

September 14, 2021

## Memorandum 2021-15

**Updates on Possible Committee Recommendations**

This memorandum provides eight potential recommendations, as identified by the Committee chair and staff, that the Committee may wish to make in its 2021 annual report. Each proposal originated from priorities set by Committee members in prior meetings.

**At the meeting on September 16, 2021, staff will deliver a presentation on each of these recommendations so that the Committee can determine if any of these recommendations should be included in the Committee's 2021 Annual Report.**

The eight proposals are:<sup>1</sup>

1. Abolish or create a review process for life without parole sentences.\*
2. Abolish or limit the Three Strikes law.\*
3. Expand eligibility for parole release.\*
4. Create a presumption for alternatives to incarceration.
5. Allow appellate courts to reduce sentences in the interest of justice.
6. Modernize the county parole system.
7. Expand CDCR's existing residential reentry programs.
8. Encourage increased parole grants and data sharing.

**Extreme Sentences and Public Safety**

Many of the staff recommendations in this memorandum propose decreasing the length of very long prison sentences. As the Committee heard from multiple panelists, there is a research consensus that, in general, extreme prison sentences do not result in significant improvements to public safety. Instead, they cost an increasing amount of money, dehumanize those who are subject to them, and often perpetuate racial, socio-economic, and other inequities.<sup>2</sup>

<sup>1</sup> The three proposals marked with \* contain recommendations that require a two-thirds vote in the Legislature or a voter initiative to become law because the relevant laws were created or modified by a voter initiative. See, e.g., Penal Code § 1170.12(g) (Three Strikes).

<sup>2</sup> National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, Washington, D.C.: The National Academies Press, 9, 317–18 (2014).

As Professor Craig Haaney told the Committee at its inaugural meeting in 2020,<sup>3</sup> the National Academy of Sciences conducted a comprehensive review of the empirical research on the impact of harsh penalties.<sup>4</sup> The study concluded that the experience of imprisonment makes many people more, not less, likely to commit crimes later in their lives, that harsher penalties have at best only a modest deterrent effect, and that crime reduction through incapacitation is an ineffective crime prevention strategy.<sup>5</sup> The report recommended that state policy makers adopt “policies to significantly reduce the rate of incarceration in the United States.”<sup>6</sup> Then-Attorney General Eric Holder echoed these sentiments in 2014, explaining that, “[h]igh incarceration rates and longer than necessary prison sentences have not played a significant role in materially improving public safety, reducing crime, or strengthening communities. In fact, the opposite is often true.”<sup>7</sup>

When addressing the Committee at its inaugural meeting, Governor Gavin Newsom charged the Committee to address extreme sentencing practices and to consider the deep racial and social inequities in California’s criminal legal system.<sup>8</sup> These insights drive many of the recommendations below to safely reduce unnecessary incarceration while improving public safety.

## **1. Abolish or create a review process for life without parole sentences.**

### *Current Law*

Life without parole sentences are allowed when someone is convicted of first-degree murder, which generally requires a willful, deliberate, and premeditated killing,<sup>9</sup> and one of twenty-two enumerated special circumstances is found true.<sup>10</sup> The Board of Parole Hearings does not review people sentenced to life without parole for potential clemency unless requested to do so by the Governor.<sup>11</sup>

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<sup>3</sup> Committee on Revision of the Penal Code, Meeting on January 24, 2020, 0:19:15-0:53:45.

<sup>4</sup> *Id.* at 132.

<sup>5</sup> *Id.* at chaps, 3, 5.

<sup>6</sup> *Id.* at 9.

<sup>7</sup> United States Department of Justice, *One Year After Launching Key Sentencing Reforms, Attorney General Holder Announces First Drop in Federal Prison Population in More Than Three Decades* (Sep. 23, 2019).

<sup>8</sup> Committee on Revision of the Penal Code, Meeting on January 24, 2020, 0:00:00-0:03:05.

<sup>9</sup> Penal Code § 189(a).

<sup>10</sup> Penal Code § 190.2.

<sup>11</sup> Penal Code § 4812(a).

### *Summary Staff Proposal*

Abolish life without parole sentences, or give judges discretion whether to impose them, and provide review of existing cases.

### *Background*

At its May 2021 meeting, the Committee considered life without parole sentences. More than 5,000 people are serving life without parole sentences in California, and 79% are people of color.<sup>12</sup> The Committee heard directly from two people, Jarret Harper and Susan Bustamante, who had been sentenced to life without parole.<sup>13</sup> Mr. Harper and Ms. Bustamante both had their sentences commuted and were eventually released by the Board of Parole Hearings. They spoke about their arduous journey of self-reflection and transformation in an environment completely absent of hope and incentives to change.<sup>14</sup>

According to The Sentencing Project, the number of people serving life without the possibility of parole sentences in California is the third highest in the nation (behind Florida and Pennsylvania).<sup>15</sup> While only a few countries authorize life without parole sentences, the number of people sentenced to life without the possibility of parole in California exceeds that of any other nation.<sup>16</sup> Yet, according to researchers, life without parole sentences are no more effective in reducing violent crime than life with parole sentences.<sup>17</sup>

Between 2003 and 2016, the number of people sentenced to life without parole in California rose by over 280%.<sup>18</sup> This steep increase in life without parole sentences occurred even as violent crime decreased by 26% during the same period.<sup>19</sup> And while recent reforms such as Proposition 57 parole, youth offender parole, and elderly parole

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<sup>12</sup> Data provided by CDCR Office of Research.

<sup>13</sup> Committee on Revision of the Penal Code, Meeting on May 13, 2021, part one.

<sup>14</sup> *Id.*

<sup>15</sup> Ashley Nellis, *No End in Sight: America's Enduring Reliance on Life Imprisonment*, The Sentencing Project, Table 1 (2021).

<sup>16</sup> See Written Submission of Dr. Christopher Seeds to Committee on Revision of the Penal Code, May 11, 2021, citing Dirk van Zyl Smit and Catherine Appleton, *Life Imprisonment: A Global Human Rights Analysis*, Harvard University Press (2019).

<sup>17</sup> Ross Kleinstuber and Jeremiah Coldsmith, *Is Life Without Parole an Effective Way to Reduce Violent Crime? An Empirical Assessment*, *Criminology & Public Policy* 19(2), 625 (2020).

