
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: SB 1321 **Hearing Date:** April 19, 2016
Author: Stone
Version: February 19, 2016
Urgency: No **Fiscal:** Yes
Consultant: JM

Subject: *Felonies: Crimes Committed While on Mandatory Supervision*

HISTORY

Source: Author

Prior Legislation: SB 443 (Emmerson) – failed passage in Senate Public Safety, 2013
SB 1441 (Emmerson) – failed passage in Senate Public Safety, 2012
AB 109 (Committee on Budget) – Ch. 15, Stats. 2011
AB 117 (Committee on Budget) – Ch. 39, Stats. 2011
ABx1 17 (Blumenfield) – Ch. 12, Stats. 2011
AB 116 (Committee on Budget) – Ch. 136, Stats. 2011

Support: California State Sheriffs' Association; Crime Victims of California

Opposition: American Civil Liberties Union of California; California Public Defenders Association; Legal Services for Prisoners with Children

PURPOSE

The purpose of this bill is to require that a defendant convicted of any felony while on "mandatory supervision" -- which is the community supervision piece of the "split sentence" felony punishment created by the 2011 Realignment Legislation -- serve his or her sentence in prison, not jail.

Current law generally provides that, for any person sentenced on or after October 1, 2011, certain felonies – those which by their statutory terms specifically so provide – are punishable by a term of imprisonment in a county jail, as specified. (Penal Code § 1170(h).)

Existing law authorizes the court, when imposing a sentence for a county jail-eligible felony, to commit the defendant to county jail as follows:

- For a full term in custody as determined in accordance with applicable sentencing law; or
- For a "split" sentence, which is a term determined in accordance with the applicable sentencing law, but where the execution of a concluding portion of the term selected in the court's discretion is suspended and the defendant placed on mandatory supervision for the remaining unserved portion of the sentence. 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 mandatory supervision, unless in actual custody, the defendant shall be entitled to only actual time credit against the term of imprisonment imposed by the court. (Pen. Code, § 1170, subd. (h)(5).

Existing law, in relevant part, provides that the court's authority to revoke, modify, terminate or change a previous order as to a person on mandatory supervision is subject to the following:

- Before any sentence or term or condition of probation is modified, a hearing shall be held in open court. The prosecuting attorney shall be given a two-day written notice and an opportunity to be heard on the matter, except as specified in domestic violence matters.
- If the sentence or term or condition of probation is modified, the judge shall state the reasons for that modification on the record.
- No order shall be made without written notice first given to the probation officer of the intention to revoke, modify, or change its order.
- The court may modify the time and manner of the term of probation for purposes of measuring the timely payment of restitution obligations or the good conduct and reform of the defendant while on probation. The court shall not modify the dollar amount of the restitution obligations due to the good conduct and reform of the defendant, absent compelling and extraordinary reasons, nor shall the court limit the ability of payees to enforce the obligations in the manner of judgments in civil actions. (Penal Code Section 1203.3, subd. (b)(1) to (5).)

Current law provides that where a defendant meets any of the following criteria, an executed sentence for a felony punishable pursuant to this subdivision shall be served in state prison:

- the defendant has a prior or current felony conviction for a serious felony described in subdivision (c) of Section 1192.7;
- the defendant has a prior or current conviction for a violent felony described in subdivision (c) of Section 667.5;
- the defendant has a prior felony conviction in another jurisdiction for an offense that has all of the elements of a serious felony described in subdivision (c) of Section 1192.7 or a violent felony described in subdivision (c) of Section 667.5;
- the defendant is required to register as a sex offender, as specified; or
- the defendant is convicted of a crime and as part of the sentence an enhancement pursuant to Section 186.11 is imposed. (Penal Code § 1170(h)(3).)

This bill would amend this provision to provide that if a defendant committed any felony offense while on mandatory supervision, an executed sentence for that felony shall be served in state prison.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past several 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 December of 2015 the administration reported that as “of December 9, 2015, 112,510 inmates were housed in the State’s 34 adult institutions, which amounts to 136.0% of design bed capacity, and 5,264 inmates were housed in out-of-state facilities. The current population is 1,212 inmates below the final court-ordered population benchmark of 137.5% of design bed capacity, and has been under that benchmark since February 2015.” (Defendants’ December 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).) One year ago, 115,826 inmates were housed in the State’s 34 adult institutions, which amounted to 140.0% of design bed capacity, and 8,864 inmates were housed in out-of-state facilities. (Defendants’ December 2014 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 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. Need For This Bill

The author states:

Following the Proposition 47 changes and “realignment” individuals are allowed to serve their sentences for certain crimes in county jail. Mandatory supervision, which involves people serving “prison time” out of custody, is specifically encouraged within statute. An issue that has arisen is that once released to the public they reoffend immediately and then simply return to county jail. Recently,

parts of Riverside County, specifically the Coachella Valley, have experienced in uptick in crime. Robbery and Aggravated assault are up by 3.2% and 8.3%, vehicle theft and larceny are up 14.1% and 10.5%, respectively. After speaking with the Riverside County DA's office, Senator Stone became aware of a revolving door of criminals committing realigned felonies, being released on mandatory supervision, and reoffending.

