First Supplement to Memorandum 2023-01
Updates on Recent Law Changes and Related Matters
Panelist Materials

Memorandum 2023-01 gave an overview of recent changes to California's criminal law and related matters. This supplement presents and summarizes written submissions from some of the panelists scheduled to appear before the Committee on March 17, 2023.

Exhibit

Perspectives on the Racial Justice Act

Prosecutor-Initiated Resentencings

Perspectives From Public Defenders

Perspectives on the Racial Justice Act

Allee Rosenmayer, Racial Justice Act Attorney, San Joaquin County Public Defender

Ms. Rosenmayer's submission describes the implementation of the Racial Justice Act, which became effective in 2022. After speaking with defense attorneys across the state, she reports that very few cases have made it to an evidentiary hearing. Data collection practices vary from county to county with some attorneys encountering resistance to gathering data to establish statistical claims. And once practitioners are able to access data and establish a systemic disparity, it is very difficult to find similarly-situated cases to establish a claim, as required by the law. Judges, defense counsel, and prosecutors throughout the state are applying different standards for what comparators may be similarly situated and what burdens apply. Ms. Rosenmayer also notes that she expects a large number of new cases to be filed under the RJA as its retroactivity provisions become effective in coming years but that there has been no corresponding funding given to practitioners to address this new work.

Evan Kuluk, Deputy Public Defender, Alternate Defender Office, Contra Costa County

Mr. Kuluk was counsel in the first case to have a conviction vacated based on a violation of the RJA. The judge set aside the conviction because the prosecutor and police officer gang expert used racially-discriminatory language by using slang terms that were more graphic and violent than any witness used. He notes that the only successful RJA motions so far have been brought under the parts of the law covering the exhibition of bias and racially discriminatory language during trial or outside of court. Challenges relying on statistical proof, which require extensive data collection and analysis, have not yet resulted in any final court decisions.

Prosecutor-Initiated Resentencings

Lois M. Davis, PhD, Senior Policy Researcher, RAND Corporation

Dr. Davis, a senior researcher at the RAND Corporation, which is the independent evaluator for the County Resentencing Pilot Program, shares findings and observations from RAND's initial evaluation of the pilot program. County prosecutors and public defenders have faced several challenges during implementation, including impact of COVID-19, receiving referrals before procedures and policies were in place, development of eligibility criteria, working with CDCR to establish data sharing agreements, and lack of collaboration between agencies. Over the first six-months of the pilot program,

259 cases were reviewed by prosecutors, but only 8 referred for resentencing, with 88 denied and 163 still pending.

Perspectives From Public Defenders

Jennifer Hansen, Deputy State Public Defender, Office of the State Public Defender

Ms. Hansen's submission describes how post-conviction resentencing laws, including changes to the felony murder law and referrals for resentencing by CDCR, have helped many people with long prison sentences be resentenced while saving the state significant costs in incarceration. In her position with a birds-eye view of statewide implementation at the Office of the State Public Defender, she notes two critical gaps that have contributed to the roadblocks that would be important to account for in any future reform measure: (1) the appointment of counsel is necessary to ensure timely and effective application of any new remedy; and (2) statewide institutional stakeholder cooperation to address foreseeable challenges in advance of any new statute's effective date.

She also includes two fact sheets showing the impact of felony murder resentencings and referrals for resentencings made by CDCR, including that there have been 470 people resentenced after changes to the felony murder

Andrew Gutierrez, Supervising Deputy Public Defender, Santa Clara County Public Defender's Office

Mr. Gutierrez is the post-conviction supervisor of the Santa Clara County Public Defender and describes how judges are using their discretion in response to recent ameliorative changes to sentencing and resentencing law. While he has seen judges use their discretion to strike gun enhancements, nickel priors, and strike priors, uncertainty in the language of some new statutes impacts how judges may use that discretion. For example, for changes to Penal Code § 1385 made by SB 81, it is not clear how courts should apply the "great weight" requirement, how courts should weigh the specified mitigating circumstances with public safety considerations, and whether the changes in SB 81 apply to strike priors. He also notes that the aggravating factors created by SB 567 in Penal Code § 1170 are not defined and have led to confusion.

Matthew Wechter, Supervising Attorney, San Diego County Public Defender

Mr. Wechter's submission describes the implementation of various reforms in San Diego County. Mr. Wechter describes how the collaborative process worked in San Diego County — soon after SB 483 passed, which made the repeal of 1 and 3-year priors retroactive, the Public Defender, District Attorney, and Superior Court, convened and developed a plan for implementation. The collaborative process resulted in less appearances, less litigation, and more time and resources dedicated to providing better outcomes. But he also notes difficulty in obtaining necessary documents from CDCR, litigation about the scope of eligibility under SB 483, and confusion about the different, yet overlapping, resentencing statutes.

To improve on the success in San Diego County, Mr. Wechter recommends that any future resentencing legislation require a centralized judge and staff that can provide a more efficient process with better communication, require that courts send new abstracts of judgment to CDCR within 24 hours, require a meet and confer process among the parties, and provide reimbursement to county agencies for the additional workload.

Respectfully submitted,

Joy F. Haviland
Senior Staff Counsel

Exhibit A

Allee Rosenmayer

Racial Justice Act Attorney, San Joaquin County Public Defender

Implementation of the California Racial Justice Act

Allee Rosenmayer, Racial Justice Act Attorney
San Joaquin County Public Defender

Since the Racial Justice Act was passed, there are several statewide convenings of RJA attorneys and associated practitioners that meet regularly to discuss cases and brainstorm RJA claims. These convenings have been immensely useful for practitioners as we attempt to digest and breathe life into this complex statute.

To be frank, RJA implementation has gotten off to a slow and rocky start. Very few RJA motions have made it to the evidentiary hearing stage. Collectively, we tend to experience the following in implementing the RJA:

- **Difficulty gathering county-level data**.
    - Data collection practices and systems vary from county to county. Some people have had some success using the California Public Records Act to gather data; some have encountered either a lot of resistance to providing data and repeated denials, or technical systems that aren't capable of providing the necessary data.
    - The data does exist; incredibly detailed data is reported and collected by the superior courts, Department of Justice, and Judicial Council. But county-level data is not accessible to defense attorneys. Penal Code sections 13300 et seq are most often used to deny public records requests for data. Amendments to these provisions to clarify that defense attorneys can access the information to bring statistical disparity claims should increase access to data.
    - We are hoping AB 2418 (the Justice Data Accountability and Transparency Act) will mitigate some of these issues; but it does not impose requirements until March 2027 and contains no mechanisms for enforcement.
- **745(a)(3)/(a)(4) claims are unworkable, even when data demonstrates statistical disparities**.
    - The RJA requires that even when data establishes a systemic disparity, a defendant's case must be compared to similarly situated cases to establish a claim. But in many instances, there *are* no similarly situated cases, given the history of structural disparities. Defense attorneys are left trying to prove a negative. If law enforcement only focuses on a particular group to investigate, how can we find a comparison group? We know, for instance, that gang prosecutions have a troubled racial history, and the data demonstrates systemic disparities. But white people are rarely, if ever, charged with gang offenses or enhancements; and defense attorneys have not yet been able to find a way to discover who *could have* been charged with gang enhancements but wasn't.
    - No one really understands what "similarly situated" or "similar conduct" means; when a showing of similarly situated/similar conduct is required (at the prima facie or evidentiary hearing stage); or how many cases are required for comparison.

        - Judges are requiring a showing of "similarly situated" at the prima facie stage and that *all* cases in the statistical pool are similarly situated.
        - Specific language to clarify either that factual comparisons must be shown or need not be shown at the prima facie stage would be helpful. If specific facts must be shown, then a discovery motion must necessarily be filed in advance of the prima facie motion – making an RJA claim an even lengthier process.
    - The "similarly situated" analysis is incredibly time-consuming, imposes significant discovery burdens on district attorneys (when discovery motions are granted), and requires expert analysis of years of crime reports. Deleting the "similarly situated" requirement would finally throw the door wide open to RJA claims.
- **The RJA does not address systemic disparities in policing/arrests**.
    - Data often demonstrates that it is arrests by local law enforcement agencies that are the genesis of broader disparities in charging and convictions; but with regards to law enforcement, the RJA as written only addresses individual bias by an officer, not patterns of over-policing communities.
- **Resistance from courts and District Attorney offices; misunderstanding of what implicit bias and systemic/structural racism is and how it operates**.
    - Given the complexity of the statute and the lack of guiding case law, many judges are erring on the side of imposing a higher burden than we believe the RJA calls for (even if they say, for instance, they are applying a prima facie standard).
    - Many judges and prosecutors appear reluctant to address implicit bias or structural racism and are not embracing the spirit of the RJA as expressed in the legislative findings, but rather are looking for reasons to deny or oppose claims.
    - Some District Attorney offices may publicly profess their commitment to racial justice, but that has not translated into the courtroom or behind the scenes practice. District Attorney offices tend to take the filing of such motions as a personal attack on the individual deputy/line attorney.
- **Staffing and funding shortfalls**.
    - RJA motions (particularly data-driven claims) are particularized and time-consuming. Few offices have the resources to devote an attorney position to RJA litigation, leaving it to individual trial attorneys who have full caseloads already. This has blunted the potential impact of the law.
    - RJA retroactivity will have a *significant* workload impact for public defender offices starting in 2024, when anyone serving a sentence can bring an RJA claim. Collectively, we do not yet know how we will be able to respond to what we expect to be an outpouring of potential RJA claimants.