<sup>18</sup> Ashley Nellis, *Still Life: America's Increasing Use of Life and Long-Term Sentences*, The Sentencing Project, 21 (2017).

<sup>19</sup> *Id.*

have expanded parole consideration to those who were previously ineligible for it, these reforms explicitly do not apply to people serving life without parole sentences.<sup>20</sup>

Some recent reforms have targeted life without parole sentences given to people who were under 18 years old at the time of the offense. In 2012, Senate Bill 9 allowed people sentenced to life without parole for offenses committed as juveniles to petition for resentencing after serving 15 years.<sup>21</sup> And in 2017, Senate Bill 394 made this group eligible for parole release after 25 years of incarceration.<sup>22</sup> Still, many serving life without parole in California prisons were young at the time they committed the offense — 61% were 25 years old or younger.<sup>23</sup> But permanently incarcerating people who have aged significantly since committing an offense fails to account for the widely-accepted age-crime curve that older people are much less violent than younger people.<sup>24</sup>

While courts previously had discretion to dismiss or strike the special circumstances which if found true, require imposition of a life without parole sentence, passage of Proposition 115 in 1990 eliminated this authority.<sup>25</sup>

Finally, as Dr. Christopher Seeds told the Committee, life without parole did not really mean confinement without hope of release until the late 20th century.<sup>26</sup> Until 1994, BPH regulations mandated a review for all people sentenced to life without parole for recommendations regarding reprieves, pardons, and commutations.<sup>27</sup> Though BPH still has statutory authorization to refer people to the Governor for clemency it does not appear that they do so with regularity.<sup>28</sup>

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<sup>20</sup> See Cal. Const., art. I, § 32(1) (Proposition 57 parole), Penal Code §§ 3051(h) (youth offender parole), 3055(g) (elderly parole).

<sup>21</sup> SB 9 (Yee), Ch. 828, 2012; Penal Code § 1170(d)(2).

<sup>22</sup> SB 394 (Lara), Ch. 684, Stats. 2017.

<sup>23</sup> Data provided by CDCR Office of Research.

<sup>24</sup> See, e.g., Ashley Nellis, *A New Lease on Life*, 8, The Sentencing Project (2021).

<sup>25</sup> Proposition 115, as approved by voters, June 5, 1990 (creating Penal Code § 1385.1).

<sup>26</sup> See written submission of Dr. Christopher Seeds to Committee on Revision of the Penal Code, May 11, 2021.

<sup>27</sup> See *Ross v. Schwarzenegger*, 2008 WL 4937599, \*2 (E.D. Cal. 2008) (describing 15 CCR § 2817). Initially, this review was to occur twelve years into a person's sentence and every three years thereafter, but in 1982, BPH regulations were changed to require 30 years before review. The repealed version of the regulation is on file with Committee staff. See also Memorandum from Board of Prison Terms, Subject: LWOP Reviews, March 15, 1994 (noting that regulation was repealed).

<sup>28</sup> Penal Code § 4801(a). At least one other state still has a review process for life without parole cases requiring that a person sentenced to life without parole be interviewed by the parole board after serving 10 years. See Mich. Dept of Corr. Policy Directive 06.05.104(M).

### *Staff Proposal*

The Committee should consider the following recommendations:

- Abolish life without parole sentences. This would require a voter initiative.<sup>29</sup>
- Alternatively, allow courts to dismiss special circumstances, which require imposition of a life without parole sentence, in the interests of justice. This would require a two-thirds majority in the Legislature.<sup>30</sup>
- Allow people sentenced to life without parole to petition for judicial review and resentencing after an appropriate period of incarceration. This would require a two-thirds majority in the Legislature.<sup>31</sup>
- In the interim, require BPH to review all people serving life without parole after an appropriate period of incarceration for possible referral for clemency by the Governor if they demonstrate “exceptional conduct,”<sup>32</sup> and do not pose a threat to public safety. This could be implemented through the BPH rulemaking process or with a majority vote in the Legislature as it does not appear to implicate any law passed by voter initiative.

## **2. Abolish or limit the Three Strikes Law.**

### *Current Law*

People who were previously convicted of a “strike” — a “serious” or “violent” felony as defined in the Penal Code — and commit any new felony have their sentences doubled.<sup>33</sup> People who commit a third serious or violent felony after having been convicted of two serious or violent felonies face a mandatory minimum sentence of 25 years to life.<sup>34</sup> 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.<sup>35</sup> Offenses

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<sup>29</sup> Proposition 7, as approved by voters, November 7, 1978, requires life without parole sentences in certain circumstances and does not, as many voter initiatives do, allow the Legislature to modify it by a two-third vote.

<sup>30</sup> Proposition 115, as approved by voters, June 5, 1990, created Penal Code § 1385.1, which prevents courts from dismissing special circumstances after they have been found true. Proposition 115 allows modification of its provisions by a two-thirds vote in the Legislature. See Proposition 115, § 30.

<sup>31</sup> A two-third vote would be required to pass this law because it would require modifying Penal Code § 1385.1, which was created by Proposition 115 in 1990.

<sup>32</sup> This is the standard used by CDCR in making Penal Code § 1770(d) resentencing recommendations. 15 CCR § 3076.1.

<sup>33</sup> Penal Code § 667(e)(1). The doubling of the sentence applies only to the imprisonment imposed for substantive offenses, not any sentencing enhancements.

<sup>34</sup> Penal Code § 667(e)(2).

<sup>35</sup> Penal Code § 667(c)(3).

committed when a person was a minor can be counted as prior strike convictions in certain circumstances.<sup>36</sup>

### *Summary Staff Proposal*

Abolish the Three Strikes law. Alternatively, establish “wash out” periods that limit the use of old strike convictions, disallow juvenile adjudications from being used as strikes, and limit the amount of time that a strike adds to a sentence.

### *Background*

At its May 2021 meeting, the Committee discussed “Three Strikes” sentences. There are more than 37,000 people in prison who are serving a sentence lengthened by the Three Strikes law — more than a third of the total population.<sup>37</sup> The Three Strikes law as created by Proposition 184 in 1994 aimed to reduce crime by incapacitating and deterring repeat offenders by dramatically increasing punishment for people previously convicted of a “serious” or “violent” offense.<sup>38</sup> Despite projections that the law would cause the state’s prison population to increase substantially and result in additional costs of up to \$6 billion annually,<sup>39</sup> nearly 72% of voters favored it.<sup>40</sup>

Though crime rates fell in California after the Three Strikes law passed, they had already been on the decline both in California and nationally for a number of years.<sup>41</sup> Research conducted by the Legislative Analyst’s Office in 2005 found that crime rates fell at the same rates in counties that sentenced people with prior strike convictions to prison most often and counties that sentenced people with prior strike convictions to prison least often.<sup>42</sup> In addition to the uncertain impact on crime rates, claims that the

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<sup>36</sup> 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.