The law is currently deficient in handling repeat offenders for certain offenses that allow for mandatory supervision as opposed to prison time. This bill is *not* designed to send people to prison for technical violations committed while on mandatory supervision, but is meant to strengthen our commitment to public safety by making sure that individuals who reoffend while on mandatory supervision with *bona fide* felonies will be sent to prison.

2. The Chief Probation Officers of California Report on Mandatory Supervision

Defendants are placed on mandatory supervision as part of a "split sentence" imposed pursuant Penal Code Section 1170, subdivision (h)(5). In a split sentence, the defendant serves the first portion of the sentence in a county jail. The second part of the sentence is served under supervision by the probation department in the community. By statute, consideration of alleged violations of the terms of mandatory supervision is made pursuant to the procedures and standards for alleged probation violations. Defendants who violate mandatory supervision are subject to a range of sanctions and outcomes.

The Chief Probation Officers of California (CPOC), in the winter of 2012, issued an explanation of and report on mandatory supervision.¹ As of that time, approximately 5,000 convicted felony defendants had received a split sentence that included a period of mandatory supervision upon release from jail.

CPOC argued that split sentences, including a period of mandatory supervision are effective:

The balanced approach of incarceration followed by a period of supervision using targeted interventions based on offender needs will do more to reduce recidivism than straight jail or incarceration sentences alone. National evidence supports the balanced approach of probation supervision as being more effective than a model focusing only on surveillance or only on therapeutic intervention to manage offender behavior. Realignment is an opportunity to get the balance right between incarceration and supervision for both of these populations.

Split sentences are an important public safety tool that is currently being underutilized in some areas of California. Plea bargaining and sentencing practices vary, but the research is clear that a period of supervision following incarceration, rather than just incarceration will lead to reduced recidivism. Probation Departments have the tools and experience with felony offenders to effectively balance community safety with rehabilitation. The Chief Probation Officers of California believe, based on years of research and experience that California citizens are better served with increased use of split sentencing.

¹ <http://www.cpoc.org/assets/Realignment/issuebrief2.pdf>

3. Comparing Probation and Mandatory Supervision

Mandatory supervision is similar to probation in that the defendant is supervised by a probation officer, and the defendant's release is subject to the terms and conditions imposed by the judge or the probation department. Like probation, the failure to comply with terms and conditions can result in the person being sent back to custody. However, the court cannot impose mandatory supervision until the judge denies probation and imposes a split sentence, not an alternative to an executed sentence.

There is another significant difference between probation and mandatory supervision: a defendant can refuse probation and instead choose to serve the sentence. (*People v. Beal* (1997) 60 Cal.App.4th 84, 87.) In contrast, a defendant does not have the right to refuse a split sentence requiring mandatory supervision. "Since the commitment under section 1170(h) generally is the equivalent of a prison sentence, the defendant need not agree to the terms and conditions of supervision in the same manner as a sentence involving a grant of probation." (See *Felony Sentencing After Realignment*, by Judge Couzens (Ret.) & Justice Bigelow, June 2013, at p. 13 [discussing split sentences], <http://www.courts.ca.gov/partners/documents/felony_sentencing.pdf>.)

4. Inmates Sentenced to Prison under this Bill would be Effectively Treated as Serious or Violent Offenders

Under criminal justice realignment, only defendants who have been convicted of a current or prior serious or violent felony, or who are required to register as sex offenders, serve executed jail felonies in prison. All other convicted defendants serve their terms in a county jail. Sentencing judges can impose on these defendants a split felony sentence, with a period of jail and a period in the community on mandatory supervision. A person on mandatory supervision who commits a felony must be sentenced to prison if the offense is serious or violent, or requires sex offender registration. Thus, persons on mandatory supervision who are subject to a realignment jail felony sentence could only have been convicted of a non-serious, non-violent, non-sex crime. The bill thus raises the issue whether a person who commits a non-serious felony on mandatory supervision should be treated as though he or she committed a serious felony.

The author's statement argues that "once [persons on mandatory supervision are] released to the public they reoffend immediately and then simply return to county jail." It is not clear whether this refers to judges revoking mandatory supervision and returning offenders to jail, judges imposing split executed felony sentences, including a period mandatory supervision, for new felonies committed on mandatory supervision, or judges imposing full executed felony jail terms on persons who commit new crimes on mandatory supervision. Where a judge imposes a full executed sentence under Penal Code Section 1170 (h), the defendant would be released no sooner than if he or she were committed to prison.

