



December 20, 2017

Hon. Xavier Becerra
Attorney General
1300 I Street, 17th Floor
Sacramento, California 95814

Attention: Ms. Ashley Johansson
Initiative Coordinator

Dear Attorney General Becerra:

Pursuant to Elections Code Section 9005, we have reviewed the proposed statutory initiative (A.G. File No. 17-0044, Amendment No. 1) relating to criminal penalties and DNA collection.

BACKGROUND

Criminal Penalties

Sentencing law generally defines three types of crimes: felonies, misdemeanors, and infractions. A felony is the most severe type of crime. Existing law classifies some felonies as “violent” or “serious,” or both. Examples of felonies currently defined as violent include murder, robbery, and rape. While almost all violent felonies are also considered serious, other felonies are defined only as serious, such as assault with intent to commit robbery. Felonies that are not classified as violent or serious include human trafficking and sale of a controlled substance. A misdemeanor is a less severe offense. Misdemeanors include crimes such as assault and public drunkenness. An infraction is the least severe offense and is generally punishable by a fine.

Felony Sentencing. Offenders convicted of felonies can be sentenced to one of the following:

- ***State Prison.*** Felony offenders who have current or prior convictions for serious, violent, or sex crimes can be sentenced to state prison. Offenders who are released from prison after serving a sentence for a serious or violent crime are supervised in the community by state parole agents. Offenders who are released from prison after serving a sentence for a crime that is not a serious or violent crime are usually supervised in the community by county probation officers, which is commonly referred to as Post Release Community Supervision (PRCS). Offenders who break the rules that they are required to follow while supervised in the community or commit new crimes can be sent to county jail or state prison, depending on their criminal history and the seriousness of the offense.

- **County Jail and/or Community Supervision.** Felony offenders who have no current or prior convictions for serious, violent, or sex offenses are typically sentenced to county jail or supervision in the community by a county probation officer, or both. In addition, depending on the discretion of the judge and what crime was committed, some offenders who have current or prior convictions for serious, violent, or sex offenses can receive similar sentences. Offenders who break the rules that they are required to follow while supervised in the community or commit new crimes can be sent to county jail or state prison, depending on their criminal history and the seriousness of the offense.

Misdemeanor Sentencing. Under current law, offenders convicted of misdemeanors may be sentenced to county jail, county community supervision, a fine, or some combination of the three. Offenders on county community supervision for a misdemeanor crime may be placed in jail if they break the rules that they are required to follow while supervised in the community.

In general, offenders convicted of misdemeanor crimes are punished less severely than felony offenders. For example, misdemeanor crimes carry a maximum sentence of up to one year in jail while felony offenders can spend much longer periods in prison or jail. In addition, offenders who are convicted of a misdemeanor are usually supervised in the community for fewer years and may not be supervised as closely by probation officers.

Wobbler Sentencing. Under current law, some crimes—such as unauthorized use of a vehicle—can be charged as either a felony or a misdemeanor. These crimes are known as “wobblers.” The sentencing decision on wobblers is left to the court and is generally based on the specific circumstances of the crime and the criminal history of the offender.

Release Consideration for Nonviolent Offenders

In November 2016, voters approved Proposition 57, which amended the State Constitution, to specify that any person convicted of a nonviolent felony offense and sentenced to state prison shall be considered for release after completing the full term for his or her primary offense. The primary offense is defined as the longest term imposed excluding any additional terms added to an offender’s sentence, including any sentencing enhancements (such as the additional time an inmate serves for prior felony convictions). The State Constitution authorizes the California Department of Corrections and Rehabilitation (CDCR) to adopt regulations to implement this consideration process, which currently restrict the process to certain offenders.

