

July 9, 2021

Memorandum 2021-13

**Extreme Sentences & High-Profile Enhancements:
Updates on Staff Research**

At its May 2021 meeting, the Committee heard from panelists about and discussed extreme sentences and high-profile enhancements. This memorandum presents updates and proposals for further discussion, analysis, and possible recommendations.

BOARD OF PAROLE HEARINGS REVIEW OF LIFE WITHOUT PAROLE SENTENCES

The Committee directed staff to research the Board of Parole Hearings' (BPH) authority to review life without parole (LWOP) sentences. As discussed at the Committee hearing, BPH regulations previously mandated a review for all LWOP prisoners for recommendations regarding reprieves, pardons, and commutations.¹ This review was to occur twelve years into a person's sentence and every three years thereafter.² The regulation creating this process was eliminated in 1994.³ Though BPH has the ability to refer people to the Governor for executive clemency,⁴ there appear to be no other laws or regulations that require BPH to do so for people serving life without parole sentences.

LIFE WITHOUT PAROLE PRACTICES IN OTHER STATES

The Committee directed staff to further research whether other states use LWOP and if so, whether those states have procedures that allow for review of those sentences. After reviewing data from other states, staff have found that with the exception of Alaska, all states allow for LWOP sentences. While some

¹ See *Ross v. Schwarzenegger*, 2008 WL 4937599, *2 (E.D. Cal. 2008) (describing 15 CCR § 2817).

² *Id.*

³ See Memorandum from Board of Prison Terms, Subject: LWOP Reviews, March 15, 1994.

⁴ Penal Code § 4801(a).

states have very few people serving LWOP — for example, as of 2016 New Mexico only had one person serving this sentence — according to the Sentencing Project, “virtual life sentences” are the equivalent of LWOP and are much more common.⁵ Alaska has 400 people serving such “virtual life sentences” and New Mexico has more than 600 people. California has more than 5,000 people serving LWOP sentences and, according to the Sentencing Project, almost a thousand more serving virtual life sentences.

Staff are continuing to research whether states have provisions for parole review of LWOP sentences like California once did. As of this writing, staff has found one example: Michigan has a review process for LWOP cases requiring that a person sentenced to LWOP be interviewed by the parole board after serving 10 years.⁶ This interview is not a parole hearing and persons sentenced to LWOP still must be granted reprieve, commutation or pardon in order to be released.⁷ The Board is not required to take any action after the initial interview but must review the person’s file every five years to determine if another interview should be granted.⁸

GUN ENHANCEMENTS

The Committee directed staff to research how other states address gun enhancements. States take a wide variety of approaches in punishing the use or possession of a firearm during the commission of a felony. The length of the enhanced sentences appears to vary widely between states and depending on the circumstances of the offense. For example, New York allows judges to add a 5-year consecutive sentence to some violent offenses, and for other specified offenses, allows addition of a substantive offense with a sentence of 3.5 to 15

⁵ The Sentencing Project, *Still Life: America’s Increasing Use of Life and Long-Term Sentences*, 9, Table 2 (2017) (a “virtual life sentence” as one which requires a person to serve at least 50 years before becoming eligible for parole.)

⁶ Mich. Dept of Corr. Policy Directive 06.05.104(M).

⁷ *Id.*

⁸ *Id.*

years.⁹ Illinois penalties seem to be harsher, mandating an additional 15-year minimum sentence for possession, 20-year minimum for discharge, and 25-year minimum for causing great bodily injury.¹⁰ Initial research shows that Florida is the only other state that has gun enhancements that can result in a life sentence.¹¹

The Committee also directed staff to review empirical research on the impact of gun enhancements on public safety. The most comprehensive report on this issue is a 2014 National Academy of Sciences literature review of empirical research on whether harsher penalties result in a reduction in crime, including the impact of gun enhancements.¹² While the study found some empirical support for the idea that incapacitation of offenders leads to a marginal reduction in crime,¹³ they were unable to estimate the magnitude of the reduction because of the divergent research findings.¹⁴ The study also reviewed research on the deterrent impact of harsher penalties for gun crimes that yielded mixed results but failed to uncover clear evidence of a deterrent effect:¹⁵

- A 2003 study of the deterrent effect of increased penalties for gun crimes in Richmond, Virginia concluded that the threat of enhanced sentences had no apparent deterrent effect.¹⁶
- A 2011 study on the impact of gun enhancements in 30 states found that in the first three years after gun enhancements were enacted, gun robberies declined by approximately five percent on average.¹⁷ In the same study, the enhancements did not appear to make a significant impact on assault crimes in those 30 states.¹⁸

⁹ NY Penal Law §§ 265.08, 265.09.

