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June 14, 2006

Mr. Stuart Drown, Executive Director
Milton Marks Commission on California,
State Government Organization and Economy
925 L Street, Suite 805
Sacramento, California 95814

Dear Mr. Drown:

Thank you for asking me to testify before the commission on sentencing policy in California. I look forward to meeting you and appearing before the commission on June 22, 2006. As requested, I am submitting written testimony for the Commissioners to review prior to my in-person testimony.

As your sentencing study is an element of the commission's broader study of correctional policies, I assume that the testimony and questions from the commission will focus on state prison commitments. Nonetheless, the enclosed written testimony reviews sentencing laws in California for both misdemeanors and felonies, including probationary sentences and county jail commitments. The main focus, however, is on felony sentencing and the current Determinate Sentencing Law.

There are considerable intricacies of the sentencing laws in California. As I understand the study to be focused on broad policy, rather than a detail oriented review, the written testimony takes a general look at the sentencing laws and does not delve into the nuts and bolts of each permutation of the laws. I hope you and commission find this approach is at least acceptable and, hopefully, appropriate.

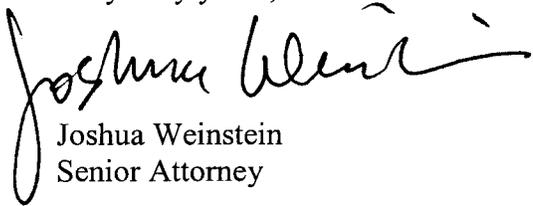
In preparing the testimony I reviewed and relied upon several source materials. I relied primarily, however, on the two sources: *Basic Elements in Felony Sentencing* by Judges J.

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Richard Couzens (Ret.) and Tricia A. Bigelow (prepared for judicial education seminars) and
California Criminal Law Procedure and Practice, 2005, Continuing Education of the Bar.

Thank you again for asking me to testify before the commission. I look forward to meeting you
and the Commissioners.

Very truly yours,

A handwritten signature in black ink, appearing to read "Joshua Weinstein". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

Joshua Weinstein
Senior Attorney

JW/sl
enc.

Sentencing in California
Written Testimony for the Little Hoover Commission
Joshua Weinstein, Senior Attorney
Administrative Office of the Courts
June 15, 2006

I. Current sentencing law:

- A. Misdemeanors
- B. Probation
- C. Determinate sentences (felony)
- D. Indeterminate sentences (felony)
- E. LWOP/Death Penalty (special circumstance murders)
- F. Conduct credit for good behavior

II. Recent trends in California sentencing:

- A. Three Strikes
- B. Proposed three-strikes amendments
- C. One strike
- D. Prop 21
- E. Prop 36

I. Current Sentencing Law

A. Misdemeanor Sentencing

The maximum possible term for each misdemeanor conviction is up to one year in the county jail and a fine of up to \$1000 (plus penalty assessments). (Pen. Code, § 19.2.) Numerous misdemeanor violations have a maximum penalty of six months and a fine of up to \$1000. Multiple convictions, however, can be ordered to be served consecutively, for a total term for *multiple* convictions to exceed one year in the county jail. What sentence to impose and whether to run the sentences for multiple convictions

consecutively or concurrently is vested in the sound discretion of the court. (*See, e.g., People v. Morales* (1967) 252 Cal.App.2d 537, 542.)

B. Probation

Both misdemeanor and felony convictions can, and often do, result in a probationary sentence. The basic structure of probationary sentences is the same in misdemeanor and felony cases. Many felony convictions are eligible for probation; probation is not available for the more serious or violent felonies.

It is noteworthy that probation is a privilege, not a right. Thus, the court *may* but is not obligated to grant probation.

