SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair
2015 - 2016 Regular

Bill No:	SB 679	**Hearing Date:**	April 21, 2015
Author:	Bates		
Version:	February 27, 2015		
Urgency:	No	**Fiscal:**	No
Consultant:	AA		

Subject: ***Mandatory Supervision: Warrantless Searches and Seizures***

HISTORY

Source: San Diego District Attorney

Prior Legislation: None

Support: California District Attorneys Association; County of San Diego; Crime Victims United of California; California State Sheriffs' Association; California Probation, Parole and Correctional Association

Opposition: American Civil Liberties Union of California; California Attorneys for Criminal Justice

PURPOSE

The purpose of this bill is to statutorily require that during the period of mandatory supervision – which is the community supervision portion of a "split sentence" for persons who have been convicted of a jail felony -- the defendant, and his or her residence and possessions, would be subject to search and seizure at any time of the day or night, with or without a warrant and with or without cause, by an agent of the supervising county agency or by a peace officer.

Current law generally provides certain persons who are subject to community supervision as a result of a criminal conviction also are subject to warrantless search and seizure by a peace officer at any time of the night or day, and with or without cause. The following situations expressly authorize warrantless searches and seizures in statute:

- The alternative custody program for female prison inmates (Penal Code § 1170.05);
- Parolees (Penal Code § 3067); and
- Persons coming out of prison who are subject to postrelease community supervision. (*Id.*)

Current law authorizes courts to impose what is known as a "split sentence" on persons convicted of a so-called "jail felony," for which any custodial time will be served locally (not in state prison), and where the court imposes a sentence comprised of both time in custody and time subject to what is termed "mandatory supervision" in the community by probation. (Penal Code § 1170(h).)

Current law requires that, unless the court finds that, in the interests of justice, it is not appropriate in a particular case, the court shall impose a period of mandatory supervision for a person sentenced for a jail felony, as specified, (Penal Code § 1170(h)(5)(A).

Current law provides that during "the period of mandatory supervision, the defendant shall be supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation, for the remaining unserved portion of the sentence imposed by the court. The period of supervision shall be mandatory, and may not be earlier terminated except by court order . . . . During the period when the defendant is under such that supervision, unless in actual custody related to the sentence imposed by the court, the defendant shall be entitled to only actual time credit against the term of imprisonment imposed by the court. Any time period which is suspended because a person has absconded shall not be credited toward the period of supervision." (Penal Code § 1170(h)(5)(B).)

Current Rules of Court enumerate several factors courts may consider in exercising discretion to select the appropriate period and conditions of mandatory supervision, including "Public safety, including protection of any victims and witnesses," and the "defendant's specific needs and risk factors identified by a validated risk/needs assessment, if available; . . . "(Cal. Rules of Ct., 4.415(c).)

This bill would provide that "(d)uring the period of mandatory supervision, the defendant, and his or her residence and possessions, are subject to search and seizure at any time of the day or night, with or without a warrant and with or without cause, by an agent of the supervising county agency or by a peace officer."

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past eight years, this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In February of this year the administration reported that as "of February 11, 2015, 112,993 inmates were housed in the State's 34 adult institutions, which amounts to 136.6% of design bed capacity, and 8,828 inmates were housed in out-of-state facilities. This current population is now below the court-ordered reduction to 137.5% of design bed capacity."(Defendants' February 2015 Status Report In Response To February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).

While significant gains have been made in reducing the prison population, the state now must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Stated Need for This Bill

The author states:

> All offenders released on PRCS are subject to search and seizure waivers. Parolees are also subject to the same waiver. However, the same is not true for offenders released onto Mandatory Supervision (MS). These are offenders who are sentenced pursuant to Penal Code section 1170(h) to local prison and serve part of their prison term in the community and receiving credit off of that prison term while in the community, unlike a parolee or PRCS offender who are released onto supervision after completing their prison term.
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> A Penal Code 1170(h) sentence allows judges to impose a straight sentence of jail incarceration, or a split sentence with a period of incarceration followed by a mandatory term of supervision for offenders convicted of a wide variety of criminal offenses, including auto theft, second degree burglary and selling controlled substances. Split sentences, followed by a term of MS, give probation officers the opportunity to use evidence-based practices to work with offenders, connect them to services and treatment, and reduce their likelihood of recidivism.
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> The level of scrutiny for an offender still serving their prison term should be higher and more restrictive. Moreover, if a defendant on MS moves from county to county, there is no way for the law enforcement in the new county to consistently know whether the offender is subject to search and seizure waiver. Additionally, on January 1, 2015, the presumptive splits went into effect and therefore there will be a greater number of defendants serving MS sentences in the community. Thus, the need is greater to ensure there is consistency throughout the state.