5. Punishment Issues Relevant to This Bill

It could be argued that a person who commits a crime on mandatory supervision after serving the custody part of a split felony sentence in a county jail should receive what would generally be considered the more punitive sentence of a term in prison, not jail. The use of criminal sentences to punish, rather than rehabilitate or incapacitate an offender, is described as "just deserts" in

criminology. A 2002 article in the *Journal of Personality and Social Psychology* succinctly described the theory:

The theory of just deserts is retrospective rather than prospective. The punisher need not be concerned with future outcomes, only with providing punishment appropriate to the given harm. Although it is certainly preferable that the punishment serve a [deterrence] function... its justification lies in righting a wrong, not a ... future benefit. The central precept... is that the punishment be proportionate to the harm. The task ... is to assess the magnitude of the harm and to devise a punishment that is proportionate in severity, if not in kind. Kant (1952) recommended censure proportionate to a perpetrator's "internal wickedness," a quantity that may be approximated by society's sense of moral outrage over the crime. (*Why do We Punish?*, *Journal of Personality and Social Psychology*, (2002) Vol. 83, No. 2, 284–299, Carlsmith, Darley and Robinson.)²

6. Research on Specific Sentences as a Deterrent to Crime

Criminal justice experts and commentators have noted that, with regard to sentencing, "a key question for policy development regards whether enhanced sanctions or an enhanced possibility of being apprehended provide any additional deterrent benefits.

Research to date generally indicates that increases in the certainty of punishment, as opposed to the severity of punishment, are more likely to produce deterrent benefits.³

A comprehensive report published in 2014, entitled *The Growth of Incarceration in the United States*, discusses the effects on crime reduction through incapacitation and deterrence, and describes general deterrence compared to specific deterrence:

A large body of research has studied the effects of incarceration and other criminal penalties on crime. Much of this research is guided by the hypothesis that incarceration reduces crime through incapacitation and deterrence. Incapacitation refers to the crimes averted by the physical isolation of convicted offenders during the period of their incarceration. Theories of deterrence distinguish between general and specific behavioral responses. General deterrence refers to the crime prevention effects of the threat of punishment, while specific deterrence concerns the aftermath of the failure of general deterrence—that is, the effect on reoffending that might result from the experience of actually being punished. Most of this research studies the relationship between criminal sanctions and crimes other than drug offenses.

In regard to deterrence, the authors note that in "the classical theory of deterrence, crime is averted when the expected costs of punishment exceed the benefits of offending. Much of the empirical research on the deterrent power of criminal penalties has studied sentence enhancements and other shifts in penal policy. . . .

² http://www.colgate.edu/portaldata/imagegallerywww/184416d4-5863-4a3e-a73b-b2b6b86e7b60/ImageGallery/Carlsmith_Darley_Robinson_2002.pdf

³ Valerie Wright, Ph.D., *Deterrence in Criminal Justice Evaluating Certainty vs. Severity of Punishment* (November 2010), The Sentencing Project (<http://www.sentencingproject.org/doc/Deterrence%20Briefing%20.pdf>.)

Deterrence theory is underpinned by a rationalistic view of crime. In this view, an individual considering commission of a crime weighs the benefits of offending against the costs of punishment. Much offending, however, departs from the strict decision calculus of the rationalistic model. Robinson and Darley (2004) review the limits of deterrence through harsh punishment. They report that offenders must have some knowledge of criminal penalties to be deterred from committing a crime, but in practice often do not.”⁴

Members may wish to discuss whether requiring that sentences for felonies committed on mandatory supervision be served in prison would deter supervised persons from committing felonies.

The authors of the 2014 report discussed above conclude that incapacitation of certain dangerous offenders can have “large crime prevention benefits,” but that incremental, lengthy prison sentences are ineffective for crime deterrence:

Whatever the estimated average effect of the incarceration rate on the crime rate, the available studies on imprisonment and crime have limited utility for policy. The incarceration rate is the outcome of policies affecting who goes to prison and for how long and of policies affecting parole revocation. Not all policies can be expected to be equally effective in preventing crime. Thus, it is inaccurate to speak of the crime prevention effect of incarceration in the singular. *Policies that effectively target the incarceration of highly dangerous and frequent offenders can have large crime prevention benefits, whereas other policies will have a small prevention effect or, even worse, increase crime in the long run if they have the effect of increasing postrelease criminality.*

Evidence is limited on the crime prevention effects of most of the policies that contributed to the post-1973 increase in incarceration rates. *Nevertheless, the evidence base demonstrates that lengthy prison sentences are ineffective as a crime control measure. Specifically, the incremental deterrent effect of increases in lengthy prison sentences is modest at best. Also, because recidivism rates decline markedly with age and prisoners necessarily age as they serve their prison sentence, lengthy prison sentences are an inefficient approach to preventing crime by incapacitation unless they are specifically targeted at very high-rate or extremely dangerous offenders.* For these reasons, statutes mandating lengthy prison sentences cannot be justified on the basis of their effectiveness in preventing crime.⁵

WOULD REQUIRING THAT SENTENCES FOR CRIMES COMMITTED ON MANDATORY SUPERVISION BE SERVED IN PRISON DETER PERSONS FROM COMMITTING SUCH OFFENSES?

-- END --

⁴ *Id.* at 132-133.

⁵ *Id.* at 155-156 (emphasis added).