<sup>37</sup> Data provided by CDCR Office of Research. Data is as of July 1, 2021.

<sup>38</sup> *Id.*

<sup>39</sup> Voter Information Guide for 1994, General Election, 34 (1994) (Legislative Analyst’s Office analysis of Proposition 184).

<sup>40</sup> California Secretary of State, *Statement of Vote*, General Election, November 8, 1994, 107 (results for Proposition 184).

<sup>41</sup> Legislative Analyst’s Office, *A Primer: Three Strikes — The Impact After More Than a Decade* (Oct. 2005).

<sup>42</sup> *Id.* See also Franklin E. Zimring, Sam Kamin, and Gordon Hawkins, *Crime and Punishment in California: The Impact of Three Strikes and You’re Out* (1999) (law did not reduce crime); Steven Raphael and Michael A. Stoll, *Why Are So Many Americans in Prison?*, 217 (2013) (finding evidence of general deterrence to be very weak). But see Eric Helland and Alexander Tabarrok, *Does Three Strikes Deter? A Non-Parametric Estimation*, *Journal of Human Resources*, 42(2) (2007) (lower arrest rate among people convicted of two strikeable offenses); Anusua Datta, *California’s Three Strikes Law Revisited: Assessing the*

law disproportionately impacted people of color began to arise only a few years after it was passed.<sup>43</sup> Currently, 80% of people serving a sentence lengthened by the Three Strikes law are people of color.<sup>44</sup> And 90% of people serving a sentence lengthened by the Three Strikes law who were 25 or younger at the time of the offense are people of color.<sup>45</sup>

Despite reforms to the Three Strikes law made by Proposition 36 in 2012, many of the most concerning aspects of the law remain:

- There is no limit on how old a prior strike can be,<sup>46</sup> though many other states do have such “wash out” periods.<sup>47</sup>
- Juvenile conduct can count as a strike, even though juvenile adjudications are not convictions and cannot be used to enhance sentences in other contexts.<sup>48</sup>
- A prior strike conviction always doubles punishment, even if the current offense is nonviolent. Though courts have the ability to dismiss prior strikes,<sup>49</sup> there is no data suggesting courts do this regularly..

#### *Staff Proposal*

The Committee should consider the following recommendations:

- Abolish the Three Strikes law.
- Establish wash-out periods, after which prior offenses can no longer be counted as strikes.

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*Long-Term Effects of the Law*, International Atlantic Economic Society, 229 (2017) (significant deterrent effect on all crimes). After reviewing research, the National Academy of Sciences concluded that crime-reduction effects of Three Strikes and similar laws were modest at best and that lengthy prison sentences cannot be justified based on their effectiveness in preventing crime. *The Growth of Incarceration in the United States* at 9, 155–156.

<sup>43</sup> Greg Krikorian, *More Blacks Imprisoned Under ‘3 Strikes,’ Study Says*, Los Angeles Times, March 5, 1996.

<sup>44</sup> Data Provided by CDCR Office of Research.

<sup>45</sup> *Id.*

<sup>46</sup> Penal Code § 667(c)(3).

<sup>47</sup> Other states, including Washington and Arizona have five-year wash-out periods for enhanced sentences based on most prior offenses and 10-year wash-out periods for more serious felony priors. (Arizona Rev. Stat. § 13-105(22)(b),(c); § 13-703(B)(C); Washington State Adult Sentencing Guidelines Manual 53-54 (2020).) Wash-out periods were codified in since-repealed California laws that allowed for one and three-year enhancements for prior prison terms. See April K. Cassou and Brian Traugher, *Determinate Sentencing in California: The New Numbers Game*, 9 Pac. L. J. 5, 48–53 (1978).

<sup>48</sup> California Welfare and Institutions Code § 203. For example, a juvenile adjudication for driving under the influence does not count as an adult DUI prior. *People v. Bernard*, 204 Cal.App.3d Supp. 16, 18 (1988). Similarly, a juvenile adjudication for a “serious” felony cannot be used to impose a 5-year “nickel” enhancement. *People v. West*, 154 Cal.App.3d 100,107-108 (1984). But the Three Strikes law and the California Supreme Court authorize the use of juvenile adjudications as prior strikes in adult court. Penal Code §§ 667(d)(3), 1170.12(b)(3); *People v. Nguyen*, 46 Cal.4th 1007, 1015-1022 (2009).

<sup>49</sup> Penal Code § 1385; *People v. Romero*, 13 Cal.4th 497 (1996).

- Disallow the use of juvenile adjudications as prior strikes.
- Disallow doubling of prison terms when the new offense is not a strike.

As discussed in previous Committee memoranda, because the Three Strikes law was created by voter initiative, significant reforms would require a two-thirds vote in the Legislature or a voter initiative to become law.

### **3. Expand eligibility for parole release.**

#### *Current Law*

In addition to people serving indeterminate life sentences,<sup>50</sup> people convicted of nonviolent offenses and confined to state prison may earn early release to parole.<sup>51</sup>

#### *Summary Staff Proposal*

Expand parole eligibility in state prison to people convicted of all offenses after they have served the term for their primary offense.

#### *Background*

At the July 2021 meeting, the Committee discussed indeterminate and determinate sentencing and received a presentation from Board of Parole Hearings Executive Officer Jennifer Shaffer about the nonviolent parole review process available to people in state prison.<sup>52</sup> This process was created by Proposition 57 in 2016 and injects a level of indeterminacy into California's determinate sentencing system. It allows people serving nonviolent prison sentences to be reviewed for early parole release after serving the full sentence for their "primary offense," which means without time added on by sentencing enhancements or any credit for good conduct.<sup>53</sup> The Board of Parole Hearings makes the release decision via a "paper review" without counsel for the parole candidate or an in-person hearing. Since this review process began in 2017, 17% to 23% of people reviewed by BPH have been released.<sup>54</sup>

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<sup>50</sup> Such "lifer" parole is addressed in Recommendation 8 below.