I thank the Committee for their time and attention to the RJA. Defense attorneys were ecstatic when the law first passed, as many of us are in this work because of a strong commitment to racial and social justice. But without clearing away some of the hurdles imposed in the RJA, the legislative intent to eliminate racial bias in the justice system will not be met.

Exhibit B

Evan Kuluk

Deputy Public Defender, Alternate Defender Office,
Contra Costa County

Implementation of the California Racial Justice Act

Evan Kuluk, Deputy Public Defender
Alternate Defender Office, Contra Costa County Public Defender

I litigated the California Racial Justice Act ("CRJA") post-conviction challenge in *People v. Gary Bryant and Diallo Jackson* ("*Bryant*"). The defendants, who are both African American, had been convicted at trial of murder with gang enhancements, which the court vacated due to violations of CJRA. This was the first case in California to have a conviction set aside and a new trial granted based on violation of CRJA during a criminal trial.

In *Bryant*, Contra Costa Superior Court Judge Clare Maier issued a 71-page written decision finding that CRJA had been violated due to racially discriminatory language and exhibition of bias at trial by the prosecutor and police officer gang expert.

The Court held that the prosecutor's use of certain terms of slang terminology by the prosecutor, including "pistol whip" and "drug rip," in context, constituted racially coded language in violation of CRJA. Importantly, the Court found that these slang terms were introduced into the trial in the first instance by the prosecutor, rather than by a witness. The slang terms were also more graphic and violent than the actual language used by witnesses. The slang terms emphasized stereotypical associations of Black men with violence. And, the repeated use of these terms by the prosecutor primed the jury by activating implicit bias.

The Court also held that the repeated utterance of the n-word by police witnesses and attorneys in the case constituted racially discriminatory language, even though the use was only in quoting social media posts and rap lyrics and there was no racist intent. The Court found that the use of the n-word was dehumanizing and activated implicit bias.

Finally, the Court held that the use of rap lyrics and videos written and performed by the defendants as evidence of their guilt of the murder and that they were gang members premised their convictions on racially discriminatory evidence. Based on social science research presented at the CRJA hearing, the court found that the use of rap lyrics in criminal prosecutions relies upon express or implicit bias regarding Black men, whether or not doing so was intentional or knowing and regarding of relevance to the allegations. Use of rap lyrics at trial draws upon implicit bias of young Black men as hyper-violent and criminal.

As far as I'm aware, the only successfully CRJA motions in California thus far have been brought under Penal Code section 745 subdivisions (a)(1) and (a)(2), which cover the exhibition of bias and racially discriminatory language outside of court and during trial. These challenges do not require the extensive record collection and statistical analysis that is required for motions brought under subdivisions (a)(3) and (a)(4) for racially disparate charging and sentencing. Outside of the *Bryant* case, some examples of successful challenges include dismissal of special circumstances due to racist language by a detective outside of court and jury instructions to counteract implicit bias based on prosecutor's use of racialized slang in closing arguments.

Exhibit C

Lois M. Davis, PhD,

Senior Policy Researcher, RAND Corporation

Testimony

Evaluation of the California County Resentencing Pilot Program

First-Year Findings

Lois M. Davis

CT-A2648-1
Testimony presented before the California Committee on Revision of the Penal Code on March 17, 2023

For more information on this publication, visit www.rand.org/t/CTA2648-1.

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Evaluation of the California County Resentencing Pilot Program: First-Year Findings

Testimony of Lois M. Davis[1]
The RAND Corporation[2]

Before the California Committee on Revision of the Penal Code

March 17, 2023

In 2018, the California State Legislature passed Assembly Bill (AB) 2942, which amended Penal Code section 1170(d)(1) to allow the district attorney (DA) to revisit past sentences to determine whether further confinement is no longer in the interest of justice. In July 2021, the legislature passed AB 128, which established the California County Resentencing Pilot Program and appropriated funding to DA and public defender (PD) offices in nine pilot counties to support and evaluate a collaborative approach to the exercise of prosecutorial resentencing discretion pursuant to paragraph (1) of subdivision (d) of Section 1170 with the goal of reducing the sentences of eligible prisoners.[3] Pilot counties were provided funding to implement the three-year pilot program. Participants include both a county DA office and a county PD office, and they may include a community-based organization (CBO) as well. The nine counties represented are Los Angeles, San Francisco, San Diego, Yolo, Humboldt, Contra Costa, Merced, Riverside, and Santa Clara.

[1] The opinions and conclusions expressed in this testimony are the author's alone and should not be interpreted as representing those of the RAND Corporation or any of the sponsors of its research.

[2] The RAND Corporation is a research organization that develops solutions to public policy challenges to help make communities throughout the world safer and more secure, healthier and more prosperous. RAND is nonprofit, nonpartisan, and committed to the public interest. RAND's mission is enabled through its core values of quality and objectivity and its commitment to integrity and ethical behavior. RAND subjects its research publications to a robust and exacting quality-assurance process; avoids financial and other conflicts of interest through staff training, project screening, and a policy of mandatory disclosure; and pursues transparency through the open publication of research findings and recommendations, disclosure of the source of funding of published research, and policies to ensure intellectual independence. This testimony is not a research publication, but witnesses affiliated with RAND routinely draw on relevant research conducted in the organization.

[3] In June 2022, Section 1170.01 of the Penal Code was amended and renumbered as Section 1172 (California Legislative Information, "Bill Analysis: AB-1540 Criminal Procedure; Resentencing," 2021).

The RAND Corporation, a nonprofit research organization, was selected as the independent evaluator of the pilot program. The pilot term is from September 1, 2021, through September 1, 2024; the evaluation term is from September 1, 2021, through January 31, 2025. The evaluation sought to determine how the pilot program is implemented in each county, whether the pilot is effective in reducing criminal justice involvement (e.g., recidivism), and whether it is cost-effective. The first of three RAND reports evaluating the pilot program was released on October 3, 2022.[4] This submission shares findings and observations from that report, including insights on support for the pilot program, eligibility criteria development, key challenges, and implementation.

Initial Findings

Overall Support for the Pilot Program

Through stakeholder interviews, DAs and PDs indicated their overall support of the pilot program, despite the challenges they faced in implementing it. Many DA office and PD office staff who we interviewed expressed their commitment and interest in the opportunities the pilot program afforded their county to address discrepancies in sentencing for individual cases.

Development of Eligibility Criteria

The pilot counties each developed their own criteria for identifying cases eligible for resentencing consideration.

- Although the inclusion criteria varied somewhat across pilot counties, overall, the inclusion criteria focused on factors such as the age of the inmate, the crime committed, and the length and other details of the sentence. One county did not specify inclusion criteria because it planned to review all current cases of incarcerated in prison.
- Exclusion criteria primarily pertained to inmates convicted of crimes considered too egregious (e.g., sex offender registrant; serving a sentence for an offense listed in Penal Code Sections 667.5(c) or 1192.7(c), which lists specific violent felonies) for resentencing consideration.
- Counties expected their eligibility criteria to be refined and to evolve over time as they bring their pilots fully to scale.

Multiple Challenges Identified in the First Year

Participants in the first year of the pilot program encountered the following implementation challenges:

[4] Lois M. Davis, Louis T. Mariano, Melissa M. Labriola, Susan Turner, and Matt Strawn, *Evaluation of the California County Resentencing Pilot Program: Year 1 Findings*, RAND Corporation, RR-A2116-1, 2022, https://www.rand.org/pubs/research_reports/RRA2116-1.html.

