

CALIFORNIA SENTENCING AND CORRECTIONS: SIGNIFICANT ISSUES

**Introduction**

This memorandum aims at a neutral description of the institutional challenges now facing California in the area of sentencing and corrections; the immediate legal constraints under which the state is operating; and the range of legislative and administrative proposals now under public discussion to solve these issues. It is not intended to cover the entire universe of issues in the sentencing and corrections field that confront California law and policy makers; it is intended as a rough sketch to serve as a starting point for discussion.

***1. The Current State of Litigation and Legislation***

Federal Courts

California is the Defendant in a several federal constitutional lawsuits challenging unconstitutional conditions in the California prisons, and is subject to continuing and evolving injunctive decrees in the following cases:

*Madrid v. Gomez* (U.S. District Judge Thelton Henderson). Conditions at California's "super-maximum" Pelican Bay State Prison have been subject to injunctions aimed at eliminating excessive force, improving health care and removing prisoners with mental illness from the Security Housing Unit. The Pelican Bay facility is subject to monitoring by a court-appointed special master. The case is reported at 889 F.Supp. 1146 (N.D. Cal. 1995).

*Plata v. Davis* (U.S. District Judge Thelton Henderson). In this class action lawsuit, prisoners alleged that California officials inflicted cruel and usual punishment by being deliberately indifferent to serious medical needs. A settlement agreement filed in 2002 requires the California Department of Corrections to completely overhaul its medical care policies and procedures, and to pump significant resources into the prisons to ensure timely access to adequate care. In October 2005, the judge ordered that California's prison medical care system be placed under the control of a court-appointed receiver. On Tuesday May 25, the receiver asked the judge to give him the power to recruit and hire prison guards.

*Prison cap cases* (U.S. District Judges Thelton Henderson and Lawrence Karlton). In a number of prisoners' rights action suits, plaintiffs have asked the federal courts to impose a cap on the number of prisoners who can be held in California prisons.

In December 2006 Judge Karlton declined to grant that request, giving the state six months to bring the system into compliance with the Eighth Amendment to the U.S. Constitution. A hearing is scheduled in that matter for June 4, 2007.

### State Court

In November 2006, having declared a state of emergency for California's overcrowded prison system, Governor Schwarzenegger began transferring inmates to private facilities in other states. Almost immediately, the California Correctional and Peace Officers Association filed suit, challenging the policy as violating the Emergency Services Act and the state Constitution. On February 20, 2007, Sacramento County Superior Court Judge Gail Ohanesian agreed, halting the transfers. The matter is currently on appeal. In the mean time, the Legislature and Governor joined to enact a measure providing the Governor with authority to transfer inmates out of state, voluntarily or involuntarily. Whether the statute is sufficient to overcome the judge's rulings is an open question.

### The *Blakely* Issue

In *California v. Cunningham*, the Supreme Court of the United States declared that the triad sentencing system in California violated the Sixth Amendment jury trial right announced in *Blakely v. Washington*. At issue in *Cunningham* was California Penal Code § 1170(b), which states that when the applicable criminal statute specifies three possible base sentence terms ("the triad"), the court must order imposition of the middle term unless she finds that there circumstances in aggravation or mitigation (in which case she may impose the upper or lower term of the triad). In determining whether there are aggravating or mitigating circumstances, the judge is permitted to consider a variety of factors. The majority of felonies in California have sentencing triads assigned to them by statute (the felonies that carry potential life terms instead of triads, including most homicides, are not affected by the ruling). The Court ruled in *Cunningham* that § 1170(b) establishes the middle term of the sentencing triad as the statutory maximum sentence; therefore, it held, a sentencing judge may not constitutionally impose a base term higher than the middle term unless she does so on the basis of facts that have either been agreed to by the defendant or formally alleged by the state and found by a jury to be true beyond a reasonable doubt. In response, the state legislature enacted SB 40, which attempts to achieve compliance with the Sixth Amendment by giving judges discretion to choose the base term from among the three possibilities set forth in the triad.

### AB 900: The Public Safety and Offender Rehabilitation Services Act of 2007

This year the legislature passed, and the Governor signed, the Public Safety and Offender Rehabilitation Services Act of 2007. The measure seeks to head off federal court action, including the possible imposition of a prison population cap and the potential of a federal receivership. The reform package contains infrastructure funding for approximately 40,000 new beds in state prisons, and also mandates 13,000 county jail beds to address overcrowding issues in local detention facilities, in addition to resources for 40,000 state beds. AB 900 also contains a strong mandate that the CDRC implement

new rehabilitation programs and other mechanisms to enhance reentry for inmates leaving the system. The reform package does not include support for adult probation services, a Sentencing Commission structure, or changes to the parole system. It is reported that these elements will be given further consideration outside of the reform deal approved today.

