

The topics and staff proposals in this memo run the gamut from the least serious offenses in California's criminal system to enhancements that lead to some of the longest sentences people serve in prison. Many of them also begin to address some of the racial disparities and unfair treatment of people with mental health issues that are recurring problems within California's legal system. They all share the goal of increasing public safety while reducing incarceration and improving equitable outcomes..

Respectfully submitted,

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