<sup>51</sup> Cal. Const., art. I, § 32(a)(1).

<sup>52</sup> See Jennifer P. Shaffer, Executive Officer, Board of Parole Hearings, *Proposition 57 Nonviolent Parole Review Process: Report for the Committee on Revision of the Penal Code*, 7 (July 2021).

<sup>53</sup> 15 CCR § 3490(f) & (d); *In re Canady*, 57 Cal. App.5th 1022 (Ct. App. 2020).

<sup>54</sup> *Proposition 57 Nonviolent Parole Review Process* at 7.



Under the current eligibility rules, almost 20,000 people are eligible for release — approximately 20% of the current prison population.<sup>55</sup> These are people whose current conviction offenses are nonviolent.<sup>56</sup>

But the people who may be most suitable for release under a process like the current nonviolent parole review process are currently unable to benefit from it because their convictions are not strictly nonviolent. As the Committee has noted previously, rigid distinctions between “violent” and “nonviolent” offenses are arbitrary and may be counterproductive.<sup>57</sup> Indeed, in California, the three-year reconviction rate for people committed to prison for a nonserious/nonviolent offense was 51% but for people committed to prison with a violent offense, it was only 29%.<sup>58</sup> And data shows that the severity of someone’s crime of conviction does not predict recidivism risk.<sup>59</sup>

According to data from BPH, if everyone serving a determinate sentence was eligible for parole release, another 42,000 people would be eligible.<sup>60</sup> This expansion could be particularly relevant to reducing extreme sentences, since, according to data compiled by The Sentencing Project, California is a national leader in “virtual life sentences” — determinate sentences of 50 years or more.<sup>61</sup>

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<sup>55</sup> The numbers are as of April 2021. See *Proposition 57 Nonviolent Parole Review Process* at 12 (as of April 30, 2021, 19,566 incarcerated people eligible for Prop 57 review); CDCR, Weekly Report of Population, April 28, 2021 (95,817 people in state prison).

<sup>56</sup> The California Supreme Court is currently considering whether people convicted of both nonviolent and violent felony offenses are eligible for Proposition 57 review. See *In re Mohammad Mohammad*, 42 Cal. App. 5th 719 (2019) (lower court decision). Three of the four appellate courts to consider this issue have held that these people are not eligible for Proposition 57 release. See *In re Ontiveros*; *In re Viehmeyer*, 62 Cal. App.5th 973 (Ct. App. 2021); *In re Douglas*, 62 Cal. App. 5th 276 (Ct. App. 2021).

<sup>57</sup> Committee on Revision of the Penal Code, 2020 Annual Report and Recommendations, 12.

<sup>58</sup> CDCR Office of Research, *Appendix to the Recidivism Report for Offenders Released from the California Department of Corrections and Rehabilitation in Fiscal Year 2014–15*, Figure 8, Table 12 (Jan. 2020).

<sup>59</sup> *Id.*, Figure 5 (“Offenders committed for crimes against persons comprised the largest percentage of the release cohort (38.5 percent or 15,106 offenders) and had the lowest three-year conviction rate among all commitment offense categories at 39.0 percent (5,888 offenders).”). See also Council on Criminal Justice, *New National Recidivism Report*, Sept. 1, 2020 (national data shows that “[p]eople released in 2012 who were convicted of homicide were the least likely to be rearrested, with 41.3% rearrested at least once over five years ... people convicted of property crimes were most likely to be rearrested, at 78.3% over five years.”)

<sup>60</sup> More than 18,000 with a mix of violent and nonviolent convictions and more than 23,000 with violent convictions only. *Proposition 57 Nonviolent Parole Review Process* at 14–16.

<sup>61</sup> The Sentencing Project, *Still Life: America’s Increasing Use of Life and Long-Term Sentences*, 7, Table 1 (2017).

### *Staff Proposal*

The Committee should consider the following recommendation:

- Expand eligibility for parole release to all offenses, including violent ones, after someone has served the term for their “primary offense.”

The existing nonviolent parole review process was created by Proposition 57 in 2016 and would require a voter initiative to modify, but creating a separate parole review process for other types of convictions may be possible with a two-thirds vote in the Legislature.

#### **4. Create a presumption for alternatives to incarceration.**

##### *Current Law*

Current law states that the purpose of sentencing is “public safety achieved through punishment, rehabilitation, and restorative justice.”<sup>62</sup> Unless a law specifically provides otherwise, sentencing courts have total discretion to impose diversion, probation, or imprisonment.<sup>63</sup>

##### *Summary Staff Proposal*

Create a clear statement in the Penal Code that that punishment should be no more severe than necessary and that incarceration should be avoided when possible. Establish a presumption for alternatives to incarceration in certain circumstances.

##### *Background*

During the July 2021 meeting, Insha Rahman, Vice President of Advocacy and Partnerships at Vera Institute of Justice, told the Committee that New York reduced its state prison population by 60% and New York City reduced its jail population by 40% while crime fell to historic lows.<sup>64</sup> The statewide decline in incarceration was driven by changes in New York City, which accounts for about half of the state population.<sup>65</sup> Researchers have identified the increased use of alternatives to incarceration as one of

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<sup>62</sup> Penal Code § 1170(a)(1).

<sup>63</sup> Penal Code § 1170(a)(3).

<sup>64</sup> Committee on Revision of the Penal Code, Meeting on Jul. 14, 2021, 0:16:30–0:21:36. See also Judith A. Greene and Vincent Schiraldi, *Better by Half: The New York City Story of Winning Large-Scale Decarceration while Increasing Public Safety*, Federal Sentencing Reporter, Vol 29, No. 1, 22.

