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# SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair  
2021 - 2022 Regular

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**Bill No:** AB 1228                      **Hearing Date:** June 29, 2021  
**Author:** Lee  
**Version:** May 24, 2021  
**Urgency:** No                                      **Fiscal:** Yes  
**Consultant:** SC

**Subject:** *Supervised persons: release*

## HISTORY

**Source:** California Attorneys for Criminal Justice

**Prior Legislation:** AB 1421 (Bauer-Kahan), Ch. 111, Stats. 2019  
AB 723 (Quirk), held in Sen. Approps, 2013

**Support:** American Civil Liberties Union California Action; Blameless and Forever free Ministries; California Public Defenders Office; Californians for Safety and Justice; Communities United for Restorative Youth Justice; Criminal Justice Clinic UC Irvine School of Law; Ella Baker Center for Human Rights; Essie Justice Group; Initiate Justice; Legal Services for Prisoners With Children; Restore Justice; San Francisco Public Defender's Office; San Jose State University Human Rights Institute; Secure Justice; Silicon Valley De-Bug; Unchained Scholars

**Opposition:** Chief Probation Officers of California; Fraternal Order of Police, Northern California Probation, Lodge 19; Fraternal Order of Police, Southern California Probation, Lodge # 702; Los Angeles County Probation Officers Union, Local 685, AFSCME; Kern County Probation Officers Association; Sacramento County Probation Association; San Joaquin County Probation Officers Association; San Luis Obispo County Probation Peace Officers Association; Santa Clara County Probation Peace Officers Union, Local 1587, AFSCME; SEIU Local 721 – Association of Probation Supervisors of Los Angeles County; Solano Probation Peace Officers Association; State Coalition of Probation Organizations; Sutter County Probation Officers Association; Ventura County Professional Peace Officers Association

**Assembly Floor Vote:** 50 - 20

## PURPOSE

***This bill provides that persons released from custody prior to a probation violation hearing shall be released pursuant to a specified procedure.***

*Existing law* defines “probation” as “the suspension of the imposition or execution of a sentence and the order of conditional and revocable release in the community under the supervision of a probation officer.” (Pen. Code, § 1203, subd. (a).)

*Existing law* states that at any time during the period of supervision of a person (1) released on probation under the care of a probation officer, (2) released on court probation not under the care of a probation officer, (3) placed on mandatory supervision, (4) subject to revocation of postrelease community supervision, or (5) subject to revocation of parole supervision, if any probation officer, parole officer, or peace officer has probable cause to believe that the supervised person is violating any term or condition of the person's supervision, the officer may arrest the supervised person and bring them before the court or the court may, in its discretion, issue a warrant for their arrest. (Pen. Code, § 1203.2, subd. (a).)

*Existing law* states that upon rearrest, or upon the issuance of a warrant for rearrest, the court may revoke and terminate the supervision of the person if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation or parole officer or otherwise that the person has violated any of the conditions of their supervision, has become abandoned to improper associates or a vicious life, or has subsequently committed other offenses, regardless of whether the person has been prosecuted for those offenses. (Pen. Code, § 1203.2, subd. (a).)

*This bill* deletes the term "has become abandoned to improper associates or a vicious life."

*Existing law* states that courts shall have the power on misdemeanor convictions to refer cases to the probation department, demand probation reports and to do and require all things necessary to carry out the purposes of the law authorizing the imposition of probation on misdemeanor cases. (Pen. Code, § 1203a.)

*Existing law* specifies unless the supervised person is otherwise serving a period of flash incarceration, a supervised person who is arrested for violating their supervision, the court may order the release of a supervised person from custody under any terms and conditions the court deems appropriate. (Pen. Code, § 1203.2, subd. (a).)

*Existing law* provides that after conviction of an offense not punishable with death, a defendant who has made application for probation or who has appealed may be admitted to bail, as a matter of discretion in felony cases. (Pen. Code, § 1272.)

*This bill* requires the court to follow the procedure specified in this bill when considering the release of a person on probation from custody for a violation of probation, unless the person serving a period of flash incarceration.

*This bill* states that all persons released prior to a probation violation shall be released on their own recognizance unless the court finds, by clear and convincing evidence, that the particular circumstances of the case require the imposition of an order to provide reasonable protection to the public and reasonable assurance of the person's future appearance in court.

*This bill* requires the court to make an individualized determination of the factors that do or do not indicate that the person would be a danger to the public, based on clear and convincing evidence, if released pending a formal revocation hearing.

*This bill* states that the court shall not require the use of any algorithm-based risk assessment tool in setting conditions of release.

*This bill* states that the court shall impose the least restrictive conditions of release necessary to provide reasonable protection of the public and reasonable assurance of the person's future appearance in court.