¹⁰ IL ST CH 720 § 5/33A-3.

¹¹ FL ST § 775.087. Committee staff reviewed relevant statutes in Florida, Illinois, Kansas, Massachusetts, Michigan, Minnesota, New Jersey, New York, Utah, and Washington.

¹² National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, The National Academies Press, 130-156 (2014).

¹³ *Id.* at 140-150.

¹⁴ *Id.* at 140-141.

¹⁵ *Id.* at 134.

¹⁶ Raphael, et al., *Prison Sentence Enhancements: The Case of Project Exile*, Washington, D.C.: Brookings Institution Press (2003).

¹⁷ Abrams, *Estimating the Deterrent Effect of Incarceration Using Sentencing Enhancements*, Faculty Scholarship at Penn Law 361 (2012).

¹⁸ *Id.* at 8.

Other research also shows that gun enhancements do not have a clear value in reducing crime.¹⁹

POTENTIAL REFORMS TO THE THREE STRIKES LAW

The Committee directed staff to compile potential reforms to the Three Strikes law. The Three Strikes law, which is the result of two voter initiatives, Proposition 184 in 1994 and Proposition 36 in 2012, classifies certain offenses as serious or violent felonies.²⁰ The law requires that a person who has been convicted of a serious or violent felony and is later convicted of a new felony offense — even if not violent or serious — must go to prison²¹ and have their sentence doubled.²² Additionally, anyone who is convicted of a new serious or violent felony and has two prior convictions for a serious or violent offense will go to prison for life.²³

Reforms to the Three Strikes law could include:

- *Washout periods*: Currently, the length of time between a prior serious or violent felony conviction and a new offense does not affect the applicability of the Three Strikes law.²⁴ The Committee could recommend incorporating a cut-off date, or “washout” provision, of five years, after which criminal history would no longer count for purposes of increasing the length of sentences for new convictions.
- *Elimination of juvenile strikes*: Currently, offenses committed when a person was a minor can be counted as prior strike convictions in certain circumstances.²⁵ The Committee could recommend disallowing use of juvenile strikes in all circumstances.

¹⁹ Daniel S. Nagin, *Deterrence in the Twenty-First Century*, Crime and Justice, Vol. 42, No. 1 (2013) 226 (describing a series of studies in the 1980s showing that enhancements for using a gun while committing another offense did not uncover evidence of a deterrent effect. The same research also indicated that the enhancements were not consistently applied.); Alex R. Piquero, *Reliable Information and Rational Policy Decisions: Does Gun Research Fit the Bill?*, Criminology & Public Policy, Vol. 4, No. 4 (2005) 785–94 (discussing Florida’s 10-20-life gun law).

²⁰ See Penal Code §§ 667.5(c) and 1192.7(c) for list of serious and violent felonies.

²¹ Penal Code § 1170(h)(3).

²² Penal Code § 667(e)(1). The doubling of the sentence applies only to the imprisonment imposed for substantive offenses, not any sentencing enhancements.

²³ Penal Code § 667(e)(2).

²⁴ Penal Code § 667(c)(3).

²⁵ Penal Code § 667(d)(3). Among other things, the person must have been 16 years old or older at the time of the offense and adjudged a ward of the juvenile court.