<sup>65</sup> *Id.* See also James Austin and Michael Jacobsen, *How New York City Reduced Mass Incarceration: A Model for Change?*, Jan. 2013.

the primary drivers of the decline in incarceration in New York City.<sup>66</sup> This expanded use of alternatives was not caused by legislative reform but by an increase in the number of available programs and growing acceptance of their appropriateness.<sup>67</sup>

California's existing diversion statutes help steer California in a similar direction but could be strengthened to ensure greater usage in appropriate cases.<sup>68</sup> For example, the existing mental health diversion law allows a judge to deny diversion even if the prosecutor and defendant both agree it is appropriate, and requires a defendant to always show that a diagnosed mental health issue was a "significant factor" in the commission of the charged offense.<sup>69</sup>

And though the Penal Code has numerous sections that require judges to impose incarceration,<sup>70</sup> it contains few statements limiting or discouraging incarceration.<sup>71</sup> New York, the federal system, and the Model Penal Code all explicitly discourage unnecessary incarceration. In New York, one of the criteria governing all sentencing decisions is that "a minimum amount of confinement should be imposed 'consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant.'" <sup>72</sup> Federal law and the Model Penal Code have provisions that sentences should be no greater than necessary,<sup>73</sup> and the Model Penal Code authorizes sentences of incarceration only when necessary to incapacitate dangerous offenders, or when other sanctions would depreciate the seriousness of the offense.<sup>74</sup>

### *Staff Proposal*

The Committee should consider the following recommendations:

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<sup>66</sup> *Id.* See also Greg Berman and Robert V. Wolf, *Alternatives to Incarceration: The New York Story*, New York State Bar Assoc Govt., Law and Policy Journal, Vol. 16 (Winter 2014).

<sup>67</sup> See Ram Subramanian, Rebecka Moreno and Sharyn Broomhead, Vera Institute of Justice, *Recalibrating Justice: A Review of 2013 State Sentencing and Corrections Trends*, 4 (2014).

<sup>68</sup> Penal Code § 1001.36.

<sup>69</sup> Penal Code § 1001.36(b)(1)(B).

<sup>70</sup> See, e.g., Penal Code §§ 462(a), 1203(e), 1203.045(a), 1203.049(a), 1203.055(a), 1203.06(a), 1203.07(a).

<sup>71</sup> One notable exception is Penal Code section 1210.1(a), which was created by Proposition 36 in 2000. Under this section, a person convicted of a non-violent drug offense is entitled to receive probation, and with certain exceptions, courts are not allowed to impose incarceration as a condition of probation. Penal Code § 1201.1.

<sup>72</sup> *People v. Notey*, 72 A.D.2d 279, 282–83 (1980) (citations omitted).

<sup>73</sup> 18 U.S.C.A. § 3553(a); Model Penal Code: Sentencing (Am. Law Inst. Proposed Final Draft, 2017) § 1.02(2)(a)(iii).

<sup>74</sup> Model Penal Code: Sentencing (Am. Law Inst. Proposed Final Draft, 2017) § 6.11(2).

- Amend the Penal Code to include a statement that punishment should be no more severe than necessary and that incarceration should be avoided when possible.
- Establish a presumption that alternatives to incarceration be imposed in the following circumstances:
  - When a person is convicted of their first felony offense.
  - When a person is convicted of a non-violent offense.
  - When a person is convicted of a misdemeanor offense.
- The presumption can be overcome if:
  - Incarceration is necessary based on clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others, or;
  - Failing to impose a sentence of incarceration would depreciate the seriousness of the offense.
- Revise the mental health diversion law:<sup>75</sup>
  - Require that a defendant be granted mental health diversion if the prosecution consents to diversion.
  - If the defendant has a diagnosis for a mental disorder specified in the statute,<sup>76</sup> presume that the mental disorder satisfies the statutory requirement that the mental disorder was a significant factor in the commission of the charged offense.<sup>77</sup>

## **5. Allow appellate courts to reduce sentences in the interest of justice.**

### *Current Law*

Appellate courts may review sentences for legal error, but have no power to reduce otherwise lawful sentences they conclude are unjust or harsh.

### *Summary Staff Proposal*

Allow appellate courts to reduce sentences in the interest of justice.

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<sup>75</sup> Penal Code § 1001.36.

<sup>76</sup> Penal Code § 1001.36(b)(1)(A).

<sup>77</sup> See Penal Code § 1001.36(b)(1)(B).

## *Background*

Professor Michael Tonry told the Committee at its July 2021 meeting that appellate courts in Europe routinely “second guess” criminal sentences.<sup>78</sup> But in California, like in most states, appellate courts cannot modify a sentence unless there is legal error.<sup>79</sup> Even if the appellate court concludes that a sentence is too harsh or otherwise inappropriate, there is little the court can do. This total deference to the trial court’s decision is typically justified by pointing to the trial court’s superior ability to holistically review a defendant’s character and background.<sup>80</sup>

But not every state limits appellate courts in this way. For example, New York grants appellate courts the “unfettered”<sup>81</sup> ability “as a matter of discretion in the interest of justice” to modify “a sentence, though legal, [that is] unduly harsh or severe.”<sup>82</sup> A claim that a sentence was harsh or severe does not need to have been raised in the trial court and can be brought on appeal even if the defendant pleaded guilty.<sup>83</sup> The highest state court in New York has explained the appellate court’s “broad, plenary power to modify a sentence that is unduly harsh or severe ... may be exercised, if the interest of justice warrants, without deference to the sentencing court.”<sup>84</sup> This formulation of the appellate power to reduce sentences is similar to the power that trial courts have in California to dismiss charges and sentencing enhancements in the “furtherance of justice” under Penal Code section 1385.<sup>85</sup>

New York appellate courts make measured use of their power to reduce harsh sentences. In the last five years, 7–9% of criminal appeals (about 190 cases a year)

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<sup>78</sup> Committee on Revision of the Penal Code, July 13, 2021 Meeting, Part 1, 1:03:00–1:07:00. See also President’s Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts, 25 (1967) (“In all Western countries except the United States, grossly excessive sentences are subject to routine review and correction by appellate tribunals.”).

<sup>79</sup> See, e.g., *People v. Scott*, 9 Cal.4th 331, 353–54 (1994).

<sup>80</sup> See, e.g., Michael M. O’Hear, *Appellate Review of Sentences: Reconsidering Deference*, 51 Wm. & Mary L. Rev. 2123, 2126 (2010)

<sup>81</sup> *People v. Felix*, 87 A.D.2d 529, 947 (N.Y. 1st Dep’t 1981).

<sup>82</sup> N.Y. Crim. Proc. Law § 470.15(6)(b).

<sup>83</sup> *People v. Thompson*, 60 N.Y.2d 513, 520 (1983). In some circumstances, an explicit condition of a guilty plea can include waiving the right to argue on appeal that a sentence was harsh or unjust. See *People v. Lopez*, 6 N.Y.3d 248, 253 (2006).

<sup>84</sup> *People v. Delgado*, 80 N.Y.2d 780, 783 (1992).