Eligible offenders are reviewed for release by the Board of Parole Hearings (BPH). Specifically, a BPH deputy commissioner reviews the inmate’s file to determine if he or she is suitable for release based on information about the inmate, such as the inmate’s criminal history. As part of these reviews, district attorneys, law enforcement agencies, and victims can submit letters to BPH regarding the inmate’s potential release. To facilitate this process, CDCR contacts victims registered with the state to inform them about their ability to submit such letters. If the deputy commissioner concludes that the inmate does not currently pose an unreasonable risk of violence the inmate is approved for release. If an inmate is denied release, he or she can appeal the decision, and the inmate’s file is reviewed by a different deputy commissioner for a final decision. Inmates who are denied release are reconsidered the following year, though they often complete their sentences and are released before this subsequent review takes place. As of

October 31, 2017, BPH has completed over 2,700 reviews and approved nearly 500 offenders (18 percent) for release.

DNA Collection

Under current state law, any adult arrested or charged with a felony offense, any juvenile found guilty of a felony offense, or any individual required to register as a sex offender or arsonist is required to provide DNA samples for law enforcement purposes. The samples are collected by state and local law enforcement agencies, and are generally submitted to the California Department of Justice (DOJ) for processing. DOJ analyzes the samples and stores the DNA profiles in a statewide DNA databank. DOJ also submits the DNA profiles to a national repository maintained by the Federal Bureau of Investigation. This allows law enforcement to compare DNA collected from crime scenes to information in these DNA databanks to identify individuals who were at the crime scene. The cost of collecting and analyzing DNA samples is partially supported by revenue collected from various criminal fines and fees.

PROPOSAL

This measure amends state law to (1) increase penalties for certain theft-related crimes, (2) change the existing nonviolent offender release consideration process, (3) change community supervision practices, and (4) require DNA collection from adults convicted of certain misdemeanors. We describe these changes in greater detail below.

Increases Penalties for Certain Theft-Related Crimes. Under current law, theft of money or property worth less than \$950 is generally charged as petty theft or shoplifting if the theft was from a commercial establishment. Petty theft and shoplifting are generally misdemeanors punishable by up to six months in county jail. The measure specifies that certain theft-related crimes—such as forgery, identity theft, and unauthorized use of a vehicle—cannot be charged as petty theft or shoplifting regardless of the value of money or property stolen. Instead, while these crimes could still be charged as misdemeanors, punishable by up to one year in jail, they also could be charged as felonies, punishable by up to three years in jail or prison.

The measure also establishes the following two crimes:

- ***Serial Theft.*** Any person with two or more prior convictions for specified theft-related crimes (such as burglary, forgery, or carjacking) who is subsequently found guilty of shoplifting or petty theft involving money or property that exceeds \$250 could be charged with serial theft.
- ***Organized Retail Theft.*** Any person, acting with one or more other persons who commits two or more instances of petty theft or shoplifting where the total value of property stolen within a period of 180 days exceeds \$250 could be charged with organized retail theft.

Both of these new crimes would be wobblers, punishable by up to three years in jail, including in cases where the offender has a prior serious, violent, or sex offense.

Changes Nonviolent Offender Release Consideration Process. The measure makes various changes to the current nonviolent offender release consideration process. Some of these changes include:

- Excluding certain inmates who would otherwise qualify for the release consideration process. For example, inmates convicted of specified human trafficking crimes and solicitation to commit murder would no longer be eligible.
- Allowing prosecuting agencies to appeal a release decision made by BPH.
- Requiring BPH to deny release to inmates who pose an unreasonable risk of creating victims as a result of future felony activity, rather than only those who pose an unreasonable risk of violence.
- Requiring CDCR to make reasonable efforts to locate victims regardless of whether they are registered with the state and notify them of the review.

Changes Community Supervision Practices. The measure makes various changes that impact how CDCR and county probation departments supervise offenders in the community. For example, counties currently have discretion on whether to punish offenders on PRCS who violate the terms of their supervision. In the case of serious violations, the probation department can choose to petition the court to revoke an offender's terms of supervision, potentially resulting in harsher terms of supervision or placement in county jail. This measure requires probation departments to petition the court to revoke a PRCS offender's terms of supervision if he or she has violated them for a third time.

