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January 8, 2021

Memorandum 2021-02

Draft Minutes of December Meeting

The Committee on Revision of the Penal Code held a meeting on December 10–11, 2020. This memorandum provides draft Minutes for that meeting.

The draft will be deemed final after it is approved by a vote of the Committee. When voting, the Committee may make specific changes to the Minutes. If so, those changes will be memorialized in the Minutes for the meeting at which the vote occurred.

Respectfully submitted,

Rick Owen
Staff Attorney

DRAFT MINUTES OF MEETING
COMMITTEE ON REVISION OF THE PENAL CODE
DECEMBER 10–11, 2020

1 A meeting of the Committee on Revision of the Penal Code was held on
2 December 10–11, 2020. Consistent with Executive Orders N-25-20 and N-29-20, the
3 meeting was held as an online video webinar.

4 **Commission:**

5 *Present:* Michael Romano, Chairperson
6 Assembly Member Sydney Kamlager
7 Senator Nancy Skinner
8 Hon. Peter Espinoza, Ret.
9 Hon. Carlos Moreno, Ret.
10 L. Song Richardson

11 *Absent:* Hon. John Burton
12

13 **Staff:**

14 *Present:* Brian Hebert, Executive Director
15 Barbara Gaal, Chief Deputy Director
16 Thomas Nosewicz, Legal Director
17 Rick Owen, Staff Counsel
18 Lara Hoffman, Stanford Fellow

19 **Invited Presenter:**

20 Hon. Thelton E. Henderson

21 **Other Persons:**

22 Up to 90 members of the public observed the meeting as attendees. The
23 Committee did not prepare a list of those attendees.

CONTENTS

Approval of Actions Taken	1
New Business	2
Ongoing Business	2

24 APPROVAL OF ACTIONS TAKEN

25 Unless otherwise indicated, the Committee decisions noted in these Minutes
26 were approved by all members present at the meeting. If a member who was

1 present at the meeting voted against a particular decision, abstained from voting,
2 or was not present when the decision was made, that fact will be noted below.

3 NEW BUSINESS

4 The Honorable Thelton E. Henderson addressed the Committee. The
5 Committee is grateful for his participation. The Committee received public
6 comment.

7 ONGOING BUSINESS

8 The Committee considered Memorandum 2020-16, which provided updates on
9 possible Committee recommendations. The Committee made the decisions
10 reported below:

11 **1. Reduce Punishment for Common Traffic Misdemeanors**

12 After a presentation by the Chairperson on a proposal to reduce the
13 punishment for two common traffic misdemeanors, the Committee voted to
14 recommend that the offenses of (a) driving without a license and (b) driving with
15 a license suspended for failure to pay a fine or appear in court be reduced from
16 misdemeanors to infractions. The Committee also voted to recommend
17 significantly reducing fines and fees as well as DMV “points” for these infractions.

18 **2. Require that Short Prison Sentences are Served in Jail**

19 After a presentation by the Chairperson on a proposal to reduce the number of
20 short-term stays in California prisons, the Committee voted to require counties to
21 maintain custody of people whose expected length of time incarcerated is less than
22 one year.

23 The Committee also voted to recommend that current state practices relating
24 to reimbursement be followed if the jail population increases as a result of
25 implementing this reform. It further voted to recommend revising policies and
26 practices so that the time served by people in county jail does not exceed five years,
27 and adding tools to manage the jail population by increasing the county parole
28 release process and specifying a “warm handoff” upon release from jails to state
29 parole and county probation. The Committee recommended that the suggestion
30 to permit inmate transfers between counties be included in the “analysis” section
31 of the annual report.

1 **3. Expand Probation Eligibility for Nonviolent Crimes**

2 After a presentation by the Chairperson on a proposal to remove mandatory
3 sentences for all non-violent offenses, the Committee voted to permit judges to set
4 appropriate sentences including probation for all non-violent offenses.

5 **4. Create “First Degree Petty Theft”**

6 After a presentation by the Chairperson on a proposal to treat minor thefts less
7 harshly than traditional robbery, the Committee voted to recommend creating a
8 new misdemeanor offense called “first degree petty theft” with a maximum
9 sentence length of one year in custody. The Committee further voted to
10 recommend excluding from this new offense any theft with use of a deadly
11 weapon or that resulted in serious bodily injury. Finally, the Committee voted to
12 recommend that this change in the theft and robbery laws be given retroactive
13 application.

14 **5. Focus Sentence Enhancements on the Most Dangerous Crimes**

15 After a presentation by the Chairperson on a proposal to focus enhancements
16 on the most serious offenders and crimes, the Committee voted to recommend
17 adding presumptions to Penal Code Section 1385, directing judges to dismiss
18 enhancements in the following circumstances: (1) when the current offense is
19 nonviolent; (2) when the enhancement is based on a prior conviction that is over
20 five years old; (3) when the current offense is connected to mental health issues;
21 (4) when the current offense or prior conviction was committed as a juvenile; (5)
22 when multiple enhancements are alleged or the total sentence is twenty or more
23 years; (6) when the gun was not loaded or operable; (7) when there is a showing
24 of a disparate racial impact; (8) when the current offense is connected to current or
25 prior victimization; (9) when the offense is connected to childhood trauma; or (10)
26 in other compelling circumstances. The Committee voted to further recommend a
27 showing by “clear and convincing evidence that the dismissal of the enhancement
28 would endanger public safety” to overcome the presumption.