- County DAs and PDs faced key challenges, including the impact of coronavirus disease 2019 (COVID-19) on the courts and retention of staff and hiring issues that made it difficult for some counties to initially dedicate staff to the pilot program.
- News about the pilot project legislation has gotten out to individuals, families, CBOs, and private attorneys, which led, early on, to multiple referrals or requests being submitted before the DAs had established procedures in place for identifying cases eligible for resentencing consideration. In addition, there has been some confusion among individuals about whether they were eligible for resentencing under this pilot program.
- Additional implementation challenges include developing eligibility criteria, putting data-sharing agreements into place, acquiring and analyzing data from the California Department of Corrections and Rehabilitation to identify individuals who met eligibility criteria, working with eligible individuals to facilitate the preparation of their applications and supporting documents, identifying and hiring CBOs, and working with the courts to develop processes and procedures for making referrals to the courts.
- Except in a few counties, most of the DA and PD offices did not have a history of working closely together and are still developing that collaboration. The PDs tended to want to play a more proactive role than the DAs envisioned in defining the eligibility criteria, in identifying cases for consideration, and making recommendations to the courts.

Early Results from Nine Counties' Case-Level Data

In the first-year report, we examined case-level data covering the first six months of pilot implementation. Below are early results from the nine counties' case-level data. Because the pilot is in its early stages, these results should not be used to draw firm conclusions because these initially identified patterns may change over time as we analyze more cases and the counties have the chance to fully develop their pilot programs, including eligibility criteria.

- Among the 259 case reviews initiated during the first six months of the pilot program, the pilot county DA offices had yet to make a determination on 163 cases (63 percent); only eight cases (3 percent) had been referred to the court with a motion to resentence the individual, while the DA offices had decided not to proceed with 88 cases (34 percent).
- Aggregated across the nine pilot counties, the initial cases reviewed tended to involve individuals who were over the age of 50. The controlling offense most often involved a crime against persons. Nearly half of the cases reviewed involved third-strike sentences, and nearly three-fourths of reviewed cases had a sentence enhancement present.

Forthcoming Insights and Data on the Pilot's Implementation

AB 128 called for annual reports to the California legislature on October 1, 2022, and October 1, 2023, and for the final report to be available January 10, 2025. We are currently in Year 2 of the evaluation of the pilot program. We expect additional insights in 2023 based on

- an update on the status of implementation of the pilot, how the pilot program has evolved in each pilot county, and strategies adopted by pilot counties to address any challenges encountered

- analyses of the flow of cases as they move through the pipeline from identification, consideration, recommendations to the court, and court decisions
- preliminary analyses of available recidivism outcomes
- preliminary analyses of costs.

Exhibit D

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Murder & Attempted Murder Reform (SB 1437/775) and CDCR-Initiated Resentencing (AB 1812, AB 1540): Successes and Lessons Learned Since 2018

In its 2020 Report, this Committee encouraged expansion and clarification of "second look" resentencing pathways for incarcerated Californians whose lengthy sentences do not match their crimes, encouraging the use of Penal Code section 1170, subdivision (d) to recalibrate those sentences. In 2021, the Legislature updated that statute to provide enhanced due process protections. Those changes greatly increased the likelihood that "second look" resentencing referrals would be acted upon by resentencing judges. (AB 1540, establishing PC 1170.03, which became 1172.1.)

In the same vein, in both 2018 and 2022, the Legislature reformed the legal definitions of murder and attempted murder to address the fact that some people were convicted of murder and attempted murder and serving life sentences, despite not knowing that those crimes were planned or likely to occur. The legislation included a petition process to allow people with old convictions to go back to court and ask a judge to reconsider whether they are still guilty of murder or attempted murder under the new law. If the person is no longer guilty of murder or attempted murder, the person is resentenced to a crime that fits their conduct, resulting in a less lengthy sentence. (SB 1437/775, establishing PC 1172.6.)

These new post-conviction laws have helped many people with long prison commitments be resentenced in a way that more equitably corresponds to their underlying conduct. This has saved the state billions of dollars in incarceration costs and is a step towards repairing the harm to Black and Latino communities who have borne the brunt of over-incarceration.

Over the past five years, however, the implementation of these new laws has not been without roadblocks. Having watched these law being applied across the state, the Office of the State Public Defender (OSPD) has some suggestions we urge be considered in any future, wide-scale resentencing efforts. Two things are critical: (1) appointment of counsel is necessary to ensure the effective application of any newly passed post-conviction remedies and (2) timely statewide institutional

stakeholder cooperation is necessary to tackle foreseeable structural challenges, with such cooperation starting prior to the effective date of new statutes.

BACKGROUND

Amendments to 1960s-era law allowing CDCR to refer people for resentencing by Superior Court judges, currently Penal Code section 1172.1:

2018 - AB 1812: Added budget funds for 13 permanent CDCR employees to review individuals for possible CDCR-initiated recall and resentencing referral, allowed judges to recall plea cases, and allowed courts to consider post-conviction factors when resentencing a person.[1]

2021 - AB 1540: Added due process protections for those referred, including right to counsel, a hearing, and clarification that all the new resentencing laws had to be considered at a new resentencing hearing, with a presumption in favor of resentencing unless the person poses an unreasonable risk of danger to public safety.

Amendments to murder accomplice liability laws:

2018 - SB 1437: Established a petition process for those possibly convicted under now invalid theories of murder, requiring appointment of counsel and a hearing.

2021 - SB 775: Expanded eligibility for petition process to those convicted of attempted murder and those who plead guilty to manslaughter based on now invalid theories of murder and attempted murder.

THE LAWS ARE WORKING: MANY PEOPLE ARE GETTING RESENTENCED

Unquestionably, post-conviction resentencing laws have meaningfully decreased the prison population and saved the state money that is better used elsewhere. According to data tracked by CDCR, 470 people have been resentenced as a result of the murder and attempted murder petitions (SB 1437/SB 775). Considering that the Legislative Analyst's Office's estimates the cost of

[1] Funds included $2 million from the General Fund in fiscal year 2018-2019, $1.9 million in 2019-2020, and $1.5 million in 2020-2021. (Assem. Budget Subcom. No. 5, Agenda, (2017-2018 Reg. Sess.) Gov. May Budget Revise, May 21, 2018, p. 24.)

incarcerating an individual to be $106K per year, these reforms have saved the state up to $1.1 billion in incarceration costs. Approximately 87.5% of the people resentenced under SB 1437 and 775 were people of color, with Black Californians comprising the largest share (45%). (See "SB 1437/775: A Snapshot of Impact" OSPD-IDID flyer.) Similarly, expanded use of CDCR's power to recommend recall and resentencing has led to more than 400 people being resentenced. (See "Impact of CDCR Initiated Resentencing" OSPD-IDID flyer.)

ROADBLOCKS

Lack of early institutional coordination around implementation of the new laws has resulted in challenges, most of which were foreseeable had stakeholders gathered early to consider the rollout of the new laws.

ATTORNEY COORDINATION WITH CDCR

- Historically, public defenders represented a client in the trial court and if the client was sentenced to prison, the trial attorney's role was over. Now trial attorneys are being appointed on cases with clients in state prison and, for the first time, thousands of trial lawyers are trying to navigate CDCR's labyrinth of rules and requirements for communication and record gathering. This has resulted in:
    - All parties experiencing lengthy delays getting records of clients' prison behavior records (C-files) from CDCR. These records are relied on by public defenders, district attorneys and judges in evaluating a person's likelihood of future danger to the community. Not having the records for months delays the possibility of stipulated resolutions or resentencing hearings for months or even years.
    - Lack of an efficient/consistent mechanism for timely communication between CDCR incarcerated clients and their attorneys (calls and video visits) which severely limits an attorney's ability to prepare for a resentencing hearing and delays the resolution of the case.
    - Lack of consistent protocols/technology systems available to facilitate virtual appearances for CDCR incarcerated people at their court hearings. Virtual appearances allow the client to participate in the hearing and greatly reduce the transportation costs borne by the State of bringing people from prisons across the state to local custody for court appearance.

- Delayed "time served" releases because attorneys, judges and courtroom clerks have not been clearly instructed as to what information must be included in the orders sent to CDCR to facilitate immediate releases. There is no deadline in statute or court rule by which to send the amended sentencing order to the prison, resulting in additional days and weeks of custody for people who have often already served many years longer than the newly imposed sentence.

ACCESS TO HISTORICAL COURT RECORDS

- Superior Court proceedings typically have not required trial transcripts from prior trials but now many of these post-conviction cases require such records. The necessity for old records has resulted in:
  - Delayed substantive hearings in murder and attempted murder resentencing proceedings while parties wait for copies of old trial transcripts. Neither the Superior Court nor the Court of Appeal retain scanned historical trial transcripts and many hard copies have been destroyed. The Attorney General's Office has some scanned records but insufficient administrative staff to provide electronic records to the whole state. There is no long-term plan for scanning and making records accessible to all parties for future resentencing efforts.