- *Eliminate “double-counting” of prior strikes:* Under current law, the punishments allowed by the Three Strikes laws are imposed “in addition to any other enhancements or punishment provisions which may apply.”²⁶ Thus, prior strike offenses can impact the length of a sentence in multiple ways in any one case: they can double the length of terms,²⁷ add 5-year (nickel-prior) enhancements,²⁸ and lead to an indeterminate life sentence.²⁹ Current law also allows a person to accumulate multiple strike offenses in a single case.³⁰ The Committee could recommend reforms that prohibit these types of double-counting.
- *Reduce the amount of time added to a sentence by the law:* As discussed above, a person who has been convicted of a strike offense and is later convicted of any new felony will have their sentence doubled.³¹ The Committee could recommend that the law be amended to reduce the amount of time a prior strike conviction adds to a sentence.
- *Complete repeal:* The Committee could recommend that the Three Strikes law be repealed completely.

While there have been some recent attempts to reform the Three Strikes law,³² because the law was created by voter initiative, the reforms listed above would all require a two-thirds vote in the Legislature or voter initiative to become law.³³

²⁶ Penal Code §§ 667, 1170.12(c).

²⁷ Penal Code § 667(e)(1).

²⁸ Penal Code § 667(a)(1). See also *People v. Nelson*, 42 Cal.App.4th 131 (1996).

²⁹ Penal Code §§ 667(e)(2), 170.12(c)(2).

³⁰ *People v. Fuhrman*, 16 Cal.4th 930, 936 (1997).

³¹ Penal Code § 667(e)(1).

³² One example is Assembly Bill 1127 (Santiago), which would prohibit prior juvenile adjudications from being counted as strikes. This bill was ordered to the inactive file on June 1, 2021.

³³ Prop. 184, as approved by voters, General Elec. (November 8, 1994); Prop. 36 as approved by voters, General Elec. (November 6, 2012).

OTHER LAWS THAT USE PRIOR CONVICTIONS TO INCREASE SENTENCES

The Committee directed staff to survey the Penal Code for additional statutes that increase a sentence because of prior convictions. The Penal Code contains several relevant provisions:³⁴

Penal Code Section	Description	Term
667(a)	Prior conviction for serious felony with current conviction for serious felony (nickel-prior).	5 years.
667.5(a)	Prior violent-felony prison term with current violent-felony conviction.	3 years.
236.4(c)	Prior conviction for human trafficking.	5 years for each prior conviction.
667.5(b)	Prior prison term for sexually violent offense and current felony prison term.	1 year.
667.6(a)	Prior specified sex offense and current specified sex offense.	5 years for each prior conviction.
667.6(b)	Prior prison term for specified sex offense and current specified sex offense.	10 years for each prior term.
667.7(a)	Two or more prior prison terms for specified violent offenses and current felony causing great bodily injury.	Indeterminate life sentence with 20-year minimum, or LWOP (if 3 or more prior prison terms).
1203.07(a)(11)	Prior specified narcotics offense and current specified narcotics offense.	Prohibits probation.

³⁴ See California Criminal Law Procedure and Practice (Cal CEB) § 15.1.

20-YEAR LIMIT ON SENTENCE LENGTHS

At its May meeting, the Committee heard from the Executive Director of the Sentencing Project, who suggested that the Committee recommend a 20-year limit on all sentences. The Committee directed staff to research whether other states have imposed a similar limit on sentence lengths. None have.

In discussing a universal limit on sentence lengths, the Committee discussed the potential need for a mechanism for continued incarceration beyond the statutory limit in cases where a person continued to pose a serious risk to public safety. Staff was directed to explore the standards and procedures currently in use for making this determination in similar circumstances.

California has two existing civil commitments processes that cover similar ground: Mentally Disordered Offender (MDO) laws and Sexually Violent Predator (SVP) laws can each be used to extend a person's confinement at the conclusion of their prison term. Each set of laws has different eligibility requirements and processes, which are discussed below.

Mentally Disordered Offender law

The MDO law allows for continued confinement if a “person represents a substantial danger of physical harm to others because of [a] severe mental disorder.”³⁵ The Penal Code directs CDCR staff to screen all people in prison for MDO eligibility,³⁶ and prior to release, CDCR must refer people who meet MDO criteria to the Department of State Hospitals (DSH) for further evaluation.³⁷ If two DSH doctors agree that the person qualifies as an MDO,³⁸ the person is “certified”

³⁵ Penal Code §§ 2962, 2964.