29 **6. Limit Gang Enhancements to the Most Dangerous Offenses**

30 After a presentation by the Chairperson on a proposal to modify the gang
31 enhancement to focus on violent and organized groups and to ensure defendants
32 charged with gang enhancements receive fair trials based on reliable evidence, the
33 Committee voted to recommend bifurcating evidence of gang involvement from
34 the guilt phase of jury trials. The Committee also voted to focus the definition of

1 “criminal street gang” to target organized, violent enterprises by removing non-
2 violent property crimes from the list of predicate felonies, requiring a defendant
3 to know the person responsible for the predicate offenses, and prohibiting the use
4 of the current offense as proof of a “pattern of criminal activity.” The Committee
5 also voted to limit expert witness testimony by requiring direct evidence of current
6 and active gang involvement.

7 **7. Apply Repealed Sentence Enhancements to Everyone**

8 After a presentation by the Chairperson on a proposal to apply recently
9 repealed sentence enhancements retroactively, the Committee voted to
10 recommend retroactively applying SB 136 (1 year enhancement) and SB 180 (3 year
11 enhancement). The Committee also voted to recommend automatic removal of
12 these enhancements without requiring court action for a new sentence. The
13 Committee voted to recommend that no limits be placed on how many
14 enhancements can be removed per person, and that renegotiation of plea bargains
15 be prohibited.

16 **8. Equalize Credits for Good Behavior in Jail and Prison**

17 After a presentation by the Chairperson on a proposal to equalize credits for
18 good behavior in jail and prison, the Committee voted to recommend equalizing
19 earned credits in jails, prisons and state hospitals. The Committee voted to
20 recommend requirements that people in jail receive no fewer “good conduct”
21 credits than similarly situated people in prison, that people in prison be eligible
22 for the same maximum credits as similarly situated people in jail, and that people
23 subject to pre-trial confinement in state hospitals earn “good conduct” credits. The
24 Committee also voted to recommend that Proposition 57 “good conduct” credits
25 be applied retroactively and used in setting youth offender and elderly parole
26 dates.

27 **9. Harmonize and Clarify Parole Release Standards**

28 After a presentation by the Chairperson on a proposal to harmonize and clarify
29 parole release standards, the Committee voted to recommend revising the parole
30 release standard to require release unless the person presents an “imminent risk
31 of committing a future serious or violent crime.” The Committee voted to
32 recommend adding presumptions establishing that the parole candidate does not
33 present an imminent risk of committing a future serious or violent crime when, (1)
34 the committing offense is nonviolent, (2) the candidate is designated as “low risk”

1 by a CDCR or BPH administered risk assessment, (3) the offense has a connection
2 to mental illness, (4) the candidate has no violent in-prison rule violations within
3 the past three years, (5) the candidate has average or above performance in
4 programming in the past three years, or (6) the candidate’s criminal involvement
5 was the result of retaliation against an abuser or was a result of prior victimization,
6 abuse or trauma.

7 The Committee also voted to make the following recommendations:

- 8 • A parole candidate’s failure to qualify for one of the above
9 presumptions does not automatically result in a denial of parole
10 and the categories shall not be construed as a checklist of
11 prerequisites.
- 12 • A parole candidate’s failure to complete a recommended
13 program that is unavailable to them cannot be a basis for denial
14 of parole.
- 15 • BPH should recommend housing with appropriate
16 programming in CDCR when parole is denied.
- 17 • BPH should consider whether the risk posed by the parole
18 candidate can be mitigated outside of prison by placement in a
19 halfway house, requiring mental health or substance abuse
20 treatment, and/or utilizing electronic monitoring. The
21 Committee specified that reliance on these additional release
22 requirements is not intended to become BPH’s default practice.
- 23 • Increasing the standard for judicial review of parole denials to an
24 “abuse of discretion” standard and specifying court remedies to
25 include remanding for a new parole hearing at the earliest
26 possible date, granting parole, or ordering any other remedy that
27 the court finds appropriate.

28 **10. Increase “Second Look” Sentencing**

29 After a presentation by the Chairperson on a proposal to increase the use of
30 “second look” sentencing, the Committee voted to recommend revising Penal
31 Code Section 1170(d)(1) procedures in the following ways:

- 32 • When law enforcement requests resentencing based on meritorious
33 conduct, require notice to the incarcerated person, an initial conference
34 within 60 days, written reasons for court decisions, and appointment of
35 counsel. The Committee voted to recommend creating a presumption
36 favoring resentencing in these circumstances.