LACK OF STAKEHOLDER COMMUNCATION

- Historically CDCR sent letters to judges only occasionally to alert them to illegal sentences. As laws have changed and allowed CDCR to recommend resentencing under different legal vehicles, there has not been widespread communication and education for judges or the court staff who are the gatekeepers for setting initial hearings and appointing attorneys. As a result:
  - Hundreds of resentencing referral letters from CDCR sent to judges in 2018-2022 sat idle or were denied without notification to the incarcerated person. In part to address this, the Legislature passed AB 1540 in 2021 requiring appointment of counsel and a hearing but there has been no organized effort to go back and provide counsel to revive the cases referred prior to 2022 where no action was taken or the referral was denied without notice of a right to appeal.

- Cases are still not being put on calendar for timely hearings despite the statutory timelines laid out in section 1172.1 (AB 1540).

STATEWIDE-DISPARITIES

- Imbalances in the resources available to different sized counties impact the ability of incarcerated people to access relief via resentencing laws, unfairly resulting in disparities between who receives the benefit of the new laws. Smaller counties without public defender offices (25 of California's 58 counties) and with few judicial officers generally do not have the resources to coordinate systemic implementation and get post-conviction cases into court and resolved with consistency.

RECOMMENDATIONS

Appointment of Counsel is Critical to Any Future Resentencing Vehicles

In any type of new resentencing bills, the Legislature might advance in the future, judges will undoubtedly be reviewing trial records, prison behavior records, and assembled mitigation materials. There are often legal arguments that must be made relating to the application of changed laws. This work cannot be done effectively without assistance of an appointed attorney.

For example, the appointment of counsel has been critical to the success of the murder and attempted murder resentencing reforms, which included the mandatory appointment of an attorney in the text of the statute. (Pen. Code, § 1172.6, subd. (c).)[2] Incarcerated individuals could not have been expected to review historical case materials and make complicated legal arguments about their liability for murder and attempted murder under the new laws. Without the right to counsel, the change in law would have been hollow. In the future, the

[2] The Legislature's decision to include of a statutory right to post-conviction counsel was strongly vindicated by the Supreme Court in *People v. Lewis* (2021) 11 Cal.5th 952. The Court rejected the arguments of some trial judges that they did not have to follow the text of the statute and appoint counsel upon the filing of a facially sufficient resentencing petition.

Legislature should be clear about the right to counsel in the text of the statute to ensure successful application of resentencing laws.

A Stakeholder Implementation Committee, Formed Prior to Effective Date of New or Amended Criminal Laws, Could Ensure Meaningful and Equitable Implementation.

Without leadership from experienced institutional stakeholders, many of the hurdles and challenges identified above have been left to be resolved piece-meal, via the adversarial process. Reaching resolutions through the adversarial process in individual courtrooms across California is slow, inefficient, and expensive; many of these challenges are better solved cooperatively. If identified early, some structural impediments can be removed and processes streamlined with required stakeholder meetings of judges from the Court of Appeal, supervising criminal judges from counties big and small, public defenders, district attorneys, the Attorney General and CDCR. Critically, the meetings should happen before the laws become effective, to ensure awareness of any new requirements and the opportunity to leverage available resources once the new laws roll out.

A statewide committee could also prepare trustworthy communications aimed at county judges, prosecutors and defenders, highlighting any new practices and procedures to expect. There could be recommendations for identifying types of cases that could be resolved without protracted litigation to ensure effective and uniform application of the new or amended laws. The stakeholder group could directly address historically problematic implementation issues. For example: Where can counsel get trial transcripts and how should they be shared with necessary parties? How should the CDCR and courtroom clerks schedule remote court appearances? What are the deadlines for appointment of counsel and setting hearings in court? Statewide guidance would also help lessen resource inequities between counties by providing information to counties without strong public defender systems in place and that have fewer court staff that can research and implement new procedures. As issues arise with implementation, committee members could solicit input from the front lines and periodically report back at meetings to address newly arising challenges.

CONCLUSION

OSPD commends the Committee for taking time to review implementation of new laws. Passing smart and data driven criminal legal reforms is critical, but without ensuring meaningful and equitable implementation actual systems change will not be achieved.

SB 1437/775: A SNAPSHOT OF IMPACT

Demographics

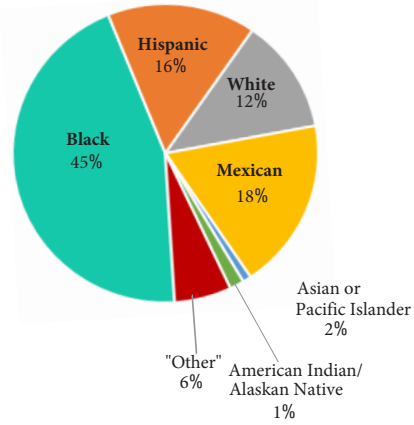
470 people have been resentenced[1]

95% of those resentenced were serving indeterminate or life without parole sentences[2].

10,380 years returned to individuals to care for loved ones and contribute to their communities[4]

$1.1 Billion in estimated incarceration cost savings to California taxpayers[5]

Racial and ethnic background of people resentenced[3]



Overview

In 2018, the Legislature began amending California's homicide laws to remedy the long-standing problem of people being convicted of murder and given lengthy prison sentences when the individual was not personally responsible for the loss of life and did not have the intent to kill.

SB 1437: Effective January 1, 2019, SB 1437 created **a legal path** for those convicted of murder under the old laws to ask a judge to resentence them to a lesser crime if they (1) **were not the person who took a life**, (2) **did not act with intent to take a life**, or (3) **were not a major participant** who acted with reckless indifference to life in a felony that resulted in a loss of life.

SB 775: Effective January 1, 2022, SB 775 allowed those with similarly invalid manslaughter or attempted murder convictions to seek resentencing to a more appropriate lesser crime.

Public Defense Pilot Program: The Budget Act of 2021 (SB 129) established the Public Defense Pilot Program through which the Legislature provided needed funding to counties for public defenders to represent people in 1437/775 hearings.

Impact on Our Communities

Savings to Taxpayers: There are many costs to Californians associated with incarceration. According to the Legislative Analyst's Office (LAO), California taxpayers pay **$106,131 per year**[6] for each person incarcerated in California. Given this figure, we estimate that SB 1437 and 775 have **saved California tax payers approximately $1.1 billion in incarceration costs.**

SB 1437/775 Provides Relief to Communities of Color: Approximately **87.5%** of the people resentenced under SB 1437 and SB 775 were **people of color**, with **Black Californians** comprising the largest share (45%). Most were serving indeterminate sentences (e.g., 25 years to life) and some were serving a life sentence without the possibility of parole.

SB 1437/775 Provides Relief to Families: About 47% of people incarcerated in state prisons in the U.S. are **parents to minor children**.[7] Parental incarceration can have deleterious psychological, academic, behavioral, and economic effects on children. Under SB 1437 and SB 775, approximately **10,380 years** have been returned to individuals to care for loved ones and contribute to their communities.

Impact to Public Safety: Research suggests that individuals released from a long prison sentence recidivate at a much lower rate than other populations. For example, according to CDCR, the three-year re-conviction rate for persons who previously served an indeterminate term was 3.2%.[8]

1-According to data received from the California Department of Corrections and Rehabilitation (CDCR) spanning January 1, 2019 - June 30, 2022
2,4,5-Based on calculations conducted by the Indigent Defense Improvement Division (IDID) on data received from CDCR.
3-Based on calculations conducted by IDID on a subset of CDCR data for which race/ethnicity was available (n=331).
6-Source: https://lao.ca.gov/policyareas/cj/6_cj_inmatecost
7-Bureau of Justice Statistics (2021) https://bjs.ojp.gov/library/publications/parents-prison-and-their-minor-children-survey-prison-inmates-2016
8-Based on findings in the Recidivism Report for Offenders Released from the CDCR FY 2015-16

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Impact of CDCR Initiated Resentencing
Penal Code 1172.1

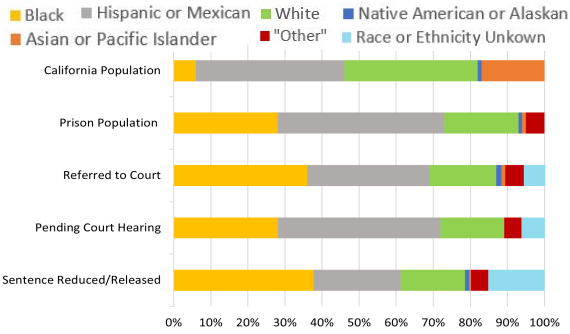
Snapshot

1,260 people referred for Court Action by CDCR[1]

414 people received reduced sentences or were released[2]

2,186 years returned to individuals to contribute to their communities[3]

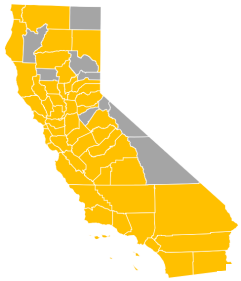
Racial and ethnic background of people referred[4]



$232 Million

in potential incarceration cost reduction[5]

48 counties represented in CDCR referrals[6]



Overview

Penal Code 1172.1 allows the courts to recall an incarcerated person's sentence at the recommendation of the Secretary of CDCR, jail administrators, and prosecutors.[7] Once this occurs, the court undertakes a new sentencing hearing, taking into consideration both the offense and the person's demonstrated efforts at rehabilitation while incarcerated. The purpose of PC 1172.1 is to reduce lengthy prison sentences of individuals who are no longer a risk to public safety.