*This bill* specifies that reasonable conditions of release may include but are not limited to, reporting telephonically to a pretrial services officer, protective orders, a global positioning system monitoring device, or other electronic monitoring, or an alcohol use detection device. However, person shall not be required to bear the expense of any conditions of release ordered by the court.

*This bill* states that bail shall not be imposed unless the court finds by clear and convincing evidence that other reasonable conditions of release are not adequate to provide reasonable protection of the public and reasonable assurance of the person's future appearance in court.

*This bill* defines "bail" for purposes of its provisions as cash bail; a bail bond or property bond is not bail. In determining the amount of bail, the court shall make an individualized determination based on the particular circumstances of the case, and it shall consider the person's ability to pay cash bail, not a bail bond or property bond. Bail shall be set at a level the person can reasonably afford.

*This bill* prohibits the court from denying release for a person on probation for misdemeanor conduct before the court holds a formal probation revocation hearing.

*The bill* states that for a person on probation for felony conduct, the court shall not deny release before the court holds a formal revocation hearing unless the court finds by clear and convincing evidence that there are no means reasonably available to provide reasonable protection of the public and reasonable assurance of the person's future appearance in court.

*This bill* provides that the court shall not impose condition of release for the purpose of preventative detention.

*This bill* states that the court shall not presume the truth of any allegation of a probation violation when making a finding concerning the release of a person before a formal probation revocation hearing.

*This bill* states that all findings required to be made by clear and convincing evidence shall be made in writing and shall state the factual basis of the finding.

*This bill* states that if a new charge is the basis for a probation violation, nothing in its provisions shall be construed to limit the court's authority to release, limit release, or impose conditions of release for that charge as permitted by applicable law.

## COMMENTS

### 1. Need for This Bill

According to the author of this bill:

Most individuals arrested and charged with a crime are entitled to some form of pretrial release. However, existing law is unclear on whether or not a person accused of violating their probation has the right to bail. Probation currently operates under a separate legal system – one where basic civil rights like the presumption of innocence, speedy detention hearings and burden of proof beyond a reasonable doubt are disregarded.

Those accused of violating probation are often arrested on a no-bail warrant. When arrested on a no-bail warrant, a person is held in custody and cannot be released by jail authorities until disposition of the case, which can place an immense amount of pressure on limited jail resources costing taxpayers more than \$1.8 billion in supervision violations.

It is imperative we uphold the cornerstone of our criminal justice system – a presumption of innocence – and allow people who are accused of a wrongdoing to have the option to live their lives outside of detention until a court can appropriately determine whether a violation occurred and what, if any, additional probation terms are necessary.

AB 1228 will require procedures be in place that consider pretrial release and detention screening procedures for defendants charged with a violation of probation and retains judicial discretion in continuing to detain an individual if they believe it is necessary to maintain the safety of the public.

### 2. Violation of Probation

Probation is the suspension of a custodial sentence and a conditional release of a defendant into the community. Probation can be “formal” or “informal.” “Formal” probation is under the direction and supervision of a probation officer. Under “Informal” probation a defendant is not supervised by a probation officer but instead reports to the court. Courts may impose any “reasonable” conditions necessary to secure justice and assist the rehabilitation of the probationer. When a defendant is placed on probation the court retains jurisdiction over the case to ensure the defendant complies with probation.

When a person who is under probation supervision is believed to have failed to comply with the terms and conditions of their grant of probation, the person can be sanctioned with non-custody sanctions such as increasing AA meetings or restricting curfew, or if the probation officer believes it to be necessary, they can be arrested and a revocation of probation could be filed against them. In addition to violating specific terms of supervision, committing a new crime would also form a basis for revocation of probation. Revocation of probation is usually initiated by an arrest or a petition to revoke the supervision filed by a prosecutor or probation officer. Generally, a court will preliminarily revoke probation upon a finding of probable cause, pending a more formal revocation hearing. If a court finds or the defendant admits a violation of

probation occurred, courts can restore probation, restore and modify probation with additional terms or imprisonment or terminate the supervision and impose some term of imprisonment. Courts have discretion to release a defendant facing a violation of probation.

A defendant has a right to a formal probation hearing on the allegation forming the basis of the violation. Such a hearing requires a presentation of evidence. In order to find a probation violation, a court must find that the evidence demonstrates the alleged violation by a preponderance of the evidence. This bill would direct a court when considering the release of a person prior to their formal revocation hearing, to follow specified procedures. In general, the default when a person is released pending a revocation hearing would be on the person's own recognizance, however, the court may impose conditions on the defendant's release if it is established by clear and convincing evidence of a threat to public safety or failure to appear at future hearings. Any conditions imposed on release must be the least restrictive necessary to provide reasonable protection of the public and reasonable assurance of the person's future appearance in court. If the court finds by clear and convincing evidence that no other reasonable conditions of release are adequate to provide reasonable protection of the public and reasonable assurance of the person's future appearance in court, the court may order bail as a condition of release, however bail must be set at an amount that the person can reasonably afford. This bill also clarifies that if the basis of the violation of probation is a new charge, the court is not limited in its authority to release, limit release, or impose conditions of release for that charge. The bill prohibits the court from presuming the truth of any allegation of a probation violation when making any finding concerning the release of a person before a formal probation revocation hearing.

