



New Criminal Laws for 2010

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February, 2010

CRIMINAL JUSTICE

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New Criminal Laws for 2010

Introduction

It is that time of year that we can have to catch up with the new laws passed during the last legislative session. This last year has been frustrating with regard to criminal legislation but more for what was not done than what was enacted.¹ As a result, criminal practitioners are not in the usual position of having to memorize a plethora of substantive and technical changes.

As to what was not done, the federal courts have stated the obvious: the state correctional system is far beyond capacity and the state government needs to fix it. There is an order, pending review *en banc*, from a three judge federal panel requiring the State of California to reduce the State Prison population by 44,000 people.

This should have set the legislative agenda for the year. For the last few years everyone involved in analyzing the criminal justice system in California has recognized the mounting crisis. There is no way that this state can keep incarcerating people at the rate we are; we cannot pay for the people who are there right now; and it is only getting worse. Everyone recognizes that the reason that we are in this crisis is that politicians do not believe that they can stop sponsoring bills, no matter how foolish, that make them appear “tough on crime.” And, this session, the lesson was reinforced that no one can take up the cause of sensible sentencing reform or they will be political toast.

The Biggest Jail Break in California History

As we have discussed in prior *Criminal Justice* columns, the overcrowding in California’s prison system has been long and well documented. We had reported on the Little Hoover Commission Report of 2007 and Joan Petersilia’s study of 2006. As we also reported in this column, there have been numerous attempts over the last few years to convene a Sentencing Commission. People are doing life on non-serious and non-violent third strikes and others doing obscenely long sentences on some drug and gang cases - not the hard core ones, but the ones where the numbers just add up on paper. There are anomalies in punishment of which everyone in the system is aware.

So, this year, one would have thought that there would be a Sentencing Commission and that there would have been a serious legislative effort to deal with the excess prison population. As this legislative session started up in earnest in January of last year, there were plans from all sides to try to do something about it. Let’s face it, we pay these people and their massive staffs to do this kind of work. We expect there to be some effort at bipartisan planning and a general exercise of responsibility in dealing with this problem that is causing so much harm to our state. After all, we spend more on prisons than schools, we do not have the money for basic services for our communities and, we all know that the costly prison system is only costly because of the opportunistic politics of fear and hatred have resulted in excessive sentences. Did the legislators earn their pay? No - in fact, they failed miserably.

As the discussions about sentencing reform started, there was an early consensus on some basic changes. The Sentencing Commission was seen as a vehicle to accomplish

these reforms. But then, the politics of who would control the Sentencing Commission resulted in the whole idea being scrapped. In the midst of the crisis, the legislators could not make the simplest compromises to get the Commission off the ground.

Similarly, the general agreement that mandatory sentences and certain life sentences were too harsh gave way to partisan politics. The humane and reasonable amendment to the three strikes law which would only allow a life sentence to be imposed if the new offence was a serious or violent offense was too hot to handle.

There was also a conclusion that there needed to be some better mechanism for releasing people from prison who were going to be released eventually. The process came to a halt in the summer when one of the political parties started to threaten members of the opposing party by saying that they would not participate in any criminal justice or sentencing reform. They put out the word that anyone who proposed such legislation would be met in their re-election campaign with a catch phrase, "(S/he) led the biggest jail break in California history."

Little Progress, Indeed

What eventually happened was that the legislature did nothing at all about prison overcrowding by the end of the summer. Not even some very simple things. It was not until the three extraordinary sessions were called that some little progress was made. Still, the big, sensible ideas never got off the ground and there still is no Sentencing Commission.

So, what did happen? Well, due to the good work of the Public Safety Committee, at least bills that just mindlessly increased sentences were shelved. In that sense, the legislature did not make things much worse. Typically, multiple bills get through with some legislator's name on them adding more prison or jail time to some offense or another. And, typically, that legislator promotes her or his role as author in the next campaign, saying s/he is tough on crime. That type of nonsense was stopped this last session for the first time in decades.

However, the affirmative steps taken to slow the intake into the prison system were few and watered down by the time they were passed. One was the increase in the jurisdictional amount required to make some property crimes felonies. The fact is that the change will probably have very little effect on the prison population. The property crime limits theoretically delineate the difference between a felony and a misdemeanor but most prosecutors draw the line at a much higher number absent some really aggravating circumstances. Furthermore, most theft cases are not affected. Still, the limits have been raised on several other offenses, like receiving stolen property, from \$400 to \$950 and not sufficient funds checks from \$100 to \$400.

By the end of the third extraordinary session, there were a couple of measures that will have some effect on releasing some people a bit earlier and not returning some technical parole violators. Just as a mechanical matter, the credits for “good time/work time” have been increased for some but not all crimes. Currently, the standard county jail credits are two days for every 4 served which is changed for most crimes to 2 days for every 2 days served. Not all cases qualify for this but it works out that a person serving a jail sentence or awaiting transportation to prison may qualify to do two thirds of the sentence. The savings in county jail are probably not that significant since most jails are overcrowded and local sentences result in early releases anyway. And, the extra credits that are given on prison sentences for time spent in the county jail has no effect on the length of the county jail commitment.

There is also a very modest early release for state inmates. Up to six weeks off of the commitment can be earned by prisoners for participation in certain programs. But, this does not pertain to serious or violent felonies, registerable sex offenses, recidivists or parole violators. It is a good idea but this effect of this will be minimal.

Of course, it is not clear that yearly increase in inmates caused by the present inconsistent patchwork of sentencing laws will not still overtake the reductions.

In addition, there have been some good, though watered down, efforts to avoid what has been called California’s “catch and release” program. Parole is a formula for failure. Inmates are released directly from prison with no rehabilitation and no re-

entry assistance. They are given a bus ticket and told to report to their parole officer within two weeks. They are violated for the inevitable technical violations and sent back to prison to try the whole experiment again in a year. There are some new rules on parole violations for certain limited cases and there are other re-entry provisions.

So, the extraordinary session produced two major laws that will incrementally help. Unfortunately they were primarily limited to non-serious and non-violent felonies. There is provision to allow early release by up to six weeks if he completes a program. There is also a provision for early release programs and alternatives to re-incarceration for technical parole violations.

Miscellany

There were other changes in the laws that pertain to criminal practice. One heads up for practitioners is that the rule on notice and response for criminal motions has been changed from days to court days. So, a noticed motion requires ten court days and the response is due five court days before the hearing.

A statute that will have to be tested in the courts also purports to reverse the California Supreme Court in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096. That case had prohibited court ordered psychiatric examinations by government experts when a defendant placed his mental state in issue. This statute will allow that again and in circumstances expanding beyond the pre-Verdin law.

And, in the face of crisis, and as a triumph of legislative focus on the needs of this state in that time of crisis, it has been legislated to not be illegal to ride a bicycle without a seat if it was manufactured that way.

Conclusion

We have to see what, if anything, the governor and the legislature of this state can do in the future. So far, politics as usual has resulted in a financial and social disaster in California. Will we ever have a Sentencing Commission? Will we ever have a coherent sentencing scheme? Will we ever really deal with the conditions of incarceration or an intelligent plan to rehabilitate people and reintegrate them into society when they finish their prison sentences? Are we going to continue to pay the salaries of legislators and their massive staffs to just secure their own political futures as opposed to govern in the people's best interests? Will pigs fly?

[1]. Although the Author is an Officer of CACJ and Co-Chair of the Legislative Committee, the views expressed herein are those of the author and do not necessarily reflect the views of CACJ or any other organization.