This bill ensures continuity of the law for all offenders released into the community to serve out the rest of their sentences. SB 679 would make a defendant subject to MS subject to search and seizure by a peace officer at any time of the day or night, with or without cause and with or without a warrant.

SB 679 would also require the defendant, and his or her residence and possessions, are subject to search and seizure at any time of the day or night, with or without a warrant and with or without cause, by an agent of the supervising county agency or by a peace officer.

2. What This Bill Would Do

This bill would require statutorily that during the period of "mandatory supervision," in every case the defendant, and his or her residence and possessions, would be subject to search and seizure at any time of the day or night, with or without a warrant and with or without cause, by an agent of the supervising county agency or by a peace officer. As discussed in more detail below, mandatory supervision is a feature of what is commonly known as a "split sentence," created in 2011 by the public safety realignment as a sentencing variation which structures a felony sentence into two elements, incarceration and community supervision. This bill would remove the discretion of a sentencing judge to impose this as a term and condition of mandatory supervision; instead, it would be required in every case as a statutory requirement.

As discussed in detail below, there have been a number of court cases in varying contexts addressing the nature of mandatory supervision. As members consider these issues, they may wish to consider whether a search requirement for these convicted felons should be imposed according to statute, or whether this requirement is adequately addressed by the sentencing court as part of its sentencing discretion.

SHOULD A WARRANTLESS SEARCH REQUIREMENT ON PERSONS SUBJECT TO MANDATORY SUPERVISION BE IMPOSED AS A MATTER OF STATUTORY LAW?

SHOULD THIS REQUIREMENT CONTINUE TO BE LEFT TO THE DISCRETION OF THE SENTENCING COURT?

3. Case Law – Mandatory Supervision: More Like Probation, or Parole?[1]

"Mandatory Supervision" was created as part of the public safety realignment of 2011, as initially enacted by AB 109 of that year. It is the community supervision element of a sentence for a jail felony conviction in a so-called "split sentence," where the court imposes a sentence

[1] The unique nature of mandatory supervision in California's sentencing scheme is not limited to issues concerning terms and conditions of supervision. Last year, several plaintiffs filed a lawsuit in Alameda county concerning the right of persons on mandatory supervision (as well as postrelease community supervision) to vote. The trial court noted, "(t)his petition squarely presents the question of whether in enacting the Realignment Act the Legislature intended Mandatory Supervision and PRCS to be "parole" for purposes of voting rights under the (law)," and held that "as a matter of law that California Constitution Article II, section 2 and Elections Code 2101, require the State of California to provide all otherwise eligible persons on Mandatory Supervision . . . and Post-Release Community Supervision ("PRCS") . . . the same right to register to vote and to vote as all other otherwise eligible persons. Neither Mandatory Supervision nor PRCS is "parole" under the Penal Code, which compels this court to hold that neither Mandatory Supervision nor PRCS is "parole" under Elections Code 2101." (Michael Scott et al. v. Debra Bowen, Superior Court of Alameda County, Case No. RG14-712570). This case is now on appeal.

structured with both custodial and community supervision features. The period of supervision is mandatory. (Penal Code § 1170(h)(5)(B).) Offenders are supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation, for the remaining unserved portion of the sentence imposed by the court. (*Id.*)

Mandatory supervision is similar to probation in that in both cases supervision is performed by probation. However, unlike probation, mandatory supervision is not agreed to by a defendant in lieu of a custody sentence; it is expressly *mandatory*. As explained in an appellate decision last year:

> As an initial matter, we note that although supervised release is to be monitored by county probation officers "in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation". . . "this does not mean placing a defendant on mandatory supervision is the equivalent of granting probation or giving a conditional sentence. Indeed, section 1170, subdivision (h), comes into play only after probation has been denied." . . . Thus, the Legislature has decided a county jail commitment followed by mandatory supervision imposed under section 1170, subdivision (h), is akin to a state prison commitment; it is not a grant of probation or a conditional sentence." *Therefore , . . . "mandatory supervision is more similar to parole than probation."* (*People v. Martinez* (2014) 226 Cal. App. 4th 759, 762-763 (citations omitted) (emphasis added).)