Proponents of the bill want to ensure that most people in custody for a violation of probation can be released either on their own recognizance or if the circumstances warrant it, with conditions of release which can include any reasonable condition such as reporting requirements or protective orders, or money bail. If a court finds by clear and convincing evidence no reasonable conditions can be placed on the person on felony probation to assure protection of the public or assure the person's appearance in court, the court can deny release. Proponents argue that keeping a person in custody makes it more likely that they will lose their jobs or otherwise have a negative impact on their rehabilitation. Additionally, once a person has had their revocation hearing, the court can decide to impose sanctions including time in custody or more stringent probation conditions.

Opponents of the bill argue probation officers are in the best place to provide information to the court about the probationer and how best to address their failure to comply with their conditions. The basis of the violation of probation would be in the officer's report to the court and if the court is not allowed to presume the truth of the allegation, the "clear and convincing" standard required by this bill may be difficult, if not impossible, to meet. Additionally, they point out that sometimes a person is detained for a violation of probation for their own safety, for example fear of overdose of drugs or potential rivalries with others in the community, and it may not be in the best interest of the probationer to be released.

### **3. Pretrial Release and Bail**

Under existing law, any person, other than a person arrested on a capital offense, may be released on their own recognizance which requires the person to sign a release agreement to obey all reasonable conditions imposed by the court. (Pen. Code, §§ 1270 and 1318.) A misdemeanor defendant is generally entitled to an own recognizance release unless the court makes a finding

on the record that an own recognizance release will compromise public safety or will not reasonably assure the appearance of the defendant as required. Public safety is be the primary consideration. If the court makes one of those findings, the court shall then set bail and specify the conditions, if any, under which the defendant shall be released. (Pen. Code, § 1270.)

In setting, reducing, or denying bail, a judge or magistrate shall take into consideration the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at trial or at a hearing of the case. The public safety shall be the primary consideration. (Pen. Code, § 1275, subd. (a).) Bail is intended to act as a financial guarantee to the court that the defendant will appear for all required court hearings. An arrestee may post bail with his or her own cash, or may post bail using a bail bond. The right to bail applies to persons prior to a conviction. (*In re O’Driscoll* (1987) 191 Cal.App.3d 1356, 1460.)

Recently, the California Supreme Court ruled that “The common practice of conditioning freedom solely on whether an arrestee can afford bail is unconstitutional. Other conditions of release—such as electronic monitoring, regular check-ins with a pretrial case manager, community housing or shelter, and drug and alcohol treatment—can in many cases protect public and victim safety as well as assure the arrestee’s appearance at trial. What we hold is that where a financial condition is nonetheless necessary, the court must consider the arrestee’s ability to pay the stated amount of bail—and may not effectively detain the arrestee “solely because” the arrestee ‘lacked the resources’ to post bail.” (*In re Humphrey* (Mar. 25, 2021, S247278) 11 Cal.5th 135, 135-136.)

This bill generally provides that a person released prior to a formal revocation hearing shall be released on their own recognizance, but it also provides standards for the court to consider when own recognizance release will not reasonably assure the safety of the public or the defendant’s appearance in court and thus conditions on release must be ordered. This bill would prohibit the costs associated with conditions of release to be imposed on the person. Additionally, the bill specifies that if the court finds that no other reasonable conditions of release are adequate to provide reasonable protection of the public and reasonable assurance of the person’s future appearance in court, the court may order bail as a condition of release. However, in setting bail, the court must make an individualized determination based on the particular circumstances of the case, and shall consider the person’s ability to pay cash bail, and bail shall be set at a level the person can reasonably afford. These requirements on bail align with the California Supreme Court’s ruling in *Humphrey*.

#### **4. Judicial Council Pretrial Detention Working Group Report**

The Chief Justice of the California Supreme Court set up a working group to study pretrial detention practices and provide recommendations for reform. The study found that California’s “pretrial and release detention system unnecessarily compromises victim and public safety because it bases a person’s liberty on financial resources rather than the likelihood of future criminal behavior and exacerbates socioeconomic disparities and racial bias.” (Judicial Council of Cal., *Pretrial Detention Reform: Recommendations to the Chief Justice* (2017), p. 1.) The working group recommended several reforms including reforms to the monetary bail system. (*Id.* at p. 2.)