<sup>85</sup> Appellate courts can review a trial judge’s refusal to dismiss under Penal Code § 1385, but can only reverse if the trial judge’s decision was “so irrational or arbitrary that no reasonable person could agree with it.” *People v. Carmony*, 33 Cal.4th 367, 377 (2004).

resulted in a modification of the judgment, which includes sentence reductions.<sup>86</sup> Such modifications have included reducing incarceratory terms to probation,<sup>87</sup> reducing sentences in murder cases,<sup>88</sup> and modifying adult convictions to youthful offender adjudications.<sup>89</sup>

Allowing appellate review of the harshness of sentences would help reduce disparities in sentences as courts could review cases across judges, individual prosecutors, and counties.

#### *Staff Proposal*

The Committee should consider the following recommendations:

- Allow appellate judges to review sentences for excessiveness on appeal — including adjusting the base sentence, the consecutive nature of additional sentences, and the application of sentencing enhancements — without giving deference to the decision of the sentencing judge.
- Allow this power to be exercised on appeal even in cases where the defendant pleaded guilty.

#### **6. Modernize the county parole system.**

##### *Current Law*

Under Penal Code § 3075, “[t]here is in each county a board of parole commissioners” that has the ability to release people serving county jail sentences. Each county parole board sets its own rules for eligibility, release, and length of supervision.<sup>90</sup>

##### *Summary Staff Proposal*

Update the county parole law, including clarifications about eligibility and the standard for release.

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<sup>86</sup> New York State Unified Court System Annual Reports (2015–2020), Table 2. The First and Second Appellate Departments, which cover New York City and account for most of the criminal cases in the state, modified criminal judgements in around 7% of cases. See also President’s Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts, 25 (1967) (“Jurisdictions permitting appellate [sentence] review, however, have not experienced an unreasonable burden on the reviewing court.”).

<sup>87</sup> See, e.g., *People v. Jackson*, 132 A.D.3d 1417 (N.Y. 4th Dep’t 2015).

<sup>88</sup> See, e.g., *People v. Naqvi*, 132 A.D.3d 779 (N.Y. 2d Dep’t 2015) (reducing minimum sentence in murder case by seven years).

<sup>89</sup> See, e.g., *People v. Kwame S.*, 95 A.D.3d 664 (N.Y. 1st Dep’t 2012).

<sup>90</sup> Penal Code § 3076.

## *Background*

As part of its discussion at the July 2021 meeting about parole release, the Committee noted that people serving county jail sentences do not have the opportunity for early parole release like many people serving prison sentences do. There is, however, a little-used provision in the Penal Code that creates “county parole.”<sup>91</sup>

As the Committee noted in its report last year, California’s county jails have recently had an average daily population of 60,000–80,000 people.<sup>92</sup> A number of county jails are also under federal consent decrees to limit overcrowding that allow jails to release people based on the length of their remaining sentences, rather than by their public-safety risk to the community.<sup>93</sup> Most people in jail are serving short sentences, but after Criminal Justice Realignment in 2011 — which shifted the place of confinement for people convicted of many lower-level felonies to county jail — some people now have years-long county jail sentences.<sup>94</sup> For example, in July 2019 in Los Angeles county, more than 2,400 people in jail were serving felony sentences of more than a year, 40% of the sentenced jail population.<sup>95</sup>

“County parole” allows a county parole board to release people from jail to supervision. The Penal Code does not provide a legal standard for when a county parole application should be granted. Instead, each county board has authority to set its own “rules and regulations.”<sup>96</sup> The county parole board has three members: a representative from the sheriff, a representative from the probation department, and a member of the public appointed by the presiding judge of the Superior Court.<sup>97</sup>

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<sup>91</sup> Penal Code § 3076(b).

<sup>92</sup> Committee on Revision of the Penal Code, 2020 Annual Report and Recommendations, 10.

<sup>93</sup> See Sarah Lawrence, *Court-Ordered Population Caps in California County Jails*, Stanford Criminal Justice Center, December 2014, 6 (at time of report, 19 county jail systems had court-ordered population caps and housed 65% of jail population); Magnus Lofstrom and Brandon Martin, *Key Factors in California’s Jail Construction Needs*, Public Policy Institute of California, May 2014 (data set listing court-ordered jail population caps).

<sup>94</sup> Ryken Grattet, Mia Bird, Viet Nguyen, and Sonya Tafoya, *California Jails Under Realignment and Proposition 47*, California Journal of Politics and Policy, 9(3), 6, 11 (2017) (between 2011 and 2015 “for sentenced felons the median [time served] is between eight and 14 weeks depending upon offense type”).

<sup>95</sup> Length of sentences for “AB 109 Inmates” provided by Los Angeles County Jail. In July 2020 during the COVID-19 pandemic, 1,162 people were serving felony sentences of more than a year. Jail sentenced population is from Board of Community and State Corrections Jail Population Trends dashboard (average daily sentenced population for July 2019 was 6,049).

<sup>96</sup> Penal Code § 3076(a).

<sup>97</sup> Penal Code § 3075(a). There are no minimum qualifications for the member of the public, except that they not be a “public official.” *Id.*

The Penal Code appears to currently require each county to have a county parole program.<sup>98</sup> Though county parole has existed in California since at least 1953, there is almost no information about its historical usage.<sup>99</sup> County parole laws have not been significantly amended since 1978, long before Criminal Justice Realignment shifted sentences for many offenses to county jail in 2011.<sup>100</sup>

After numerous interviews with people who run county parole programs, staff learned that county parole is used very differently across California:

- Most jurisdictions make limited use of county parole and have caseloads of no more than a few dozen people. Los Angeles County, the largest county jail system in the state, does not use the program at all.
- Some jurisdictions do not allow people who are serving Realigned jail sentences into the program. This restriction does not appear in the Penal Code,<sup>101</sup> though a sentencing judge can explicitly forbid release to county parole.<sup>102</sup>
- People incarcerated in jails are not regularly reviewed for the program but must apply.
- Most jurisdictions require half of a sentence to be served before someone is eligible. But at least one jurisdiction has no minimum time-served requirement, and another makes people eligible after serving a quarter of their sentence. The Penal Code does not address this issue.
- Though each jurisdiction had a different standard for releasing someone, the overall concern was for “public safety.” No jurisdiction seemed to have a formal policy addressing the specific release standard.
- The amount of time supervised under county parole can exceed the amount of time someone would spend incarcerated. The Penal Code appears to allow this, but does not clearly address it.<sup>103</sup>

#### *Staff Proposal*

The Committee should consider the following recommendations:

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<sup>98</sup> Penal Code § 3075(a) specifies: “There is in each county a board of parole commissioners ...”.

