SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2017 - 2018 Regular

Bill No:	AB 1408	**Hearing Date:**	June 27, 2017
Author:	Calderon		
Version:	April 6, 2017		
Urgency:	No	**Fiscal:**	Yes
Consultant:	SJ		

Subject: ***Crimes: Supervised Release***

HISTORY

Source: Author

Prior Legislation: SB 266 (Block) Ch. 706, Stats. of 2016
AB 63 (Patterson) Failed Assembly Public Safety 2014
AB 109 (Committee on Budget) Ch. 15, Stats. of 2011

Support: California District Attorneys Association; City of Lakewood; City of La Quinta; City of San Jose; City of Signal Hill; City of Thousand Oaks; City of Torrance; City of West Covina; City of Whittier; Crime Victims United; League of California Cities; Los Angeles County Board of Supervisors, District Four; Los Angeles County Sheriff's Department; Peace Officer Research Association of California

Opposition: American Civil Liberties Union of California; California Attorneys for Criminal Justice; California Public Defenders Association; Courage Campaign

Assembly Floor Vote: 72 - 0

PURPOSE

The purpose of this bill is to: (1) limit the number of intermediate sanctions which the probation department may impose against a person on post-release community supervision (PRCS); (2) require the Department of Corrections and Rehabilitation (CDCR) to share information with local law enforcement agencies regarding a person's prior parole record; (3) require probation offices to share information regarding a person's PRCS record with CDCR upon request; (4) require probation offices to notify the court and specified government agencies when it employs flash incarceration; and (5) codify the Board of Parole Hearing's (BPH) existing practice of considering an inmate's entire criminal history when making a parole suitability determination .

Existing law requires the parole board to set a release date unless it determines that the gravity of the current offense or offenses, or the timing and gravity of current or past offense or offenses, is such that consideration of the public safety requires a lengthier period of incarceration for the inmate. (Pen. Code, § 3041, subd. (b).)

Existing law provides that the following persons released from prison prior to, or on or after July 1, 2013, be subject to parole under the supervision of the CDCR:

a) A person who committed a serious felony listed in Penal Code section 1192.7, subdivision (c);

b) A person who committed a violent felony listed in Penal Code section 667.5, subdivision (c);

c) A person serving a Three-Strikes sentence;

d) A high risk sex offender;

e) A mentally disordered offender;

f) A person required to register as a sex offender and subject to a parole term exceeding three years at the time of the commission of the offense for which he or she was sentences to state prison; and,

g) A person subject to lifetime parole at the time of the commission of the offense that resulted in a state prison sentence. (Pen. Code, § 3000.08, subds. (a) and (i).)

Existing law requires all other offenders released from prison to be placed on post-release community supervision (PRCS) under the supervision of a county agency, such as a probation department. (Pen. Code, §§ 3000.08, subd. (b), & 3451.)

Existing law requires all persons paroled before October 1, 2011 to remain under the supervision of the CDCR until jurisdiction is terminated by operation of law or until parole is discharged. (Pen. Code, § 3000.09.)

Existing law requires CDCR to provide local law enforcement agencies with specified information about an inmate released on parole or PRCS. (Pen. Code, § 3003, subd. (e)(1).)

Existing law authorizes intermediate sanctions, including flash incarceration, to be imposed on inmates released from prison and subject to parole. (Pen. Code, § 3000.08, subd. (d).)

Existing law authorizes intermediate sanctions, including flash incarceration, for violating the terms of PRCS. (Pen. Code, § 3454, subd. (b).)

Existing law defines "flash incarceration" as a period of detention in a city or county jail due to a violation of a person's conditions of parole or PRCS. The length of the detention period can range between one and 10 consecutive days in a county jail. (Pen. Code, §§ 3000.08, subd. (e), and 3454, subd. (c).)

Existing law specifies that if parole is revoked, the offender may be incarcerated in the county jail for a period not to exceed 180 days. (Pen. Code, § 3000.08, subd. (g).)

Existing law specifies that if PRCS is revoked, the offender may be incarcerated in the county jail for a period not to exceed 180 days for each custodial sanction. (Pen. Code, § 3455, subd. (d).)

This bill requires CDCR to provide a local law enforcement agency with copies of an inmate's record of supervision during any period of parole.

This bill requires county probation offices to share information regarding a person's PRCS records with CDCR upon request.

This bill specifies that the parole board must consider an inmate's entire criminal history, including all current and past convictions, in determining whether to grant parole.

This bill prohibits the use of intermediate sanctions for person released on PRCS if the person has violated the terms of his or her release for a third time. In this case, the supervising agency is required to file a petition to modify, revoke, or terminate PRCS.