The *Martinez* court concluded that its analysis of the validity of the terms of supervised release under mandatory supervision would be guided by standards analogous to the conditions of parole. The court explained:

> "In California, parolee status carries distinct disadvantages when compared to the situation of the law-abiding citizen. Even when released from actual confinement, a parolee is still constructively a prisoner subject to correctional authorities. . . . The United States Supreme Court has characterized parole as 'an established variation on imprisonment' and a parolee as possessing 'not … the absolute liberty to which every citizen is entitled, but only … the conditional liberty properly dependent on observance of special parole restrictions.' . . . Our own Supreme Court holds a like opinion: 'Although a parolee is no longer confined in prison his custody status is one which requires … restrictions which may not be imposed on members of the public generally.'
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> The fundamental goals of parole are "'to help individuals reintegrate into society as constructive individuals' . . . '"to end criminal careers through the rehabilitation of those convicted of crime"' . . . and to [help them] become self-supporting." In furtherance of these goals, "[t]he state may impose any condition reasonably related to parole supervision." . . . These conditions "must be reasonably related to the compelling state interest of fostering a law-abiding lifestyle in the parolee."
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> The validity and reasonableness of parole conditions is analyzed under the same standard as that developed for probation conditions. "A condition of [parole] will not be held invalid unless it '(1) has no relationship to the crime of which the

> offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality … .' . . . Conversely, a condition of [parole] which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality."
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> In general, the courts are given broad discretion in fashioning terms of supervised release, in order to foster the reformation and rehabilitation of the offender, while protecting public safety. . . . (*People v. Martinez, supra* at 763.)

4. Authority and Standards for Parole Searches

Following the *Martinez* court's reasoning that mandatory supervision should be analyzed according to standards applicable to parole, California statutory law now requires that inmates eligible for parole be notified that they are subject to terms and conditions of parole upon release.[2] (Penal Code § 3067.) The statute specifies the content of the notice. With respect to searches and seizures, the statute states the inmate must receive the following:

> An advisement that he or she is subject to search or seizure by a probation or parole officer or other peace officer at any time of the day or night, with or without a search warrant or with or without cause.[3] (*Id.*, subd.(a) (3).)

This bill would appear to statutorily authorize a broader scope of search or seizure of persons on mandatory supervision:

> During the period of mandatory supervision, the defendant, ***and his or her residence and possessions,*** are subject to search and seizure at any time of the day or night, with or without a warrant and with or without cause, by an agent of the supervising county agency or by a peace officer.

However, regulations currently applicable to parolees reach both a parolee's residence and property under a parolee's control:

> Search. You and your residence and any property under your control may be searched without a warrant at any time by any agent of the Department of Corrections or any law enforcement officer. (15 CCR 2511 (4).)

Case law appears to uphold the warrantless searches of parolee residences if law enforcement officers have probable cause to believe that the parolee is a resident of the house to be searched. (*See U.S. v. Grandberry*, 730 F.3d 968 (9th Cir. 2013.) As drafted, it does not appear that the bill would abrogate this requirement.

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[2] There is no parallel statutory authority for the warrantless search of probationers, although that can be a condition of probation imposed by the court and agreed to by the defendant.

[3] As discussed later in this analysis, this section also states that, "It is not the intent of the Legislature to authorize law enforcement officers to conduct searches for the sole purpose of harassment." (Penal Code § 3067(d).) The motive of officers in conducting suspicionless search of parolee's residence is relevant to determining whether a suspicionless search is arbitrary, capricious, or harassing. (*Smith v. City of Oakland*, 538 F. Supp. 2d 1217 (N.D. Cal. 2008).)