There are two types of probation, the distinguishing factor is the sentence the court may impose if probation is revoked. These are discussed below, as are the conditions of probation that may be ordered.

i. Execution of sentence suspended

A court may order probation by imposing the sentence, but may suspend the execution of the sentence. This is called “execution of sentence suspended.” It works, for example, by the judge ordering that the defendant serve six months in county jail for a misdemeanor conviction; the six-month sentence would be suspended, however, pending the completion of probation. If the defendant satisfactorily completes probation, the six-month sentence is not imposed. If the probation is subsequently revoked, the court *must* impose the six-month sentence – the terms of the previously suspended sentence cannot be changed. (Pen. Code, § 1203.2(c); *see also People v. Colado* (1995) 35 Cal.App.4th 260 [court has no discretion to modify previously imposed but suspended sentence].)

ii. Imposition of sentence suspended

A court may also order probation without imposing the sentence. This is called “imposition of sentence suspended.” It works, for example, by the judge ordering that the defendant complete a probationary term. If probation is subsequently revoked, the court may impose any sentence up to the statutory maximum. (Pen. Code, § 1203.2(c).)

iii. Conditions of probation

The court has wide discretion in ordering conditions of probation. The Penal Code provides that the court may impose “reasonable conditions” of probation that are “proper to the end that justice may be done” and are geared toward “the reformation and rehabilitation of the probationer.” (Pen. Code, § 1203.1(j).) To be valid, “probation conditions which regulate conduct ‘not itself criminal’ [must] be ‘reasonably related to

the crime of which the defendant was convicted or to future criminality.” (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121, quoting *People v. Lent* (1975) 15 Cal.3d 481, 486.)

Conditions of probation may typically include some of the following conditions:

- Confinement in the county jail, work furlough, or home detention;
- Fine and/or community service;
- Drug testing without a warrant;
- Submit to search without a warrant;
- Refrain from ingesting alcohol;
- Stay-away orders; and
- No association with other criminals, drug users, or gang members.

C. Determinate Sentencing (felony)

The current sentencing law for most felonies in California, commonly known as the Determinate Sentencing Law (DSL), was enacted in 1976. Under the DSL, the defendant is sentenced to a set term of imprisonment and has a limited period of parole upon release from prison. Sentences under the DSL are imposed in most felonies if the court does not grant probation and the crime (or defendant) does not present any of the exceptions from the DSL. The exceptions from the DSL include “three strikes” for recidivists and life sentences or the death penalty for capital murders.

The DSL was initially a fairly straight-forward concept, but has become more and more complex over the past thirty years. The basic concept is that there are three components to a sentence: (1) the base term; (2) conduct enhancements; and (3) status enhancements. Conduct enhancements relate to the way the crime was committed. Status enhancements are imposed based on the history or position of the defendant at the time the crime was committed. For either a conduct or status enhancement to be imposed, the District Attorney must charge the enhancement and it must be found true by the jury.

Under the DSL in its most pure form, these three components – the base term, any conduct enhancements, and any status enhancements – are added together, resulting in the term of imprisonment. If there are multiple charges, victims, and/or enhancements, the calculation begins to get fairly complex.

i. The base term

In the vast majority of felonies under the DSL, the judge is offered three choices for the base term: (1) a middle term (the presumptive term to be imposed); (2) an aggravated term; and (3) a mitigated term. Examples of the three terms for various crimes are two, four, or six years for first degree burglary (Pen. Code, § 461): two, three, or four years for

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a felony assault with a deadly weapon (Pen. Code, § 245(a)(1)); and three, six, or eight years for rape. (Pen. Code, § 264(a).)

The court must select one of the three terms. Penal Code section 1170(b) provides that “the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.” In making that determination, the court is to balance any factor “reasonably related to the decision being made.” (Rule 4.408(a) of the Calif. Rules of Ct.) Additionally, the Judicial Council of California has adopted rules listing factors in aggravation and mitigation, helping guide the discretion of the judge. (Rules 4.421 and 4.423 of the Calif. Rules of Ct.)

The court may impose the middle term even if it finds either the mitigating or aggravating factors to predominate, as the only mandatory sentence is the middle term. (*People v. Myers* (1983) 148 Cal.App.3d 699.)

ii. Conduct enhancements

As noted above, there are enhancements tied to the manner in which the crime was committed (i.e., the conduct of the defendant in this particular case). Typically these enhancements come into play if the defendant used a weapon during the commission of the crime, inflicted injury, or there was an excessive taking of property. There are *many* different conduct enhancements; indeed, there are over 100 conduct enhancements listed in a common practice guide. (See *California Criminal Law Procedure and Practice*, 2005, Continuing Education of the Bar, § 37.13 (pp. 1063-1071).)