³⁶ Penal Code § 2960

³⁷ Penal Code § 2962(d)(1).

³⁸ The specific criteria that must be met for a person to be certified as a MDO are: the person must have a “severe mental disorder” that is not in remission or cannot be kept in remission without treatment; the severe mental disorder was a cause or an aggravating factor of a crime for which the person was sentenced; the person has been treated for the severe mental disorder for 90 days or more during the year prior to the end of the prison term; the person represents a substantial danger of physical harm to others because of the severe mental disorder; and, the person received a determinate sentence for a specified crime. Penal Code § 2962(a)-(e).

as an MDO.³⁹ Once certified, the person has the right to a hearing with BPH, and then a jury trial to challenge the designation.⁴⁰ If a person is found to be a MDO, they are committed to the state hospital.⁴¹ BPH must conduct periodic reviews for re-commitment, following the same process described above.⁴² Once the parole period has expired, the state hospital must obtain a new court order if it wants to continue the MDO commitment.⁴³

Sexually Violent Predator law

The SVP law allows certain people convicted of sex offenses to be confined in a state hospital after the completion of their prison term. To be deemed a “sexually violent predator”, a person must have a prior or current conviction for a “sexually violent” offense and a current mental disorder that makes it “likely that they will engage in sexually violent criminal behavior.”⁴⁴ CDCR is required to refer people who may qualify for an SVP commitment for an evaluation no less than six months prior to their release date.⁴⁵ Once referred, CDCR and BPH evaluate the person’s social, criminal and institutional history.⁴⁶ If it is determined that the person is likely to qualify as an SVP, they are referred to the state hospital for further evaluation.⁴⁷

The DSH evaluation is conducted by two mental health professionals appointed by DSH.⁴⁸ If it is determined that the person has a qualifying mental disorder, DSH will refer the case to the district attorney to file an SVP

³⁹ *Id.*

⁴⁰ The question for the judge or jury is whether the person meets the criteria defined in Penal Code § 2962. The standard of proof is beyond a reasonable doubt and the jury is required to be unanimous in their verdict if the MDO finding is to be upheld. Penal Code § 2966.

⁴¹ Penal Code § 2964.

⁴² 15 CCR § 2535; 15 CCR § 2580.

⁴³ Penal Code § 2970.

⁴⁴ Welfare & Institutions Code § 6600(a).

⁴⁵ Welfare & Institutions Code § 6601(a)(1).

⁴⁶ Welfare & Institutions Code § 6601(b).

⁴⁷ Welfare & Institutions Code § 6601(a)(1).

⁴⁸ Welfare & Institutions Code § 6601(d).

commitment petition.⁴⁹ Once the petition is filed, the person has a right to a probable cause hearing and a jury trial on the issue of whether they meet the SVP criteria.⁵⁰ If the judge or jury decides a person meets the SVP criteria, that person will be committed to the custody of DSH for an indeterminate term.⁵¹

DSH is required to reexamine the person's mental condition and to file a report describing their findings with the court annually.⁵² If DSH determines that either: (1) the person's condition has so changed that the person no longer meets the definition of a sexually violent predator, or (2) conditional release to a less restrictive alternative with conditions that adequately protect the community is in the best interest of the person, they must authorize the person to petition the court for an unconditional discharge.⁵³ A committed person can also petition for a conditional discharge without the recommendation of DSH but this petition is subject to different procedural rules.⁵⁴

PROPOSALS TO LIMIT "STACKING" OF SENTENCING ENHANCEMENTS

The Committee directed staff to research limits on the ability to "stack" enhancements. Options include:

- *Limit enhancements to double the base term.* In prior years a sentence could be increased by no more than double what was imposed for the main offense.⁵⁵
- *Impose a hard cap of a certain number of years on enhancements.* For example, require a sentencing limit of up to 10 years total for all enhancements for each crime committed.

⁴⁹ *Id.*

⁵⁰ The standard is proof beyond a reasonable doubt. Welfare & Institutions Code §§ 6601.5, 6602, 6604.