This bill permits a peace officer, including a probation officer, to arrest a person on PRCS if he or she has failed to appear at a hearing on a motion to revoke or modify PRCS.

This bill requires the probation department to notify the court, public defender, district attorney, and sheriff of each imposition of flash incarceration.

COMMENTS

1. Need for This Bill

According to the author:

> … AB 109 limits who can be sent to state prison, instead requiring that certain lower-level felons serve their incarceration terms in county jail….It further requires that counties, rather than the state, supervise certain lower-level felons released from state prison and county jails under Post Release Community Supervision (PRCS).
>
> Under PRCS, county probation officers are tasked with supervising "non-serious, non-violent" felons, or at least those whose most recent commitment offense falls into that category. The rules governing supervision vary by county agency, including the use of continuous electronic monitoring, ordering rehabilitation and treatment services, and offering incentives. The tools probation officers have to enforce violations of these terms vary as well, and include intermediate sanctions up to and including referral to a reentry court or flash incarceration in a city or county jail. Flash incarceration is a period of detention in jail ranging between one and 10 consecutive days.
>
> The Penal Code encourages the use of flash incarcerations, as these shorter periods of detention punish an offender while preventing the disruption in a work or home establishment that typically arises from longer term revocations. If, however, the supervising county agency has determined that these intermediate sanctions are not enough, the agency can request a revocation hearing, during which the terms of the supervision can be modified or revoked entirely, resulting in the supervised person being sent to County Jail for up to 180 days.

> … [A]n over-reliance on flash incarcerations in the face of repeated supervision violations, does not serve the dual interest of such brief re-incarcerations – first, to penalize the supervised individual for said violations and encourage better adherence; and second, to protect the general public from individuals with little regard for the law. In the case of supervised individuals that routinely flout the rules of their supervision or commit new crimes, it seems prudent to establish a limit, that when reached results in a complete re-evaluation of the terms of their release, and if necessary, a longer re-incarceration period. Unfortunately, recent events in Whittier have highlighted the need for such a threshold in the number of PRCS violations permitted.
>
> Additionally, under realignment, many supervised persons have been supervised by both DAPO and local county probation departments at various times, based on their most recent commitment offense. This results in lengthy gaps in the supervision history, during which the supervised person was being supervised by the other agency. Closing these gaps of information will provide greater context for the current supervision agency and the individualized supervision strategy they decide to pursue.
>
> Another reform, Proposition 57, would expand the scope of those considered for release by the Board of Parole Hearings…Current law does not specify that the Board must weigh previous convictions when considering whether to release an inmate, though the regulations do not prevent it. As the scope of inmates considered by BPH grows under Proposition 57…to include those with potentially less serious commitment offenses, prior criminal convictions become more important in their deliberations.
>
> As outlined, the last seven years have borne witness to extensive reform efforts to our criminal justice system. It is still fairly early in the implementation of these policies to determine whether they have been successful in ways beyond prison population reduction. However, as real world events reveal the need for adjustments to these reforms, the Legislature must react accordingly. AB 1408 is a necessary modification as we balance the rights and rehabilitation of the formerly incarcerated population, with the need to ensure that our communities are safe from dangerous criminals….
>
> …AB 1408 does not undo the steps the state has taken to address its prison overcrowding problem, but it does endeavor to set some practical ground rules and enhance the tools available to law enforcement operating under these recent reforms.

2. Changes to Parole Due to Realignment

Prior to realignment, individuals released from prison were placed on parole and supervised in the community by parole agents working for CDCR's Division of Adult Parole Operations (DAPO). If it was alleged that a parolee had violated a condition of parole, he or she would have a revocation proceeding before the Board of Parole Hearings (BPH). If parole was revoked, the offender would be returned to state prison for violating parole.

Realignment shifted the supervision of some released prison inmates from CDCR parole agents to local probation departments. Parole under the jurisdiction of CDCR for inmates released from prison on or after October 1, 2011 is limited to those defendants whose term was for a serious or violent felony; were serving a Three-Strikes sentence; are classified as high-risk sex offenders; who are required to undergo treatment as mentally disordered offenders; or who, while on certain paroles, commit new offenses. All other inmates released from prison are subject to up to three years of PRCS under local supervision.

Realignment also changed where an offender is incarcerated for violating the terms of his or her supervision. Most individuals can no longer be returned to state prison for violating a term of supervision; offenders serve the revocation term in county jail. The only offenders who are eligible for return to prison for violating parole are life-term inmates paroled pursuant to Penal Code section 3000.1 (e.g., those convicted of murder, specific life term sex offenses, etc.).