There are many other rules regarding imposition of conduct enhancements. For example, multiple enhancements for the same conduct cannot be imposed; the court must impose “greatest” term. (Pen. Code, § 1170.1(f) and (g).) However, different conduct enhancements may be imposed concurrently or consecutively. Additionally, some enhancements have three possible terms, like the base term. Finally, the court may “strike” (i.e., dismiss and therefore not impose) enhancements in most circumstances if it would be in the “furtherance of justice.” (See Pen. Code, § 1385.) There are some conduct enhancements, however, which the court does not have the discretion to strike. (See, e.g., Pen. Code, §§ 12022.5, 12022.53 and 12022.55.)

iii. Status enhancements

There are also enhancements based upon the history or status of the defendant. Typically status enhancements apply if the defendant had certain types of prior convictions or was on bail or released on his or her own recognizance (O.R.).

Some status enhancements are general and some very specific. For example, if the defendant is being sentenced to state prison, under Penal Code section 677.5, an

additional one-year enhancement is to be imposed for each prior prison term served by the defendant. (Pen. Code, § 667.5(b).) If the defendant is convicted of a violent offense (as defined by the Penal Code), each prior prison term adds a three-year enhancement. (Pen. Code, § 667.5(a).) Similarly, if the present and prior offenses are both serious felonies (as defined by the Penal Code), there is a five-year enhancement. (Pen. Code, § 667(a).)

iv. Multiple charges

If there are multiple charges, courts generally have the discretion to impose the term for those multiple charges concurrently or consecutively. There are some limited situations where multiple charges must be served consecutively. For most charges consecutive sentencing is not fully consecutive. Rather, there is a complicated formula to calculate the partially consecutive sentence. Without describing the exact formula, usually the defendant will be sentenced to a term of about one-third above the normal sentence if there were not consecutive sentences. Under limited circumstances, the law requires fully consecutive sentences. These are usually in the more serious or violent cases, including multiple violent sex offense (Pen. Code, § 667.6(d)), escape with injury (Pen. Code, § 4532), the defendant committing the crime was out of custody on bail or O.R. (Pen. Code, § 12022.1), and three strikes cases. (Pen. Code, § 1170.12.)

D. Indeterminate Sentencing (felony)

Prior to 1975, all felony sentencing was “indeterminate.” The hallmark of an indeterminate sentence under the prior law is that the court sets the maximum terms of confinement, but the parole board decides whether to release the defendant prior to serving the maximum term.

Under the pre-DSL indeterminate sentencing law, the court would sentence the defendant “for the term prescribed by law.” (Former Pen. Code, § 1168.) This meant the statutory maximum, which, in most cases, meant a life sentence.

Of course, most offenders did not serve a life sentence. After the court imposed the sentence prescribed by law, “[t]he parole board would then fix a ‘term’ somewhere between the statutory minimum and maximum (often a span of one year to life), and release the prisoner on parole after a few years. After release, a prisoner’s parole could be revoked, and each time a higher and higher term and new parole date would be set.” (Cassou & Taugher, *Determinate Sentencing in California: The New Numbers Game* (1978) 9 Pacific L.J. 5, 8.) The decision whether to violate parole and the new term was made solely by the parole board. Thus, the court’s role in sentencing was restricted to setting the initial confinement at “the term prescribed by law” – without any further definition; the parole board was vested with virtually all sentencing discretion.

There are some offenses now that are subject to indeterminate sentencing, but it is usually reserved for very serious or violent felonies (murders other than capital cases, for example) or recidivists (three strikes). For example, second degree murder is subject to an indeterminate term of 15 years to life; first degree murder (other than those explained below) is subject to an indeterminate term of 25 years to life. (Pen. Code, § 190(a) and (c).) How these indeterminate sentences work is that the defendant must serve the minimum term (15 or 25 years in the two examples above) and is then eligible for parole. The parole board, however, can grant or deny parole and ultimately the defendant can be held in custody for the maximum term (life).