⁵¹ Welfare & Institutions Code § 6604.

⁵² Welfare & Institutions Code § 6604.9.

⁵³ Welfare & Institutions Code § 6604.9(d).

⁵⁴ Welfare & Institutions Code § 6608. The court can deny the petition without a hearing if it finds that the petition is without merit.

⁵⁵ *People v. Magill*, 41 Cal. 3d 777, 779 (1986) (describing former Penal Code § 1170.1(g)). The limit did not apply to violent felony offenses. *Id.*

- *Require prosecutors to choose only one enhancement even when multiple are available.* In 2020, Santa Clara County District Attorney Jeff Rosen suggested that the Committee explore this reform.⁵⁶
- *Establish an upper limit on maximum sentences.* For example, require that each sentence imposed be no more than 20 years long, except in unusual circumstances.
- *Impose a five year “washout” provision for enhancements based on criminal history.* Incorporate a cut-off date of five years, after which criminal history would no longer count for purposes of increasing the length of sentences for new convictions.

These reforms would only apply to all enhancements if passed by a two-thirds vote in the legislature or via a voter initiative, because some of the most important enhancements (i.e., “Three Strikes”, “nickel” prior) were enacted by voter initiative.

Many of these limits are similar to the Committee’s recommendation in its first annual report that the Legislature should give sentencing judges clearer guidance when considering whether to dismiss sentencing enhancements. For example, the Committee recommended that a judge should normally dismiss a sentencing enhancement when “multiple enhancements are alleged in a single case or the total sentence is over 20 years,” and when “the enhancement is based on a prior conviction that is over five years old.”⁵⁷ A bill implementing this recommendation is currently pending in the Legislature.⁵⁸

DATA ON WOMEN SERVING LIFE SENTENCES IN CALIFORNIA PRISONS

The Committee directed staff to discuss data about the number of women serving life sentences in California.

The most recent publicly-available information from CDCR shows that in December 2019, there were 175 women serving life without parole sentences and more than a thousand serving indeterminate life sentences — altogether 22% of

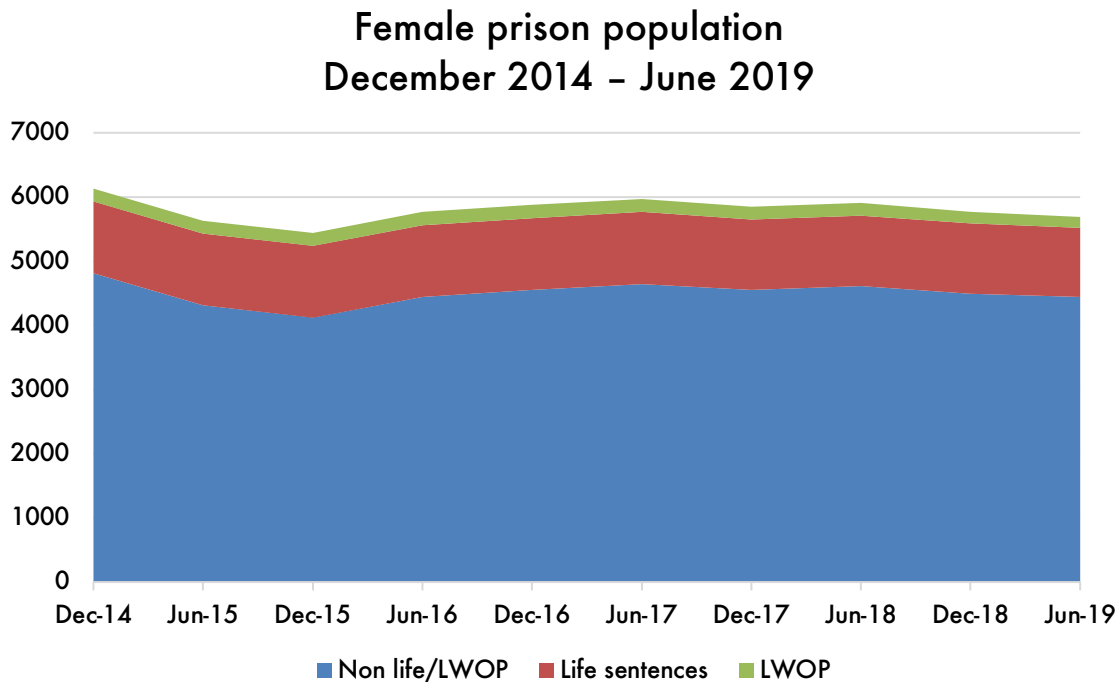
⁵⁶ Committee on Revision of the Penal Code, Meeting on Sept. 17, 2020, 1:08:08–1:08:45.