The current parolee statute also includes the following, which is not included in this bill:

> It is not the intent of the Legislature to authorize law enforcement officers to conduct searches for the sole purpose of harassment." (Penal Code § 3067(d).)

The motive of officers in conducting suspicionless search of parolee's residence is relevant to determining whether a suspicionless search is arbitrary, capricious, or harassing. (*Smith v. City of Oakland*, 538 F. Supp. 2d 1217 (N.D. Cal. 2008).)

In addition, while courts have upheld "suspicionless" searches, such searches cannot be for the purpose of harassment. As explained by the Ninth Circuit:

> (P)ivotal to the Court's permitting suspicionless searches of parolees was the safeguard that such searches may not be arbitrary, capricious, or harassing -- e.g., motivated by the "purpose of harassment." Accordingly, while the existence of objective probable cause or individualized reasonable suspicion may obviate inquiry into subjective motives . . ., where there is no such objective protection, *parolees subject to suspicionless searches are entitled to at least protection against searches initiated for arbitrary, capricious, or harassing reasons* under *Samson. Smith v. City of Oakland*, 538 F. Supp. 2d 1217 (9th Cir. 2008); (Aff'd., *Smith v. City of Oakland*, 2010 U.S. App. LEXIS 10132 (9th Cir. Cal., May 18, 2010) (some citations omitted) (emphasis added).)

Members may wish to consider whether this bill should be amended to fully mirror the current law applicable to parolees, by adding the following sentence to its provisions:

> It is not the intent of the Legislature to authorize law enforcement officers to conduct searches that are arbitrary, capricious, or for the sole purpose of harassment.

SHOULD THIS AMENDMENT BE MADE?

5. Opposition

The American Civil Liberties Union of California, which opposes this bill, argues in part that this "bill unnecessarily removes from the trial courts the discretion to determine the appropriateness of a condition of supervised release.

> Under realignment, a trial court that sentences an individual to county jail may "suspend execution of a concluding part" of that sentence and release the person for a period of "mandatory supervision." . . . With mandatory supervision as with probation, the court retains jurisdiction over the case. . . . The trial court sets all the conditions of mandatory supervision and individuals are then "supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation.". . .
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> "In general, the courts are given broad discretion in fashioning terms of supervised release, in order to foster the reformation and rehabilitation of the offender, while protecting public safety." (*People v. Martinez* (2014) 226 Cal. App. 4th 759, 764.) This is distinct from parole or release following prison on post-conviction

community supervision. In those circumstances, the conditions of release are set by the Department of Corrections and Rehabilitation. Indeed, the Third District of the Courts of Appeal recently stated,

> While we have said that mandatory supervision is more like parole than probation it is similar to probation in the sense that the terms and conditions of the defendant's release are ordered by the court.

(*People v. Munoz* (2015) 183 Cal.Rptr.3d 484, 487 [citation omitted]; see also *People v. Fandinola* (2013) 221 Cal.App.4th 1415, 1423 ["the Legislature understood mandatory supervision is neither probation nor parole"].)

In the context of probation, the California Supreme Court has stated, "[t]he trial court's discretion, although broad, nevertheless is not without limits." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.) The court explained further,

> 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. As with any exercise of discretion, the sentencing court violates this standard when its determination is arbitrary or capricious or exceeds the bounds of reason, all of the circumstances being considered. . . .

Currently, courts determine all conditions for mandatory supervision and routinely impose a "search clause" that requires the supervised person to submit to law enforcement searches. Trial courts now have the discretion to determine if a search clause is appropriate and if so, to determine the exact scope of the search clause. For example, a trial court may decide that it is not reasonable to require someone to subject his or her entire residence to a search without a warrant if the home is shared with other people. In such cases, the court will fashion a more limited search clause, requiring, for example, that the supervised person submit to a search of his or her person, property or vehicle without a warrant, but not his or her residence.

Under SB 679, however, the courts would lose this ability. Conditions imposed during mandatory supervision should be left to the sound discretion of the court, to ensure that the conditions reasonably related to the offense committed and are not "arbitrary or capricious or exceeds the bounds of reason." (*Ibid.*)

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