E. LWOP/Death Penalty

In the most serious cases — certain murders with “special circumstances” — there are two sentencing choices: life without possibility of parole or the death penalty. (Pen. Code, § 190.2.) As the death penalty is not part of the commission’s review, this area will not be explained further.

F. Conduct credit for good behavior

Every person serving time in both the county jail or in state prison — for a misdemeanor or felony, a determinate or indeterminate sentence, on probation or not — receives credit towards their sentence for good behavior. The exact amount of credit may vary based on the crime for which the defendant was convicted, with defendants convicted of the more serious crimes entitled to less credit. Assuming the prisoner performs in a satisfactory manner, the maximum credit available is 50% and the minimum is 15%. This means that one convicted of a serious crime would have to serve a minimum of 85% of their sentence.

II. Recent trends in California sentencing

A. Three Strikes

In 1994 the “three-strikes” law was adopted. Under the three-strikes law, if a defendant is convicted of a felony and has had one, two, or more prior convictions that qualify as “strikes,” the defendant will be sentenced for the current offense under the three strikes law. Although prior strikes most commonly are serious or violent felonies, the *current* conviction can be based on the commission of *any felony*. (See, e.g., *People v. Terry* (1996) 47 Cal.App.4th 329 [petty theft with a prior is a felony to be sentenced under three strikes law if defendant suffered the necessary prior convictions].)

Under the three-strikes law the defendant’s sentence is lengthened depending on how many prior “strikes” he or she has suffered. If the defendant suffered *one prior*

conviction, the normal term under the determinate sentencing law (or indeterminate if it is a murder conviction) is doubled. So, for example, the middle term for first degree burglary would be eight years rather than the four years it is in non three-strikes cases. If the defendant has suffered *two or more prior convictions*, then the defendant is to be sentenced to an indeterminate term of 25 years to life. As noted above, if there are multiple three-strikes convictions in the current case, the court must order that the terms for those convictions be served consecutively.

The court, however, does have some discretion under the three-strikes law. The court may, in the interests of justice, dismiss prior strike convictions. (*People v. Superior Court (Romero)* (1996) 113 Cal.4th 497.) In exercising its discretion, the court is to consider the rights of the defendant and the interests of justice. (*Ibid.*)

B. Proposed three-strikes amendments

There is a proposed ballot initiative to modify three-strikes and a similar one that appeared on the 2004 ballot that was defeated. The proposed initiative and the failed 2004 initiative share one hallmark: the increased sentences under three-strikes would not apply to any felony conviction; rather, it would apply only if the *current* offense is a serious or violent felony. This would make “petty” crimes, like shoplifting (which can be charged as a second-degree burglary) ineligible for three-strikes.

C. One strike

So-called “one strike” crimes are certain sex crimes that, if certain factors are present, result in an indeterminate sentence of either 15-years to life or 25-years to life. The factors that must be present to transform these crimes from determinate to indeterminate sentences are either (1) a prior conviction for certain sex offense; (2) kidnapping the victim in the current case; (3) injuring the victim in the current offense or using a deadly weapon; or (4) committing a burglary in the course of the current offense. (Pen. Code, § 667.61.)

D. Proposition 21

In March 2000, the voters adopted Proposition 21. The effects of the proposition were

- giving prosecutors (instead of judges) the power to send many juveniles, including 14 and 15 year olds, to adult court;
- increasing the situations in which juveniles can be tried as adults;
- requiring 16 and 17 year olds convicted in adult court to be sentenced to state prison;
- requiring that juveniles accused or convicted of certain crimes be held in local or state correctional facilities;

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- reducing the probation options available to judges and probation officers;
- increasing penalties for gang-related crimes and creating a death penalty for certain gang offenses;
- increasing criminal penalties for certain serious and violent offenses; and
- extending the adult "three strikes" laws, adding longer sentences and life terms for new offenses.

E. Proposition 36

The Substance Abuse and Crime Prevention Act, also known as Proposition 36, was approved by the voters on November 7, 2000. It changed state law to provide that first and second time nonviolent, simple drug possession offenders receive substance abuse treatment instead of incarceration. The court has little discretion other than to order the treatment under Proposition 36 and is limited in options if the defendant fails in his or her treatment.