Starting in 2018, a series of laws amended this statute and expanded its availability. In 2021, AB 1540 amended the statute to clarify that a resentencing hearing under this provision shall apply to all new laws and include the right to counsel upon a recommendation for recall.

Public Defense Pilot Program: The Budget Act of 2021 (SB 129) established the Public Defense Pilot Program, through which the Legislature provided needed funding to counties for public defenders to represent people in resentencing hearings under Penal Code 1172.1.

Impact

Benefit to Taxpayers: Between January 2019 and January 2023, 414 people were released or had their sentence reduced as a result of CDCR initiated resentencing. Consequently, a total of **2,186 years** have been saved in incarceration time. Estimated incarceration cost reductions range from **$32.8 million to $232 million.**[5] These cost reductions only include CDCR initiated proceedings. The true impact, including prosecutor initiated hearings, is greater.

Reducing the Use of Prisons: Over reliance on prison and prison overcrowding are important topics in California as the risks to health and safety, and the cost of lengthy sentences become more widely discussed. California has one of the highest populations of elderly prisoners.[8] Penal Code 1172.1 is an example of sentencing reforms that can help California to reduce prison size without increasing risk to public safety.

Addressing Harm to Communities of Color: People of color have long been disproportionately represented in California jails and prisons.[4] Penal Code 1172.1 begins to address some of that harm. About 76% of people CDCR referred to court for potential resentencing were people of color. **Black Californians** made up the largest share (36%), followed by **Hispanic or Mexican Californians** (33%).

Resourcing Public Defenders: Between January 2019 and January 2023, CDCR referred 1,260 people back to court. These referrals spanned 48 counties across California. Funding from the Public Defense Pilot Program is helping counties provide critical legal representation for individuals in these hearings and addressing backlogs.

1,2,3,6-Between Jan 2019-Jan 2023 according to data received from CDCR
4-Retrieved from the Vera Institute https://trends.vera.org/state/CA
5-The LAO estimates a marginal cost savings of $15,000 per released person per year and $106, 131 in average incarceration costs per year. See https://lao.ca.gov/policyareas/cj_inmatecost
7-Previously codified in PC 1170.03 and, prior to that, in PC 1170(d)(1).
8-https://www.prisonpolicy.org/blog/2020/05/11/55plus/

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Exhibit E

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March 7, 2023

COMMENTS TO COMMITTEE TO REVISE THE PENAL CODE

Andrew Gutierrez, Post-Conviction Supervisor,
Santa Clara County Office of the Public Defender

I am the post-conviction supervisor of the Santa Clara County Office of the Public Defender. I have been supervising and directly handling post-conviction sentencing matters from the beginning of the Covid-19 pandemic and through our recent criminal justice reforms—particularly the sentencing and resentencing reform statutes. I have been asked to give some comments regarding the exercise of judicial discretion in light of ameliorative changes to our sentencing and resentencing laws.

JUDICIAL DISCRETION – SENTENCING & RESENTENCING

Our judges historically maintained broad unguided discretion in terms of how they exercise discretion at sentencing. Outside the Rules of Court and our determinate and indeterminate sentencing schemes, *see e.g.*, PC § 1170 et seq., the key statute guiding a court's discretion is Penal Code section 1385. However, until recently Penal Code section 1385 provided little statutory guidance in terms of how precisely a court was to exercise that discretion. The statute simply provided for exercising discretion—*e.g.*, striking enhancements—so long as it was "*in furtherance of justice*." (Pen. Code § 1385(a).) But what, exactly, does that mean? Our state supreme court in 1998 pondered the same question—"*In Romero, we recognized that the 'concept' of 'furtherance of justice' within the meaning of Penal Code section 1385(a) is '"`amorphous.'"' [Citation] In so doing, we did no more and no less than we had to. Plainly, the words do not define themselves*." (*People v. Williams* (1998) 17 Cal.4th 148, 159-160.)

It can be argued that a judge's discretion under Penal Code section 1385 is no longer amorphous and should be guided by the text and spirit of recent criminal justice reform. Most significantly, **SB 81** amended Penal Code section 1385 by adding paragraph (c). Paragraph (c) of Penal Code Section 1385 provides that "*the court shall consider and afford great weight*" to enumerated mitigating circumstances. It also provides that proof of the presence of one or more of the mitigating circumstances "*weighs greatly in favor of dismissing the enhancement*," unless the court finds that dismissal of the enhancement would endanger public safety. "*Endanger public safety*" means there is a likelihood that

the dismissal of the enhancement would result in physical injury or other serious danger to others. (Pen. Code § 1385(c).)

AB 1540 (now codified at Penal Code section 1172.1) amended our general recall statute and did more than create certain procedural protections for defendants. It created a presumption in favor of recall and resentencing and added to the list of mitigating circumstances a court may consider, including pre-conviction factors. **SB 483** (now codified at Penal Code sections 1172.7 and 1172.75) provides for recall and resentencing if a specified 1 or 3-year prison prior enhancement was imposed. It also creates a presumption in favor of recall and resentencing and provides for consideration of post-conviction mitigating factors.

Significantly, both statutes require the court to apply any ameliorative changes in the law that reduce sentences or provide for judicial discretion so as to eliminate disparity of sentences and to promote uniformity of sentencing.

While SB 81, AB 1540 and SB 483 carry different presumptions and obviously differ in other respects, a court resentencing under either AB 1540 and/or SB 483 should not consider its discretion under those statutes in a vacuum. The recall and resentencing statutes are interrelated with a court's general exercise of discretion under Penal Code section 1385. As a consequence, exercise of judicial discretion under section 1385 will factor into many, if not most, recall and resentencing cases. Given the importance of section 1385, and its general applicability, it is vital that the language introduced by SB 81 is interpreted in a manner consistent with recent criminal justice reform.

IMPACT OF JUDICIAL DISCRETION

There is no question that recent ameliorative sentencing and resentencing reform have substantially altered the landscape of criminal sentencing. Courts, particularly in the resentencing context, are exercising discretion to strike enhancements and reduce sentence. This includes striking gun use enhancements, 5-year (Nickel) priors, and strike priors. These reductions have occurred largely in the wake of SB 81, AB 1540, and SB 483.

However, despite these reforms, there remains uncertainty in the language of some of the reform statutes that could use clarification. Such clarification would go a long way in advancing the spirit and intent of the sentencing reform laws SB 81, AB 1540 and SB 483.

RECOMMENDATIONS

1. SB 81 CLARIFICATION. Clarify how courts are to apply the "great weight" requirement of SB 81. PC 1385(c) provides that the court "shall consider and afford great weight to evidence offered by the defendant to prove that any of the mitigating circumstances in subparagraphs (A) to (I) are present." (Pen. Code § 1385(c).) Proof of the presence of one or more of these circumstances "weighs greatly in favor of dismissing the enhancement, unless the court finds that dismissal of the enhancement would endanger public safety." (*Id*.)

It is not clear in practice how a trial court is to apply the great weight requirement. One court has ruled that the language "erects a rebuttable presumption that obligates a court to dismiss the enhancement unless court finds dismissal would endanger public safety." (*People v. Walker* (2022) 86 Cal.App.5th 386.) The concern remains that as currently worded this requirement will amount to a talismanic phrase echoed at sentencing but devoid of true import. One suggestion is to adopt the approach taken by the California Supreme Court in *People v. Martin* (1986) 42 Cal.3d 437.[1]

In *People v. Martin* (1986) 42 Cal.3d 437 the state's high court found that the trial court did not give "great weight" to the parole board's notification that a particular sentence would result in disparate sentencing. Specifically, it observed that a trial court does not meet this obligation where the record shows only that the court "seriously considered" the Board's determination of disparate sentencing. Rather, to afford "great weight" means that the trial court should have followed the Board's disparate sentence finding in the absence of "*substantial evidence of countervailing considerations of sufficient weight to overcome the recommendation*." (*Martin, supra,* at p. 448.)