### SB 110

This bill would state legislative findings and declarations regarding criminal sentencing laws and policies, specifically that: (1) there are more than 1,000 felony sentencing laws and more than 100 felony sentence enhancements across the California Codes; (2) sentences for similar crimes can vary significantly by county and courtroom; (3) states with sentencing commissions have reduced overall crime rates by increasing penalties for the most dangerous offenders and expanding options for community-based sanctions for certain low-level offenders; and (4) California currently lacks a reliable and comprehensive system for collecting and analyzing data related to current and historical sentencing practices. The bill would create the California Sentencing Commission, chaired by the Chief Justice of the California Supreme Court, and mandated to develop and implement a new sentencing system by devising policies that would go into effect unless rejected by the Legislature by statute.

### AB 160

This bill would establish the California Sentencing Commission, with specified membership and terms, to devise sentencing guidelines, as well as a Judicial Advisory Committee composed of judges, to assist the commission. The proposed commission would be required to submit to the Legislature, on or before January 1, 2009, a report containing sentencing guidelines. These guidelines would become effective on May 1, 2009, unless the legislature provided otherwise. The commission would be required to report to the Legislature biannually on revisions or modifications to the guidelines, which would become effective on May 1 of that year unless the legislature provided otherwise. The bill would provide that it would not affect sentences established by an initiative adopted by the voters at a statewide election.

## **2. *A Diagnosis of Incarceration in California***

Most agree that the legal, political, and economic challenges facing California sentencing and corrections are related to a sheer problem of numbers of prisoners relative to capacity, as well as to administrative and cost inefficiencies in managing the inflow and outflow of prisoners.

### ***The Basic Numbers***

California's state prison population currently is at an all-time high with approximately 180,000 inmates housed in facilities designed to hold half that. Until the

1980s, the inmate population grew fairly slowly, by an average of 500 inmates a year. From 1980 to 2006, the population rose dramatically, more than 600 percent, adding an average 5,500 inmates a year.

Beginning in the 1970s the state began a building boom that lasted through 1997. The State added 21 prisons and more than 120,000 inmates. One additional prison opened in June 2005, adding nearly 3,000 beds. Nevertheless, as of November 30, 2006, California's 33-prison system was operating at 200 percent of the design capacity. Approximately 19,000 offenders are double-and triple-bunked in dorms, hallways and classrooms.

In addition, California prison population appears to be anomalously violent compared to that of other states. California prisons have nearly twice as many assaults as the Texas prison system and almost three times as many assaults as the federal prison system. Inmates not only assault other inmates, each year hundreds of staff are seriously assaulted by inmates. During a recent three-year period, the Legislative Analyst's Office reported that 1,700 staff health and workers' compensation claims were filed for injuries resulting from inmate violence. California also has higher prison homicide and suicide rates than the U.S. average. This in part is attributed to California's overcrowding, but also is a result of its violent prison gang culture. Additionally, data indicate that suicide and homicide rates increase when an inmate population ages and lengths of sentences increase, both factors which characterize California's inmate population.

### ***Costs***

At the beginning of the building boom in the early 1980s, adult and youth corrections accounted for 4 percent of California's General Fund expenditures at \$1 billion per year. Today, it represents 8 percent of the total General Fund, approximately \$9 billion, and continues to grow. Governor Schwarzenegger has proposed a budget of approximately \$10 billion for 2007-08.

### ***The Parole Factor***

In terms of the ratio of prison inmates to population or the ratio of incarceration rates to crime rates, California is roughly at or just above the average for the 50 states. The most striking anomaly in the California statistics is another factor--recidivism, where, by one measure, its 70 percent recidivism rate places it well atop the nation. But defining the phenomenon of recidivism is a complex matter because in California the key "input" by which recidivism manifests itself is the parole revocation process.

On any given day, 6 out of 10 admissions to California prisons are returning parolees. California is one of just two states that place every felony offender on parole and the only state where parole can last three years – in some cases longer than the actual prison term served. In 2005, 62,000 parolees were returned to prison for parole violations and served, on average, a four-month prison term. Although parole violators cycle through the system quickly, they further burden an already stressed intake system and add

to the prison overcrowding crisis, particularly in the State's reception centers, which are some of the most dangerous and severely overcrowded facilities.