⁵⁷ Committee on Revision of the Penal Code, *2020 Annual Report*, 37 (Feb. 2021).

⁵⁸ SB 81 (Skinner).

CDCR's female population.⁵⁹ (For men, these types of sentences account for 32% of the population.)⁶⁰ The December 2019 numbers are a 12% drop in the number of women serving LWOP sentences since December 2014, and a 4% drop in the number of women serving life sentences.

The overall trends are shown in this chart:⁶¹



California's percentage of women serving extreme prison sentences is the highest in the nation. In 2019, the Sentencing Project reported that — once long determinate sentences of 50 or more years were included — one in four women in California prisons was serving a life or virtual life sentence.⁶² The next state with the highest percentage was Louisiana, with one in seven imprisoned women.⁶³ California's use of extreme sentences for women is particularly striking

⁵⁹ CDCR Office of Research, *Offender Data Points — Offender Demographics For The 24-Month Period Ending June 2019*, October 2020, Table 2.3.

⁶⁰ *Id.*, Table 1.10.

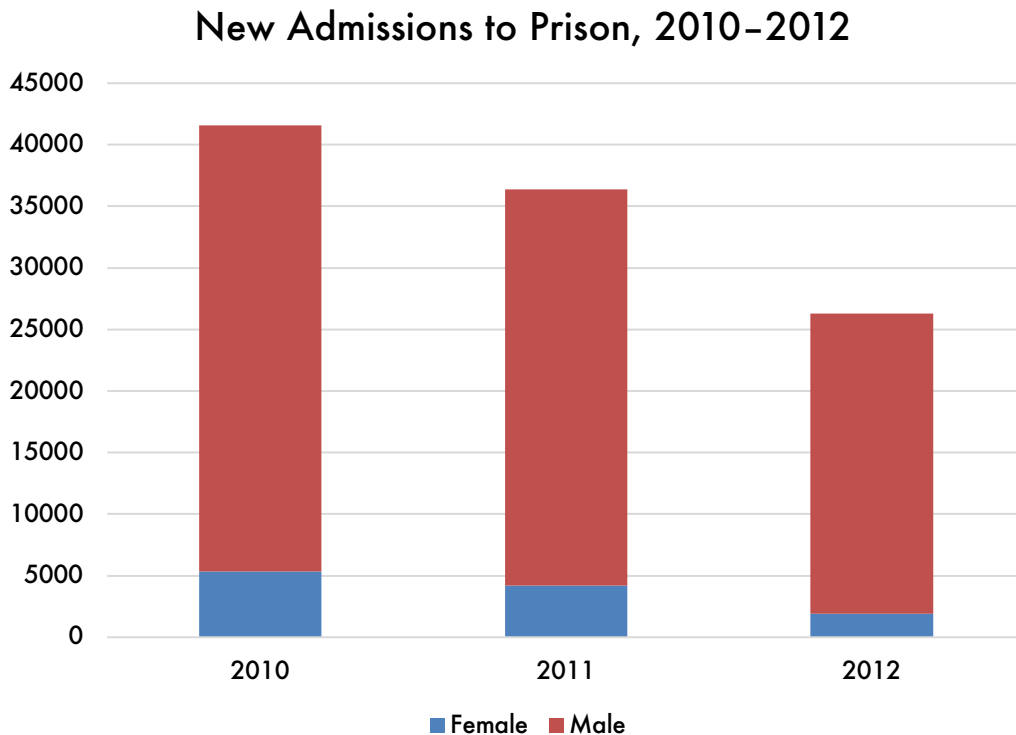
⁶¹ This data is from CDCR Office of Research Offender Data Points Reports. The number of people serving life sentences includes people sentenced as "Third Strikers."