In addition, the measure expands the type of information that CDCR and counties have to make available. For example, the measure requires counties to provide any records of supervision related to PRCS offenders upon request by CDCR. CDCR would be required to provide similar information to local law enforcement about individuals being released from prison into their jurisdictions.

Expands DNA Collection. The measure requires state and local law enforcement to collect DNA samples from any adult convicted of certain misdemeanor crimes and wobblers. Some of these crimes include shoplifting, forging checks, and certain domestic violence offenses.

FISCAL EFFECTS

The measure would have various fiscal effects on state and local governments. However, the magnitude of the effects discussed below are subject to significant uncertainty, depending how the measure is interpreted by the courts and how it is implemented by various entities (such as county probation departments and local prosecutors). For example, the changes to the nonviolent offender release consideration process would likely be subject to legal interpretation. This is because the measure seeks to impose statutory limits on the constitutional authority CDCR has to implement the process. For the purposes of our analysis, we assume that the measure is fully implemented.

State and Local Corrections Costs. The measure would increase state and local correctional costs in three ways. First, the increase in penalties for various theft-related crimes would increase

state and local correctional costs primarily by increasing the workload associated with housing offenders in county jail and supervising them in the community. Second, the changes made to the nonviolent offender release consideration process would increase state correctional costs by likely reducing the number of inmates who are released through the process and generally increasing the cost of the process. Third, the changes to community supervision practices would increase state and local correctional costs by likely increasing the number of PRCS offenders whose terms of supervision are revoked and placed in county jail and creating additional reporting requirements for CDCR and counties. We note that a small portion of the above costs would be offset by certain savings, such as from a reduction in the number of offenders reviewed by BPH. In total, we estimate that the net increase in state and local correctional costs could potentially range in the tens of millions of dollars annually. The actual increase would depend on the number of offenders that would be affected by the measure, which is uncertain given limited data currently available on offenders who commit certain crimes.

State and Local Court-Related Costs. The measure would increase state and local court-related costs. By increasing prosecutors' discretion to charge certain theft-related crimes as felonies, this measure would increase the number of felony filings and reduce the number of misdemeanor filings in state court. As a result, workload for the courts, county district attorney and public defender offices, and county sheriffs (who provide court security) would increase as felonies take more time to adjudicate than misdemeanors. In addition, requiring probation departments to petition the court after each PRCS offender's third violation would result in additional court proceedings. In total, we estimate that these court-related costs could be around a few million dollars annually, depending on the actual number of offenders affected by the measure.

State and Local Law Enforcement Costs. The measure would increase state and local law enforcement costs by expanding the number of offenders who are required to provide DNA samples. The magnitude of these costs would depend on the number of additional offenders that would be required to submit DNA samples, but would likely not exceed a couple million dollars annually.

Other Fiscal Effects. There could be various other unknown fiscal effects on state and local governments due to the measure. For example, costs described above could be somewhat offset by criminal justice system savings to the extent that this measure reduces future crime. This could occur if (1) higher criminal penalties authorized by this measure deter individuals from committing new crimes or (2) keeping offenders in prison, jail, or under community supervision for longer reduces offenders' opportunities to commit crimes. The extent to which these or other effects would occur is unknown.

Summary of Fiscal Effects. We estimate that this measure would have the following major fiscal effects:

- Increased state and local correctional costs likely in the tens of millions of dollars annually, primarily related to increases in penalties for certain theft-related crimes and the changes to the nonviolent offender release consideration process.

- Increased state and local court-related costs of around a few million dollars annually related to processing probation revocations and additional felony theft filings.
- Increased state and local law enforcement costs not likely to exceed a couple million dollars annually related to collecting and processing DNA samples from additional offenders.

Sincerely,

Mac Taylor
Legislative Analyst

Michael Cohen
Director of Finance