<sup>99</sup> Asm. Com. on Public Safety, Analysis of AB 884 (2013–2014 Regular Session), May 3, 2013, 2 (California State Sheriffs’ Association noted that “very few counties are currently utilizing county parole”).

<sup>100</sup> Stats. 1978, c. 918, p. 2884, § 1.

<sup>101</sup> County parole is available to “any prisoner confined in ... any county jail ... under a judgment of imprisonment or as a condition of probation for any criminal offense.” Penal Code § 3076(b)

<sup>102</sup> Penal Code § 3076(b).

<sup>103</sup> Penal Code § 3081(b) allows a term of county parole to be up to three years, but also explains that if someone violates county parole, they can only be reincarcerated “for the unserved portion of his or her sentence.”



- Clarify that each county must have a county parole board.
- Set minimum standards for county parole instead of the current county-by-county system.
- Clarify that county parole is available to everyone imprisoned in county jail regardless of offense, including people serving Realigned jail sentences, and that the term of parole supervision cannot be longer than the person would serve in jail.
- Require that everyone confined in county jail be reviewed for county parole when they become eligible.

## 7. Expand CDCR’s existing residential reentry programs.

### *Current Law*

CDCR operates reentry programs that allow people serving state prison sentences to spend the final portion of their incarceration (generally around two years) in community-based residential programs focused on helping them successfully reenter society.<sup>104</sup> All programs have a variety of restrictions on eligibility.<sup>105</sup>

### *Summary Staff Proposal*

Expand CDCR’s existing residential reentry programs so that more people serve the last two years of their incarceration in them.

### *Background*

At its July 2021 meeting, the Committee heard from a panel of experts about CDCR’s existing residential reentry programs — the Male Community Reentry Program, “MCRP,” and the women’s Custody to Community Transitional Reentry Program, “CCTRP” — which combined have around 1,200 beds (about 1% of CDCR’s current population).<sup>106</sup> A study published in June 2021 by Stanford University graduate students found that people who participated in MCRPs for nine months or longer were

<sup>104</sup> Penal Code §§ 1170.05, 6250–6259; 15 CCR §§ 3078.1-3078.6. See also CDCR, *Community Prisoner Mother Program*.

<sup>105</sup> See, e.g., Penal Code § 1170.05(d); Penal Code § 6258.1.

<sup>106</sup> *Id.*; staff Interview with Doug Bond, Executive Director of the Amity Foundation. CDCR also offers the 24-bed Community Prisoner Mother Program, where some mothers can apply to serve up to six years of their prison sentences with up to two children under the age of six, Penal Code §§ 3410–3424; CDCR, *Community Prisoner Mother Program*, and the Alternative Custody Program, where men and women may serve their last custodial year in a community-based transitional housing program or residential drug treatment program that has agreed to accept them. Penal Code § 1170.05; 15 CCR §§ 3078.1-3078.6; CDCR, *Alternative Custody Program*. People also can apply for home confinement as part of this program. See Penal Code § 1170.05(b)(1).

37% less likely to be arrested and 92% less likely to be reconvicted than a control group that completed their sentences in prison.<sup>107</sup>

Men may serve up to their last two years<sup>108</sup> of prison in an MCRP,<sup>109</sup> and women can serve up to their last 30 months in a CCTRTP.<sup>110</sup> The Federal Bureau of Prisons similarly places people serving up to their final year of a federal sentence in community-based halfway houses run by contractors.<sup>111</sup> Unlike in California, placement in a federal halfway house is not based on a voluntary application but is mandatory in most cases.<sup>112</sup>

Similar to the federal system, CDCR's residential reentry programs are run by contractors and provide "a range of community-based, rehabilitative services" to help participants "successfully reenter the community from prison."<sup>113</sup> Services include substance abuse treatment, mental health care, medical care, employment training/assistance, education, housing, family reunification, social support, and more.<sup>114</sup> Program costs range from \$100–150 per person per day (roughly \$37,000–\$55,000 per year)<sup>115</sup> compared to CDCR's average cost per incarcerated person of \$281 per day (\$102,736 per year).<sup>116</sup>

CDCR reviews individuals who apply for entry into the program for eligibility and placement.<sup>117</sup> Doug Bond, Executive Director of one MCRP contractor, Amity Foundation, emphasized to the Committee that a therapeutic and rehabilitative, rather

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<sup>107</sup> Higuera, et al., *Effects of the Male Community Reentry Program* (MCRP on Recidivism in the State of California, 43 (Jun. 2021).

<sup>108</sup> AB 145, a public safety trailer bill passed in July 2021, recently changed the length of stay to "less than two years." AB 145 (amendment to Penal Code Section 6258.1(c)).

<sup>109</sup> CDCR, Male Community Reentry Program.

<sup>110</sup> CDCR, Custody to Community Transitional Reentry Program.

<sup>111</sup> 18 U.S.C. § 3624(c)(1); US Courts, *Residential Reentry Centers Reference Guide*; Federal Bureau of Prisons, *Completing the Transition*.

<sup>112</sup> See United States Courts, *How Residential Reentry Centers Operate and When to Impose*; 18 U.S.C. § 3624(c)(1). The Director of the Bureau of Prisons must "ensure" that incarcerated people spend up to their last 12 months "under conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community," including their placement in a "community correctional facility." *Id.*

<sup>113</sup> CDCR, *Male Community Reentry Program*.

<sup>114</sup> *Id.*

<sup>115</sup> Higuera, et al., *Effects of the Male Community Reentry Program* (MCRP on Recidivism in the State of California, 13 (Jun. 2021).

<sup>116</sup> 2021–22 Governor's Budget, California Department of Corrections and Rehabilitation, CR-7 (estimated per capita costs for adult institutions).