Because parole violators serve such short sentences, many never move out of the reception center before being released again. As a result, reception centers no longer serve their original purpose – to quickly process and classify incoming felons and recommend placement in an appropriate facility. Reception centers should return to their original purpose.

The decision to send a parole violator back to prison for an additional sentence is made not by a judge, but by a correctional official – a parole agent, a parole supervisor or a deputy commissioner at the Board of Parole Hearings. Criminologists and academic experts have coined the term “back-end sentencing” to describe the parole revocation process. And not only are back-end sentences determined by corrections officials instead of judges, the standard of evidence used is much lower than would be required in a court of law.

The parole revocation process is frequently used to respond to new and serious criminal behavior by parolees. In 2000, the most recent year for which data is available, more than 47,000 parolees were returned to custody on a parole violation for serious criminal activities. These serious parole violators served an average of five months for criminal activities that included homicides, robberies and rapes.

### **3. *Local Corrections and Judicial Discretion***

While judges have very little discretion when sentencing offenders convicted of serious felonies, they do have sentencing options for many of the State's low-level offenses. These options include probation, county jail, and state prison.

If mandatory sentencing laws and sentence enhancements explicitly define what a judge can do, a judge's discretion also is implicitly limited by the resources available at the local level, which varies widely by county. Experts, judges and local law enforcement say this is one result of a lack of systematic state investment in community correctional programs and one that makes itself apparent in California's surging prison population.

In testimony to the Commission, former Sacramento Superior Court Judge Roger K. Warren wrote that “the principal reason...judges are sentencing too many non-violent offenders to prison is the absence of effective community corrections programs providing intermediate punishments and necessary and appropriate treatment and rehabilitation services to non-violent offenders.” The situation is exacerbated by court-ordered or self-imposed population caps at jails in 32 counties around the state. In 2005, these counties released more than 155,000 sentenced offenders early because of the shortage of bed space.

Lacking local alternatives, many offenders who could be sentenced to county jail, probation or other community-based punishment alternatives are sent to prison. In doing so, the State squanders its most expensive resource on low-level offenders who could be more effectively supervised by local authorities.

Often, the low-level offenders sent to state prison serve fairly short terms. With good time credit, some serve just six months. In 2005, of approximately 64,000 felons released to parole for the first time, the median time served for nearly 45,000, or 69 percent, was less than a year in prison. Most experts agree that these short prison stints do little for public safety, while they do disrupt families and communities where these offenders come from and return to, and diminish the potential for offenders to get and keep jobs, maintain housing and become law-abiding citizens.

#### **4. *Sentencing Law Reform Proposals***

The issues delineated above focus attention on many administrative problems in California that, in the view of many stakeholders, call for significant policy changes (such as a reconception of the parole revocation process). Some of those changes could result from executive branch action within CDRC, while others might require legislative action. Some critics, however, have also focused on a matter solely within the province of the Legislature—the state of the substantive sentencing laws in our penal code.

In the view of these critics, California lacks a coherent criminal justice sentencing policy as well as a system of accountability for the impact of sentencing laws on public safety and correctional resources. California has created a haphazard jumble of sentencing laws enacted incrementally over three dozen years. What initially was a fairly straightforward determinate sentencing structure has been radically rewritten – law by law – over a 30-year span with no consistent or informed evaluation of the laws for their effect on public safety and the state treasury. Today, there are more than 1,000 felony sentencing laws and more than 100 felony sentence enhancements across 21 separate sections of California law. Thus, some argue that to ensure long-term improvements in the California corrections system, the Legislature must reconceive its entire scheme of sentencing statutes. And stakeholders who promote this goal argue that a crucial mechanism for assisting the Legislature to achieve this goal is establishment of California Sentencing Commission. These stakeholders point to the success of many other states that have employed sentencing commissions to devise new rules of sentencing, noting many variations in governmental structures for translating commission policy recommendations into binding statute law.

Other stakeholders who have been skeptical about the idea of a sentencing commission argue that it is a code term for shorter sentences or for limiting correctional capacity. Commission advocates, in turn, point to evidence refuting this concern. Sentencing commissions frequently lead to longer terms, particularly for the most dangerous and serious offenders. Sentencing commissions in both North Carolina and Virginia increased sentences for violent criminals, and North Carolina increased sentences for violent crimes and simultaneously increased spending on probation and

drug treatment programs to keep low-level offenders from becoming more dangerous. Virginia tripled sentences for some of the worst offenders, but also diverted low-level offenders to community-based punishment. Both states have seen a combination of cost savings and a decrease in crime.