Additionally, realignment changed the process for revocation hearings, which was implemented in phases. Until July 1, 2013, individuals supervised on parole by state agents continued to have revocation hearings before the BPH. After July 1, 2013, trial courts assumed responsibility for holding all revocation hearings for those individuals who remain under CDCR's jurisdiction. In contrast, since the inception of realignment, individuals placed on PRCS appear before the trial court for revocation hearings.

3. Flash Incarceration

Changes to the supervision of inmates released from prison included establishing a new sanction for a violation of supervised release known as flash incarceration. Flash incarceration is defined as "a period of detention in county jail due to a violation of a parolee's conditions of parole" that "can range between one and 10 consecutive days." (Pen. Code, §§ 3000.08, subd. (e), & 3455, subd. (c).)

With the creation of PRCS, the supervising agency was authorized to employ "flash incarceration" as an "intermediate sanction" for responding to both parole and PRCS violations. (See Pen. Code, §§ 3454, subd. (c), & 3000.08 (e).) The Legislative Analyst's Office explained the context and reasoning behind "flash incarceration" as part of realignment: "[T]he realignment legislation provided counties with some additional options for how to manage the realigned offenders. . . . [T]he legislation allows county probation officers to return offenders who violate the terms of their community supervision to jail for up to ten days, which is commonly referred to as "flash incarceration." The rationale for using flash incarceration is that short terms of incarceration when applied soon after the offense is identified can be more effective at deterring subsequent violations than the threat of longer terms following what can be lengthy criminal proceedings." (Legislative Analyst's Office, The 2012–13 Budget: The 2011 Realignment of Adult Offenders—An Update (Feb. 22, 2012), pp. 8-9.)[1]

The intent of intermediate sanctions, like flash incarceration, is to balance holding offenders accountable for violating the conditions of supervision while creating shorter disruptions from

[1] Flash incarceration as intermediate sanction for offenders under state supervision who violate a term of their parole became effective July 1, 2013. (Pen. Code, § 3000.08, subd. (d).) Despite the authority to impose terms of flash incarceration upon state-supervised parolees, DAPO does not to utilize flash incarceration. (See *Valdivia v. Brown*, Response to May 6 Order, filed 05/28/13, p. 17.) CDCR has informed this Committee that as of June 21, 2017 it is still not utilizing flash incarceration.

work, home, or programming which often results from longer term revocations. Because flash incarceration has been used successfully by probation officers on persons supervised under PRCS, the Chief Probation Officers sponsored SB 266 (Block), Chapter 706, Statutes of 2016, last session to extend the use of flash incarceration to individuals granted probation or placed on mandatory supervision.

This bill curtails the use not only of flash incarceration, but in fact all intermediate sanctions, on persons on PRCS. It prohibits the use of any intermediate sanction if the person has violated the terms of release for a third time. In that instance, the supervising agency must file a petition to revoke, modify, or terminate PRCS.

Committee members may wish to consider the following:

- Should the discretion of probation officers, who are familiar with case-specific factors, be limited?
- Should all violations of the terms of release be treated the same, or should the provisions in this bill be limited to serious violations?
- What is the maximum number of violations that should be allowed before the supervising agency is required to petition the court of a modification of termination of PRCS?

4. Parole Suitability

Inmates who are indeterminately sentenced must be granted parole by the BPH in order to be released from prison. The Penal Code provides that the parole board "shall grant parole to an inmate unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual." (Pen. Code, § 3041, subd. (b).) The fundamental consideration when making a determination about an inmate's suitability for parole is whether the inmate currently poses a threat to public safety. (*In re Shaputis* (2008) 44 Cal.4th 1241.) The decision whether to grant parole is an inherently subjective determination. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 655.)

In deciding whether to grant parole, the BPH must consider all relevant and reliable information available. (Cal. Code Regs., tit. 15, § 2402, subd. (b).) Factors the BPH must consider include the nature of the commitment offense, including "the circumstances of the prisoner's: social history; past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before, during and after the crime; past and present attitude toward the crime; any conditions of treatment or control, including the use of special conditions under which the prisoner may safely be released to the community; and any other information which bears on the prisoner's suitability for release." (Cal. Code Regs., tit. 15, §§ 2281, subd. (b) & 2402, subd. (b).) The regulations further state that "[c]ircumstances which taken alone may not firmly establish unsuitability for parole may contribute to a pattern which results in a finding of unsuitability." (Cal. Code Regs., tit. 15, §§ 2281, subd. (b).) Although the BPH is required to consider the circumstances of the offense, the California Supreme Court has held that the parole board may not rely solely on the commitment offense when deciding to grant parole unless the circumstances of the offense "continue to be predictive of current dangerousness." (*In re Lawrence* (2008) 44 Cal.4th 1181, 1221.)