In the context of Penal Code section 1385(c), where the court is required to both "consider and afford great weight," (P.C. § 1385(c)(2)), to enumerated mitigating circumstances when determining whether to dismiss an enhancement, the court should strike the enhancement "*in the absence of substantial evidence of countervailing considerations of sufficient weight" to overcome dismissal of the enhancement*."

Admittedly, this language from *Martin* is not a model of clarity. Thus, the following suggestions may also be considered:

[1] The author and sponsor of SB 81, Senator Nancy Skinner, clarified that in establishing the "great weight" standard in SB 81 for imposition or dismissal of enhancements [Penal Code §1385(c)(2)] it was her intent that this great weight standard be consistent with the case law in California Supreme Court in People v. Martin, 42 Cal.3d 437 (1986). (California Senate Journal, 2021-2022 Reg. Sess., No. 121, California Senate Journal, Sep. 10, 2021, p. 60.)

A. Clarify that "to afford great weight" means more than "seriously consider."

B. Clarify that a court shall strike the enhancement where "substantial evidence of countervailing considerations" is lacking.

C. Clarify that substantial evidence of countervailing considerations is not established *solely* by reference to the commission of the underlying offense.

In some cases, particularly resentencing cases, many years have elapsed since commission of the offense. The static fact of the conviction should not take on outsized importance to the exclusion of a person's subsequent growth and maturity. (See e.g., *In re Lawrence* (2008) 44 Cal.4th 1181, 1220 ["In other words, contrary to the Attorney General's contention that if the circumstances of the commitment offense are egregious, those circumstances will provide some evidence of current dangerousness in perpetuity, it is evident that the Legislature considered the passage of time—and the attendant changes in a prisoner's maturity, understanding, and mental state—to be highly probative to the determination of current dangerousness.].)

2. SB 81 CLARIFICATION. **Clarify that courts are required to consider the mitigating circumstances listed under Penal Code section 1385(c)(2) as part of its consideration of whether dismissal would endanger public safety**. Several courts have held that the mandatory dismissal language contained within two of the mitigating circumstances—where multiple enhancements are alleged in a single case and where application of the enhancement would result in a sentence exceeding 20 years—is not strictly mandatory. In other words, the court retains the same discretion as it applies to the other seven mitigating circumstances that do not have the mandatory dismissal language. (*People v. Lipscomb* (2022) 87 Cal.App.5th 9; *People v. Walker* (2023) 86 Cal.App.5th 386; *People v. Anderson* (2023) 88 Cal.App.5th 233; *People v. Mendoza* (2023) 88 Cal.App.5th 287.)

In reaching this holding, however, these courts concluded that "**consideration of the mitigating factors in section 1385(c)(2) is not required if the court finds that dismissal of the enhancement would endanger public safety** . . .." (*Mendoza*, *supra*, 88 Cal. App. 5th 287, 304 Cal. Rptr. 3d 624, 631.) In light of these holdings courts can short circuit SB 81 and avoid having to consider any mitigating circumstances—even where some are plainly relevant to the public safety determination. These include whether the current offense is connected to mental illness, (P.C. § 1385(c)(2)(D)); whether the current offense is connected to prior victimization or childhood trauma, (P.C. § 1385(c)(2)); whether the current offense is not a violent felony, (P.C. § 1385(c)(2)(F)); whether the defendant was a juvenile when they committed the current offense or any prior, (P.C. § 1385(c)(2)(G); and though a firearm was used, it was inoperable, (P.C. § 1385(c)(2)(I)).) These mitigating circumstances can all have direct bearing on *current* risk.

Section 1385(c) further provides for how a court may conclude that a defendant's mental illness was connected to the offense. (P.C. § 1385(c)(5). If the court concludes that mental illness was connected to the offense but that the mental illness is now well-controlled and treated—or has otherwise abated—the risk to public safety would be diminished. Section 1385(c) likewise defines "childhood trauma" and "prior victimization." (P.C. § 1385(c)(6).) Assuming the court finds these mitigators true, they can contextualize the commission of the offense and support an argument that a defendant, years removed from his or her victimization/trauma, poses no *current* endangerment to public safety as defined by section 1385.

The Administrative Office of the Courts issued a report titled "*The Effects of Complex Trauma on Youth*" in 2014. (https://www.courts.ca.gov/documents/effects-complex-trauma-on-youth-briefing.pdf.) While that report noted the impact of trauma on a child and associated risk of delinquency, it also noted that children are resilient. In other words, while the trauma youth suffer may explain their criminal conduct, their resiliency bodes well for their future development and compliance with social norms, standards, and laws.

Finally, it has long been understood that youth and childhood trauma are factors that should be considered *when determining current risk to public safety*. The youthful offender parole scheme is premised on that foundation. (Pen. Code § 3051.) Similar to section 1385, the Board of Parole Hearings is required to give "great weight" to the diminished culpability of youth, the hallmark features of youth, and subsequent growth and increased maturity when determining risk to public safety. (*People v. Franklin* (2016) 63 Cal.4th 261, 277.)

3. SB 81 CLARIFICATION. Clarify that the term "enhancements" in Penal Code section 1385(c) apply to prior strikes alleged under the Three Strikes law. SB 81 added paragraph (c) to Penal Code section 1385 empowering and guiding a court's discretion to strike enhancements. "Notwithstanding any other law, the court shall dismiss an enhancement if it is in the furtherance of justice to do so, except if dismissal of that enhancement is prohibited by any initiative statute." (Pen. Code § 1385(c)(1).) To avoid unnecessary litigation and ensure that the goals and objectives of SB 81 are fully implemented, Section 1385 should be amended to clarify that "enhancements" includes strike priors under the Three Strikes law.

If courts determine that prior strike convictions are not "enhancements" within the meaning of SB 81, it would reduce court discretion for a large demographic serving lengthy and disparate sentences. Three-Strikes and Two-Strikes sentences affect a large portion of incarcerated individuals. People of color are over-represented among persons serving sentences enhanced by the Three Strikes law. Use of strike enhancement sentencing varies widely depending on the county one resides. ("Three Strikes in California," California Policy Lab, Aug. 2022, available at

https://www.capolicylab.org/wp-content/uploads/2022/08/Three-Strikes-in-California.pdf.)

There is no legal impediment to this proposed statutory clarification. The California Supreme Court has long held that notwithstanding the Three Strike law our courts retain discretion under Penal Code section 1385, subdivision (a), to strike a prior strike alleged under the Three Strikes law. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 [Three Strikes law did not remove court discretion to strike a prior conviction under Penal Code section 1385(a)].) Unlike special circumstances and One-Strike law sentences nothing in the Three Strikes law specifically removes court discretion to strike prior convictions under Penal Code section 1385. Thus, this clarification would not conflict with the Three Strikes law.
The language of Penal Code section 1385, paragraph (c)(1) could be clarified as follows:

> *Notwithstanding any other law, the court shall dismiss an enhancement, including a prior conviction alleged under Penal Code sections 667, subdivisions (b) through (i), inclusive, 1170.12, if it is in the furtherance of justice to do so, except if dismissal of that enhancement is prohibited by any initiative statute.*

Or, also as a clarifying amendment, paragraph (c)(1) of Penal Code section 1385 could be modified as follows:

> *Notwithstanding any other law, the court shall dismiss an enhancement if it is in the furtherance of justice to do so, except if dismissal of that enhancement is prohibited by any initiative statute. The term "enhancement" under this section includes a prior conviction alleged under Penal Code sections 667, subdivisions (b) through (i), inclusive, 1170.12.*

4. SB 567 AMENDMENT. **Codify a set of aggravating factors that juries can use when a court is determining whether to impose a high term on a triad sentencing scheme**.

Many offenses in California carry a low, middle and high term. These are called triad offenses. SB 567 amended Penal Code section 1170 to make the middle term the presumptive sentence. As a consequence, and to comply with the Sixth Amendment to the United States Constitution, before a court may rely upon an aggravating fact in sentencing, such fact must be proved at trial beyond a reasonable doubt to a jury or admitted by the defendant. (*Cunningham v. California* (2007) 549 U.S. 270; relying on *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [held, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."].) Accordingly, a court may impose a sentence exceeding the middle term only when there are circumstances in aggravation of the crime justifying imposition of the high term, and the facts underlying those

circumstances have been stipulated to by the defendant, or have been found true beyond a reasonable doubt at trial by the jury or judge in a court trial. (Pen. Code § 1170(b).)