⁶² Ashley Nellis, *Women and Girls Serving Life Sentences*, The Sentencing Project (2019), 1.

⁶³ *Id.*

because it has a relatively low female imprisonment rate compared to the rest of the country, at 28 women imprisoned per 100,000 — the 11th lowest in the country and well below the national average of 54 women imprisoned per 100,000.⁶⁴

One possible explanation for this concentration of extreme sentences for women in California’s prison is the effect of 2011’s Realignment, which shifted the place of confinement for many lower-level offenses from prison to jail. In 2011, 4,182 women were admitted to state prison as the result of new convictions.⁶⁵ In 2012 — the first full year of Realignment — this number dropped 55% (compared to 2011) to 1,896 women. The comparable drop in admissions for men was only 24%, as shown in this chart:



⁶⁴ The Sentencing Project, Fact Sheet: Incarcerated Women and Girls (Nov. 2020).

⁶⁵ This admissions data is from Table 1 of the relevant CDCR Characteristics of Felon New Admissions and Parole Violators Returned with a New Term reports.

“FAILURE TO PROTECT” THEORIES IN CALIFORNIA CRIMINAL LAW

The Committee directed staff to research accomplice liability laws, particularly as used against women in “failure to protect” cases.

The term “failure to protect” is not used in the Penal Code,⁶⁶ but a custodial parent can be convicted of a felony for failing to protect their children from an abusive partner if the custodial parent is found to be criminally negligent.⁶⁷ For example, Eva Valdez was sentenced to six years imprisonment when her abusive fiancé killed her 11 month old daughter, even though Valdez never directly abused her child.⁶⁸ The California Supreme Court upheld the jury’s finding that Valdez was criminally negligent, by entrusting her daughter to the care of her fiancé who had a history of violence.⁶⁹

There are currently over 200 women serving prison time for child endangerment,⁷⁰ but staff has been unable to identify which of these convictions were based on “failure to protect” theories.⁷¹

Additionally, current accomplice liability law can allow survivors of domestic violence to be criminally charged for harm to their children caused by their abusers.⁷² For example, Kelly Savage, was convicted of first-degree murder

⁶⁶ California’s “failure to protect” law is civil in nature, whereby it allows the state to take a child into foster care when there is a “substantial risk” that the child “will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child.” Welfare and institutions code § 300(b).

⁶⁷ Penal Code § 273a. A person acts with criminal negligence when: (1) they act in a reckless way that is a gross departure from the way an ordinarily careful person would act in the same circumstance; (2) the person’s acts amount to disregard for human life or indifference to the consequences of his or her acts; and (3) a reasonable person would have known that acting in that way would naturally and probably result in harm to others. Judicial Council of California Criminal Jury Instructions, No. 821.

⁶⁸ *People v. Valdez*, 27 Cal.4th 778 (2002).

⁶⁹ *Id.*

⁷⁰ Penal Code § 273a.

⁷¹ Data provided by CDCR Office of Research.

⁷² See, e.g., Penal Code § 189(e)(2) (aiding and abetting murder), § 31 (aiders and abettors are considered “principals” in any crime in California), § 182 (conspiracy).

in the death of her three-year-old son at the hands of her abusive partner under an “aiding and abetting” theory and sentenced to life without parole.⁷³

Staff has been unable to locate any data on the number of women in prison who are serving a sentence for the abuse or death of their children based on an accomplice liability theory.

CONCLUSION

Staff looks forward to discussing with the Committee the research presented in this memorandum.

Respectfully submitted,

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⁷³ *Morgan Lewis Secures Victory for Domestic Abuse Survivor After Decade-Long Fight*, Morgan Lewis (Dec. 27, 2017). Ms. Savage’s sentence was commuted by Governor Jerry Brown in December 2017 and she was released from prison in November 2018. See *Survived & Punished, Kelly Ann Savage is Free!*, November 17, 2018 <survivedandpunished.org/2018/11/17/kelly-ann-savage-is-free/>