This bill requires the BPH to consider an inmate's entire criminal history, not just the most recent commitment offense, in determining whether the inmate is suitable for parole. Although not delineated in statute, the BPH is already required to consider this information per regulations for indeterminately sentenced inmates. Proposition 57 regulations, which pertain to the non-violent parole process and were introduced earlier this year, also require the BPH to consider an inmate's criminal history.

5. Argument in Support

The League of California Cities supports this bill stating:

> This measure provides a range of important reforms associated with managing the population of ex-offenders who are subject to post-release community supervision, and does so in a manner that can be expected to enhance public safety in our communities.
>
> First, it expands the volume and quality of data available to local law enforcement by mandating the California Department of Corrections and Rehabilitation to provide locals with copies of an inmate's record of supervision during any period of parole.
>
> Second, it specifies that during its deliberations about whether to grant an inmate parole, the state Parole Board shall consider the individual's entire criminal history, including all past convicted offenses, in making that determination. This is a critical provision in that it ends the current policy of considering only the offender's most recent commitment offense. It also follows other practices related to developing a realistic assessment of an individual's actual risk of recidivism.
>
> Third, AB 1408 prohibits the use of intermediate sanctions such as flash incarceration for ex-offenders on post-release community supervision (PRCS) who have violated the terms of their release for a third time. This measure specifies that in the case of such repeat offenders, the supervising agency must modify or revoke PRCS.
>
> Finally, this measure requires notice to the court, sheriff, district attorney and public defender if the local probation department employs flash incarceration, and authorizes a peace officer, including a probation officer to arrest an individual on PRCS if he or she has failed to appear at a hearing on a motion to modify or revoke such supervision.

6. Argument in Opposition

California Attorneys for Criminal Justice writes:

> The bill seeks to strip Probation Officers of discretion, circumvent Constitutional Due Process protections, and create remedies to non-existent problems.
>
> Currently a probation officer supervising an individual on Post Release Community Supervision has multiple options available to them to deal with non-compliance ranging from counseling to added terms of supervision to flash

incarcerations and, if intermediate sanctions are ultimately deemed insufficient, an officer may petitioning the court for modification, revocation or termination of supervision and a formal sentence.

Of greatest concern is this bill's effort to strip probation officers of their discretion to choose an appropriate sanction that best accomplishes the goals of supervision and rehabilitation. AB 109 (2011) recognized the need for evidence based reform of California's process for supervising released inmates and a major component of that was empowering the boots on the ground (probation officers), with additional options in the form of graduated sanctions. Currently, the decision as to when court intervention is necessary resides with the person in the best position to make that decision. This bill would arbitrarily require probation officers to file a formal petition on a third violation. AB 1408 cites to no research that would justify this step backwards.

Additionally, this bill expands a probation officer's power to arrest an individual on Post Release Community supervision from the constitutionally permissible instances in which the officer has probable cause to believe the individual has violated the terms of his or her release to include instances in which the individual has failed to appear at a court hearing to provoke, modify, or terminate the individual's Post Release Community Supervision. Similar to the bill's proposed changes to parole hearings, discussed below, this provision of the bill seeks to solve a problem that does not exist. In the vast majority of instances when an individual fails to appear at a properly noticed court hearing, the judicial officer issues a warrant for the individual's arrest. Thus, the only occasion on which this added provision would ever have practical effect would be that in which a judicial officer has deemed it inappropriate to issue a warrant for the individual's arrest for failure to appear AND the officer does not have probable cause to believe the individual has violated any term of supervision (which would allow the officer to arrest under current law) at which time this bill would allow a probation officer to override that decision and arrest the individual against the judgment of the judicial officer and without any other probable cause. Such an arrest would likely violate the Due Process Clause.

Lastly, Penal Code section 3041(b)(1) already commands that a body making a parole determination shall grant an individual parole unless 'the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual.' In other words, the statute already clearly contemplates the consideration of past offenses. This bill nevertheless deems it necessary to add the following sentence to the end of that section: "The panel or the board, sitting en banc, shall consider the entire criminal history of the inmate, including all current or past convicted offenses, in making this determination." The bill seeks to amend a statute to repeat the directive of the immediately preceding sentence in the statute.

-- END --