There exists, however, no *codified* set of aggravating factors to make this determination. Courts are instead using the set of aggravating factors created by the Judicial Council under California Rules of Court 4.421. These rules were not designed for use by a jury. They were designed as intentionally broad guidelines for judges. "Neither the DSL nor the Judicial Council's sentencing rules were drafted in contemplation of a jury trial on aggravating circumstances." (*People v. Sandoval* (2007) 41 Cal.4th 825, 848; see also *People v. Thomas* (1979) 87 Cal.App.3d 1014, 1023-24 ["Obviously the list of "circumstances in aggravation" in rule 421 is not intended to give people advance warning of prohibited activities; rather it is designed to provide guidance to sentencing judges."].)

The California Supreme Court recognized the problems inherent in submitting the Rule 4.421 aggravating factors to a jury:

> Moreover, as noted above [internal citation omitted], *the aggravating circumstances listed in the rules were drafted for the purpose of guiding judicial discretion and not for the purpose of requiring factual findings by a jury beyond a reasonable doubt*. Many of those circumstances are not readily adaptable to the latter purpose, because they include imprecise terms that implicitly require comparison of the particular crime at issue to other violations of the same statute, a task a jury is not well-suited to perform. For example, without some basis for comparing the instant offense to others, it would be difficult for a jury to determine whether "[t]he victim was *particularly* vulnerable," or whether the crime "involved ... taking or damage of *great* monetary value" or "a large quantity of contraband." (Cal. Rules of Court, rule 4.421(a)(3), (9) & (10), italics added.)

(*Sandoval*, *supra*, 41 Cal. 4th 825, 849, internal citation omitted, italics added.)

Codified aggravating factors applicable to determinate sentences do exist but they are strewn throughout the penal and other codes. Some of these are confined to a specific offense or class of offenses; others are more generally applicable. (See e.g., Pen Code §§ 136.1(b) [forceful dissuasion of witness], 243.4(i) [sexual battery, existence of employment relationship], 502.9/515/525 [larceny, embezzlements, extortions – elderly victim], 186.22(b)(2) [gang-related crime near school], 422.76 [hate crime], 1170.7 [robbery], 1170.71 [obscenity and minors], 1170.72 [drugs and minors], 1170.73 [quantity of drugs], 1170.74 [type of methamphetamine], 1170.76 [minor relationship], 1170.78 [retaliatory arson], 1170.8 [crimes involving churches], 1170.84 [confinement of serious felony victim], 1170.85 [assaultive crimes for witness dissuasion], 1170.86 [felony sex crimes near schools, 1170.89 [knowledge of firearm as stolen].)

Any crafting of a codified set of aggravating factors should be suitable for a jury and comply with basic constitutional principles.

A. Vague and/or overly broad factors should not be included—at least without further definitional guidance. For example, what does it mean for a crime to involve "*great violence*," (Rule 4.421(a)(1)), or that a "*victim was particularly vulnerable*" (Rule 4.421(a)(3).) For some aggravating factors, existing decisional law may provide definitional guidance.

B. **Principles of unanimity** should be followed so that a jury is required to unanimously agree on a particular aggravating factor. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) Related aggravating factors should not be lumped together as if they constituted but one factor. For example, Rule 4.421(a)(1) lists as an aggravating factor – "*The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness.*" Given the Sixth Amendment concerns underlying factual findings and punishment, the jury should be required to make a unanimous finding as to a specific aggravating factor—not a general unanimous finding as to an amalgamation of related factors.

Exhibit F

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COMMENTS TO COMMITTEE TO REVISE THE PENAL CODE

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Since 2019, I have worked on Special Projects for San Diego County Public Defender – from PC3051 Youth Offender Parole Eligibility Packets to AB1950 Probation Modifications, to Penal Code 1172.7 & 1172.75 prison prior resentencings. These changes in the Penal Code have been a welcome addition to the myriad of sentencing reforms in California, allowing Courts to even the playing field for someone sentenced today, with a person currently serving a sentence for the same crime from years past, while also giving a person who has done well and made steps to rehabilitate themselves in prison the opportunity to show that performance and growth to the original sentencing court in the hopes of a chance at release.

As with any changes in the law, there are always bumps in the road, and I submit these comments to speak today from the ground floor – the good, the bad, the unintended, and suggestions to improve outcomes more in line with the intent of the legislation. As a preliminary note, San Diego County has – and continues to – lead the way in many respects. San Diego Superior Court Judge Lisa Rodriguez, Court Clerk Staff, and Mark Amador and his resentencing team at the District Attorney office have collaborated with my team at the Public Defender to make these projects work; many of the things I mention today are issues we addressed head on at an early stage in San Diego Superior Court. However, in numerous trainings and conversations I have had with colleagues, many of the issues I describe below continue to provide roadblocks to the intended reforms in other counties.

The main points I would like to bring to the Committee's attention, and I will expand on in my testimony are the following related to prison prior resentencing and other post-conviction matters:

1. Difficulty obtaining the necessary documents and visitation with clients housed within CDCR
2. Clarification on eligibility and scope for Prison Prior resentencing hearing cases under SB483/PC1172.7/PC1172.75.
3. Clarification on processes for handling, calendaring and final processing of resentencing hearing cases.

DIFFICULTY OBTAINING THE NECESSARY DOCUMENTS AND VISITATION TO EFFECTUATE NEW LAWS AND THE LEGISLATIVE INTENT

Background Information

When a person is in the custody of the Department of Corrections, their record of behavior, location, interactions, credits, etc. is housed in a repository colloquially referred to as their "C-File". Historically, once a convicted person was sent to state prison from local custody, that meant, unless there was an appellate proceeding or other extraordinary occasion, there was minimal attorney visitation or need for records to be produced outside of the institutions. These visits or requests for access for outside litigation of any sort would be facilitated by the designated Litigation Coordinator's Office at the institution. While the Litigation Coordinator still handles these requests, the current volume of requests for visitation and records is anything but minimal.

Background C-File Request Process: In order to receive a copy of a client's C-File, the client must sign a release form, and that form is submitted by the requestor to the Litigation Coordinator for the particular institution. Once received and processed by the Litigation Coordinator, an invoice is prepared and sent to the requestor. Only upon receipt of payment by check or money order, the C-File is sent via mail or courier to the requestor on paper or on CD. This process can take several months, depending on the institution.

Background Telephone/Video/Visitation Process: In order to request a visit – by phone, video or in person – the process is highly differentiated by institution. The minimum requirements are filling out a one-page form [106(a)], accompanied by a letter on attorney

letterhead. This process can take between a week to more than a month, depending on the institution.

Impact on CDCR records and visitation processes by new resentencing laws: When a person has been deemed eligible for resentencing by law, whether it be prison prior resentencing laws or any others, or they believe they should be eligible for relief under a proposed set of changed circumstances, the need for access to attorney-client visits and C-File records becomes important. With myriad new sentencing laws that have come through in the last several years, many of which implicitly or explicitly require an analysis of a person's record while housed at CDCR, the requests for both visitation with clients, and need for production of C-File records has increased exponentially. In many instances across the state, prosecutors and judges have refused to consider a modification of sentence without a review of such documents.

As a result of this large increase in requests, attorneys and staff have been met with significant delays in records requests, which delays the handling of the case in court. The responsiveness of the Litigation Coordinator is highly institution dependent and can vary between weeks to several months for a response to a request.

Similarly, as a result of the large increase in requests for attorney-client confidential visits, there have been sometimes significant delays in scheduling a phone/video visit. These delays can be due to resource (phone/video) availability, responsiveness of the Litigation Coordinator Office, or background processing if not on the Gate Clearance list.

Costs of Requesting C-Files: While an individual attorney requesting a record will be required to pay anywhere from $9.00 to $17.00 for production of a C-File may not seem like a large amount, the prison prior resentencings are mainly handled by county-level public defender offices. Speaking for San Diego County, the number of resentencings on just the prison prior resentencings are over 600 clients, which can become very costly. In addition, the records are only released *after* payment by check or money order is received; this becomes very difficult for a government organization to facilitate these payments in advance via check or purchasing money orders.

Positive Steps CDCR has taken

- Statewide Gate Clearance List: A few years previous, CDCR instituted a program to background gate-clear certain individuals from Public Defender Offices for quicker access to visits. This process is done once per year at the State level and has assisted in speeding up approvals on background.