Among the recommendations made by the working group was to apply pretrial procedures to violations of supervision. As explained in the report:

The court often issues “no bail” arrest warrants for those defendants who violate the terms of community supervision. Thirty-nine jails in 19 counties have population caps, and jail population management issues are most acute in these jurisdictions. A significant portion of the jail population includes individuals accused of violating the terms and conditions of probation, mandatory supervision, postrelease community supervision, or parole.

When arrested on a no-bail warrant, a person is held in custody and cannot be released by jail authorities until disposition of the case, which can place a significant impact on limited jail resources. In addition, these defendants are also subject to the previously identified negative impacts of detention. In development of a pretrial system, legislation and rules of court must be adopted that consider the pretrial release and detention screening procedures for defendants alleged to be in violation of the conditions of their supervision. (*Id.* at p. 55.)

This bill specifies a release procedure for persons who are in custody for a violation of their supervision prior to the formal hearing on their revocation of probation.

## 5. Argument in Support

According to California Attorneys for Criminal Justice, the sponsor of this bill:

Probationers are people a judge has determined deserve to be released into society, despite having committed a crime. Generally, the crimes involved are misdemeanors or non-violent felonies. Probationers are expected to work to better themselves. By engaging with their families, seeking and maintaining employment, participating in educational and drug treatment programs, and making restitution for any damage they have caused. Of course, they are also expected to lead law-abiding lives.

However, probation can be a bumpy ride. Family life can be chaotic, work and schooling can be sporadic and hard to find, and substance abuse treatment can include relapses and other setbacks. Some probationers, unfortunately commit new crimes, many of them minor offenses.

Our current criminal justice system takes a sledgehammer approach to these nuanced situations. Based solely on probation officer or police officer’s “probable cause,” a probationer can be arrested without a warrant, taken before a judge, and held in custody without bail until a formal probation violation hearing is conducted, weeks or months later. Such “no bail” probation holds are standard procedure for felony cases throughout California, and they are common in misdemeanor cases as well. These procedures take no account of the severity of the alleged violation, or the severity of the crime for which the person is on probation. They also fail to consider the degree to which incarceration will interfere with the probationer’s rehabilitation, or otherwise harm that person. And of course, they do not consider the possibility that the probationer did not actually violate probation.

Our current system facilitates an additional injustice. Frequently, when a probationer is arrested for a new minor offense, the local District Attorney will elect not to file a new criminal case. Filing a new case would safeguard the accused's rights, by allowing release on bail, full discovery of the facts, and ultimately a trial by jury. Instead, prosecutors will proceed by way of a probation violation, which provides none of these rights. The results, all too often, is that the probationer serves weeks in jail, loses a job, loses educational opportunities, and is expelled from substance abuse treatment, only to be placed back on probation.

....

AB 1228 follows the lead of the California Supreme Court in *In re Humphrey*, the landmark decision which requires an individualized determination when evaluating pretrial release of people accused of crimes. AB 1228 mandates a similar individualized determination of a probationer's circumstances, including the ability to pay bail, when a judge makes a decision about releasing someone accused of a probation violation.

AB 1228 also requires courts not to presume that a person is guilty of a probation violation until a formal probation revocation hearing is held. Presuming the truth of these allegations stands the presumption of innocence on its head. Also, unlike criminal charges, which must identify a specific penal code statute which was allegedly violated, probation violations can be described in vague, sweeping language. Presuming the truth of these allegations invites arbitrary detentions based on incorrectly presumed case specific facts.

## 6. Argument in Opposition

According to the Chief Probation Officers of California:

Probation utilizes graduated sanctions to address an individual's behavior and violations of the terms and conditions of probation. Graduated sanctions are structured, incremental, and proportional and intended to reflect research on the effectiveness of swift and certain responses to addressing behavior. Similarly, incentives and rewards are effective in enhancing an individual's motivation to change behavior, engage in treatment, comply with court ordered conditions, and make sustainable changes.

Probation understands change is a process and in the vast majority of cases, it is not immediate. Therefore, violations of their agreed upon terms of probation are often part of an individual's change process. Probation uses options short of filing a revocation when at all possible. In light of the use of graduated and incremental responses to violations, a petition for revocation before the court is used as a last resort when other lesser or intermediate responses have not been successful or if an imminent risk is present.

Probation Chiefs have supported pretrial reforms which focus on release prior to a conviction; however, the release mechanisms in this bill differ significantly as they apply to an individual after they have been convicted and subsequently violated the terms of their sentence. In issuing probation, a court is specifying the

terms agreed to by the individual to serve their sentence in the community. We are concerned that by setting up a presumption for release in instances where a violation of the court's orders has occurred is being considered for revocation, the unintended consequence is that sentences in lieu of custody will be used less if there are not deemed to be suitable mechanisms to address instances of recurring violations and releases.

**-- END --**