<sup>117</sup> Higuera, et al., *supra* at 18-19; CDCR, Male Community Reentry Program; Penal Code § 6258.1(a) & (e).

than carceral, environment is needed to help individuals successfully reenter society from prison.<sup>118</sup>

Currently, the Board of Parole Hearings does not have the ability to grant parole conditioned on a person being transferred to a residential reentry program.<sup>119</sup> However, Jennifer Shaffer, Executive Director of the Board of Parole Hearings, informed the Committee that community-based programs would be “a viable option for increasing approval rates” by the Board, and it would be “helpful” to have this choice since they are used in many other jurisdictions.<sup>120</sup>

#### *Staff Proposal*

The Committee should consider the following recommendations:

- Expand the current residential reentry programs so that eventually everyone leaving California prisons serves their final two years there.
- Allow the Board of Parole Hearings to grant release to a residential reentry program.

#### **8. Encourage increased parole grants and data sharing.**

#### *Current Law*

The Board of Parole Hearings (BPH) determines whether people serving indeterminate life sentences are suitable for release.<sup>121</sup> BPH does not release information about the demographics or background of parole candidates. The parole grant rate in California in the last five years has been between 16–22%.<sup>122</sup>

#### *Summary Recommendation*

Encourage BPH to increase its parole grant rate. Recommend that BPH regularly release more data on the background and outcomes for parole candidates.

#### *Background*

As the Committee has discussed throughout its existence, parole release is a complicated and sensitive topic: in California, it frequently involves people convicted of

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<sup>118</sup> Committee on Revision of the Penal Code, Meeting on Jul. 13, 2021, part 4, 10:25-10:55.

<sup>119</sup> Penal Code § 6253 allows the Director of Corrections to transfer people who have *already been granted* parole to Community Corrections Centers (MCRPs and CCTRPs).

<sup>120</sup> Committee on Revision of the Penal Code, Meeting on Jul. 13, 2021, 24:20-28:10.

<sup>121</sup> Penal Code § 3041(a)(2); Penal Code § 3041(b)(1); 15 CCR § 2281(a); 15 CCR § 2402(a); 15 CCR § 2422(a); 15 CCR § 2432(a).

<sup>122</sup> BPH, Suitability Hearing Summary Calendar Year 1978 through Calendar Year 2020.

the most serious offenses but who also often present a low risk to public safety because of the long amount of incarceration they have served. Balancing these interests, along with the costs associated with extended incarceration and the interests of crime victims, is challenging. In 2020 alone, BPH scheduled more than 7,600 people for parole review.<sup>123</sup> More than 3,400 of them proceeded to hearing and 1,234 of them (16% of all scheduled hearings) were granted parole.<sup>124</sup>

The Committee recommended numerous changes to the parole suitability process in its 2020 Annual Report, which included clarifying the current standards for parole, adding rebuttable presumptions for release, enhancing the standard for judicial review of parole decisions, and increasing the data that BPH releases to the public.<sup>125</sup> None of the Committee's proposals were adopted by the Legislature or BHP.

The Committee remains concerned with the operation of parole hearings. Available data suggests that BPH could safely grant parole to more people. The most recent recidivism data shows that people granted parole release by BPH have extremely low recidivism rates: less than 1% of people released by BPH were convicted for a new crime against a person, and half of those offenses were misdemeanors.<sup>126</sup> Overall, people released by BPH have a 2.4% reconviction rate after three years (that is, there were 16 convictions — 7 felonies and 9 misdemeanors — among the 688 people who had been released in 2014–15).<sup>127</sup> The reconviction rate for all people released from CDCR in that time was 46.5%.<sup>128</sup>

Other large states have higher parole grants for similarly serious offenses. In Texas, the parole grant rate for “aggravated violent offenses” is 35%.<sup>129</sup> In New York, the grant rate for the most serious offenses is 30%.<sup>130</sup> Though the parole grant rate in

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<sup>123</sup> BPH, 2020 Report of Significant Events, 1.

<sup>124</sup> *Id.*

<sup>125</sup> Committee on Revision of the Penal, 2020 Annual Report and Recommendations, 56–63.

<sup>126</sup> CDCR Office of Research, Recidivism Report for Offenders Released from the California Department of Corrections and Rehabilitation in Fiscal Year 2014–15, January 2020, Table 6.

<sup>127</sup> *Id.* There were 3 felony convictions for crimes against a person, 2 for felony drug/alcohol crimes, and 2 for “other” felony crimes. The 9 misdemeanors: 3 misdemeanors against persons, 4 drug/alcohol misdemeanors, 1 property misdemeanor, and 1 “other” misdemeanor.

<sup>128</sup> *Id.* at Table 5.

<sup>129</sup> The Texas Board of Pardons and Paroles, Annual Statistical Report, FY 2019, 5 (11,424 “violent aggravated non-sexual” cases considered and 3,974 cases approved).

<sup>130</sup> New York Board of Parole Legislative Report, 2017, 4.

California has increased significantly in the last decade, it is still almost half of what it is in these comparable states.<sup>131</sup>

In addition to these low grant rates, there is emerging research that parole grants are sometimes controlled by inappropriate factors such as the parole candidate's race or whether they have an attorney not appointed by the state.<sup>132</sup> Though BPH contests these findings, they have yet to provide detailed data refuting them.

#### *Staff Proposal*

The Committee should consider the following recommendations:

- Encourage BPH to increase its parole grant rate, either by supporting changes to the Penal Code as recommended in the Committee's previous report or making similar changes to its regulations concerning the factors for parole suitability.
- Recommend that BPH regularly release data on the backgrounds of parole candidates and outcomes of parole hearings, including demographic information, controlling offense, time served, recent history of rules violations, and other information that would be relevant to evaluating how the parole suitability process functions.

### **Conclusion**

The topics and staff proposals in this memorandum consider the most extreme sentences in California's criminal legal system as well as the least serious offenses where incarceration is usually inappropriate. All of these proposals share the goal of increasing public safety while reducing incarceration and improving equitable outcomes.

Respectfully submitted,

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<sup>131</sup> BPH, Suitability Hearing Summary Calendar Year 1978 through Calendar Year 2020.

<sup>132</sup> Kristen Bell, *A Stone of Hope: Legal and Empirical Analysis of California Juvenile Parole Lifer Decisions*, 54 Harv. C.R.-C.L. L. Rev. 455, 488 (finding that for some similarly situated candidates, 53% of juvenile lifers with retained attorneys were granted parole compared to only 23% of those represented by BPH-appointed attorneys); *id.* at 473, 486 (finding "significant differences in [California's] parole grant rate among different racial groups," and that in many cases "the grant rate among Black candidates is lower than that of candidates of other racial/ethnic groups.").