- Getting Out App[1]: CDCR has worked with outside contractors to make tablets or email/video capability available to clients at certain facilities. The availability of this resource is facility dependent, and does include, while nominal, a cost-component to both sides of the contact. While this resource is good for families, friends, and loved ones, this is not suitable for attorney client communication as it is not confidential in nature.

Recommendations

1. When a C-File is prepared and made available, the C-File records should be made available at no cost to the representing party, provided the option is given for secure electronic delivery of the C-File. This secure electronic delivery should occur using encrypted email, or through secure file sharing tools, such as is currently used by the Board of Parole to provide access to records for appointed parole counsel.
2. CDCR should allow, through similar means as the current public-facing GTL app, a confidential portal for communications between attorneys, experts, and clients. This can be through the GTL app, or another provider. This would cut down the frequency of US mail and Litigation Coordinator-scheduled visits needed with clients.
3. CDCR should be given additional funding to increase the resources of the Litigation Coordinator offices to properly respond to counsel and court requests, to effectuate the intent of the Legislature in resentencing cases.

CLARIFICATION ON ELIGIBILITY AND SCOPE FOR PRISON PRIOR RESENTENCING HEARING CASES UNDER SB483/PC1172.7/PC1172.75.

Background Information

Prior to January 2020, if a person had been committed to prison, and was convicted of a subsequent felony and sentenced to prison, or if they had a prior drug prison commitment, with certain exceptions, they would be required to serve an additional year for each prior prison commitment or three years for a prior drug prison commitment. This is referred to as a "prison prior" or "drug prior" respectively. In January 2018 and January 2020, SB180 and SB137, respectively, repealed those priors being used for pending and future cases, under most circumstances. Under SB483 (now PC1172.7/PC1172.75), the Legislature deemed that any prison prior imposed prior to January 1, 2020 (or 2018 for drug priors) are now invalid, and as a result the sentence itself was now invalid. Further, CDCR was

[1] https://www.gettingout.com/

ordered to identify all those within its custody, within those parameters, to the courts for full resentencing. The means to identify those individuals was through CDCR records that are generated from the court's Abstract of Judgment upon intake in CDCR. These resentencings must be completed by December 2023.

Abstract of Judgment: When a person is sentenced by a trial court, the clerk of the court must prepare an "Abstract of Judgment". This is a form that is a standardized document that allows the court to properly communicate the material facts – charge, term of years, fines, etc. – to CDCR. Under several different legal theories, a portion of the term of a person's sentence may be "stayed" or the "punishment stricken" as a part of the plea agreement or sentencing by the court after a trial, and that is reflected on the Abstract of Judgment.

To the Legislature's credit, the language in PC1172.7/75 is very specific in drilling down how the information was to be transmitted to the court. However, in its specificity, the consequence of that is interpreted as exclusion by some courts. For example, several courts have refused to hear eligible resentencing cases *unless* that case was included on the list provided to them by CDCR. This created situations where paperwork was misfiled or mislabeled by CDCR, but a person is actually eligible based on local court records. In other words, a person could be eligible for relief under PC 1172.7/75, but inadvertently left off the CDCR list of "eligible" persons.

Disputes over eligibility

"Stayed/Punishment Stricken": There is currently much dispute regarding eligibility for the sentencing reforms passed by the Legislature. In fact, for example, entire email listserv's have been dedicated to coordination of the defense bar regarding the felony murder rule resentencing hearings. Prison prior resentencing has been no different. Specifically, there has been dispute over whether a person with a prison prior that has been "stayed" or "punishment stricken" by the original sentencing court would be eligible for relief. To the credit of CDCR, they placed the individuals on the list to the courts as ordered by the Legislature. Some courts have ruled that priors that are "stayed" or "punishment stricken" are eligible, some have ruled that they are not. This dispute has caused immense litigation in most counties throughout the state, and the issue is currently up in front of the appellate courts on several test cases.

Parole/PRCS: When a person nears the end of their prison term in CDCR, they are released on either Parole or Post-Release Community Supervision ("PRCS"). The time on Parole or PRCS is affected by their custody credits – i.e., they would be released on Parole or PRCS

earlier after a resentencing hearing. Those individuals that are already released on parole or PRCS are not currently "in the custody of" CDCR, but there is a question regarding whether they are "serving a sentence".

It is undeniable that a person who is on parole or PRCS is still subject to the authority of CDCR or the local County probation department, and still is in jeopardy of losing their liberty for a violation and being returned to custody. Yet, those individuals are not part of the identified list provided by CDCR under the current language of the statute.

Recommendations

1. While the Legislature prescribed a definite period of time to complete prison prior resentencings, the litigation over eligibility may not conclude by then. In other circumstances, due to communication issues or language barriers, someone may not have received notification of their eligibility by counsel. PC1172.7/75 (and any other similar time-specific legislation regarding resentencing) should be amended to require the court to do its part based on the CDCR provided eligibility list by the December 2023 date but allowing for continued requests for resentencing after the December 2023 date by an otherwise eligible person.
2. Amend Penal Code 1172.7/75 (and other resentencing statutes) to be clear that an individual under current Parole or PRCS supervision, and having an eligible case for resentencing, is eligible for resentencing under the statute.
3. Amend Penal Code 1172.7/75 to be clear that the previous sentence is fully vacated, and that the person is to be sentenced without regard to any previous rulings at a prior sentencing hearing.

CLARIFICATION ON PROCESSES FOR HANDLING, CALENDARING AND FINAL PROCESSING OF RESENTENCING HEARING CASES.

Background Information

Penal Code 1172.7/75 and other related resentencing cases spell out with differing levels of specificity, how a case should be calendared and handled by a court. This is likely to give deference to individual counties and courtrooms the flexibility to do what works for them. The intention is applauded, and many courthouses may appreciate this flexibility. The prison prior resentencing law prescribed that the list be given to the courts, and the courts must determine eligibility. If eligible, counsel will be appointed, and the sentence must be recalled, and resentenced on or before the prescribed dates.

What worked in San Diego County for SB483/PC1172.7/75

San Diego enjoys a collaborative atmosphere among its court community and justice partners. In San Diego County, key members of those justice partners convened upon notice of the new law being passed; this included the Public Defender, District Attorney, and Superior Court, including Court Operations Clerks. It was decided that the cases would be handled through a central courtroom, unless the original sentencing judge requested jurisdiction OR the client requested the original sentencing judge hear their case. Upon receipt of the CDCR eligibility list, it was shared amongst the parties, and procedures were implemented for quick appointment of counsel and setting of rolling status dates weekly on Fridays to review and attempt to come to a stipulated agreement on sentencing.

Upon receipt of the C-File from CDCR, if defense counsel intended to use it in the resentencing hearing, it was shared with the District Attorney and Court for review. If an agreement could be reached, the Public Defender prepared a stipulation, presented it to the court, and the client was sentenced without a full rehearing or argument. If no agreement could be reached, the case was either continued for further information gathering (read: get the C-File if not received yet) or set for a full resentencing hearing where the client would be produced on video or in person at their request. The District Attorney took on the process of submitting the Order to Produce the client for the sentencing hearing.

Upon resentencing, the court clerk prepared the Amended Abstract of Judgement, which was sent to the appropriate authorities at CDCR and electronically CC'd to all parties to keep a proper record. This collaborative process between the parties has resulted in less appearances, less litigation, and more time spent on providing better outcomes for the clients.

Recommendations

1. Include in future resentencing legislation that a centralized judge and staff handle resentencing, unless the defendant requests hearing by the original sentencing judge, if available. This will prevent disparate rulings on novel matters of law, and also centralize processes to provide quicker appointment of counsel, better communication amongst justice partners, and more efficient and consistent case handling.
2. Include in future resentencing legislation that the Abstract of Judgment be prepared and transmitted to CDCR or the agency supervising the client (Parole/PRCS/Sheriff), if the contemplation is that it will be "time served" within

30 days of the sentencing hearing, the document should be transmitted within 24 hours of the sentencing hearing. This is in line with the recommendations of the Office of the State Public Defender, Indigent Defense Improvement Division letter from Director Galit Lipa provided to this Committee on 10/24/22.

3. Include in future resentencing legislation a requirement to meet and confer, similar to civil proceedings, prior to setting of a full resentencing hearing.
4. Include in future resentencing legislation that County agencies may be reimbursed for additional work performed on these new legislative initiatives.

CONCLUSION

California continues to be a leader sentencing reform. Applying what we have learned, we can make the process efficient and equitable for all parties on future wide-scale resentencing efforts. Consideration of these recommendations as well as that of my colleagues, will benefit of the Courts, Community Members, Justice Partners and, most of all, the Clients.