SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair
2015 - 2016 Regular

Bill No:	SB 266	**Hearing Date:**	March 24, 2015
Author:	Block		
Version:	February 19, 2015		
Urgency:	No	**Fiscal:**	No
Consultant:	AA		

Subject: Community Supervision by Probation: Flash Incarceration

HISTORY

Source: Chief Probation Officers of California

Prior Legislation: SB 419 (Block) – 2014, amended into unrelated bill

Support: California State Sheriffs' Association

Opposition: California Attorneys for Criminal Justice; California Public Defenders Association; Legal Services for Prisoners with Children

PURPOSE

The purpose of this bill is to require that courts authorize probation to use "flash incarceration" for violations of probation or mandatory supervision, as specified.

Current law generally authorizes the use of a penalty known as "flash incarceration" for felons who have been released from prison, are subject to supervision by state parole or county probation, and are believed to have violated a condition of their supervision. (Penal Code §§ 3008.8; 3450.)

Current law specifically authorizes county agencies responsible for supervising persons subject to postrelease community supervision ("PRCS") to:

> . . . determine and order appropriate responses to alleged violations, which can include, but shall not be limited to, immediate, structured, and intermediate sanctions up to and including referral to a reentry court . . . , or flash incarceration in a county jail. *Periods of flash incarceration are encouraged as one method of punishment for violations of an offender's condition of postrelease supervision.*
>
> (c) "*Flash incarceration*" is a period of detention in county jail due to a violation of an offender's conditions of postrelease supervision. The length of the detention period can range between one and 10 consecutive days. Flash incarceration is a tool that may be used by each county agency responsible for postrelease supervision. Shorter, but if necessary more frequent, periods of detention for violations of an offender's postrelease supervision conditions shall appropriately punish an offender while preventing the disruption in a work or

> home establishment that typically arises from longer term revocations. (Penal Code § 3454(b) and (c) (emphasis added).)

Current law also authorizes this use of flash incarceration on parolees, who are supervised by state parole. (See Penal Code § 3008.08 (d), (e) and (f).)

Current law generally authorizes courts to suspend a felony sentence and order the conditional and revocable release of an offender in the community to probation supervision. (Penal Code § 1203.)

Current law also authorizes courts to impose what is known as a "split sentence" on persons convicted of a 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).)

This bill would require courts to authorize a county probation officer to use flash incarceration for any violation of conditions of probation or mandatory supervision if, at the time of granting probation or ordering mandatory supervision, the court obtains from the defendant a waiver to a court hearing prior to the imposition of a period of flash incarceration.

This bill would require that if the person on probation or mandatory supervision does not agree to accept a recommended period of flash incarceration upon a finding of a violation, the probation officer may address the alleged violation by filing a declaration or revocation request with the court.

This bill would provide that for purposes of this section, "flash incarceration" is a "period of detention in a county jail due to a violation of an offender's conditions of probation or mandatory supervision. The length of the detention period may range between one and 10 consecutive days. Shorter, but if necessary more frequent, periods of detention for violations of an offender's conditions of probation or mandatory supervision shall appropriately punish an offender while preventing the disruption in a work or home establishment that typically arises from longer periods of detention."

This bill would not apply to defendants subject to Proposition 36 of 2000, as specified.

This bill contains a sunset clause of January 1, 2021.

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 its most recent status report to the court (February 2015), 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:

> As a result of AB 109 Realignment, counties are now responsible for supervising Post Release Community Supervision (PRCS) offenders. These offenders are now under local supervision by county probation officers instead of serving their parole time on a state parole jurisdiction.
>
> One of the tools that has been successful in supervising and working with PRCS offenders is the use of intermediate sanctions like "flash" incarceration which was authorized under Realignment legislation.
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> "Flash" incarceration is a period of detention in county jail triggered by a violation of a condition of probation. The length of the detention period can range from one to ten consecutive days. Intermediate sanctions, like flash,

balance holding offenders accountable for violations of their conditions of supervision while focusing on shorter disruptions from work, home, or programing which often result from longer term revocations.

While the authority to use flash for PRCS offenders was provided under AB 109 Realignment, the statute does not equally afford this authority for offenders on felony probation or Mandatory Supervision. Thus, the existing mechanism to address violations of probation is to initiate revocation proceedings which is a much lengthier process and can result in custody time much longer than the 10 days.

Under SB 266, an offender would agree to the authority to use flash incarceration as a part of their terms and conditions of probation. If the person on probation or mandatory supervision does not agree to accept a recommended period of flash incarceration upon a finding of a violation, the probation department may address the alleged violation by filing a declaration or revocation request with the court for purposes of a traditional revocation hearing. This ensures that, upon finding of a violation, a defendant may request that a petition for revocation be filed to go through the existing hearing revocation process. This will ensure that an offender has the option to have their case heard in a revocation court proceeding should they request it.

SB 266 gives county probation departments the authority to use flash incarceration for a person on probation or mandatory supervision similar to existing authoring for PRCS offenders. By extending this authority, county probation departments can continue to use this effective, evidence based tool for offenders under their supervision.

2. What This Bill Would Do

This bill would expand the sanction of "flash incarceration" – a custodial sanction of up to 10 days for violating a term of supervision without a specific court order -- to include persons on probation or mandatory supervision if the offender expressly waives his or her right to a hearing at the time probation or mandatory supervision is ordered. Currently, flash incarceration can be imposed only on offenders subject to parole or PRCS. Under this bill, if an offender on probation or mandatory supervision has not waived his or her hearing rights he or she could not be "flashed," and probation would have to file a petition with the court to address the alleged violation with a custodial sanction.

"Flash incarceration" in this context is a "period of detention in a county jail due to a violation of an offender's conditions of probation or mandatory supervision. The length of the detention period may range between one and 10 consecutive days. Shorter, but if necessary more frequent, periods of detention for violations of an offender's conditions of probation or mandatory supervision shall appropriately punish an offender while preventing the disruption in a work or home establishment that typically arises from longer periods of detention." This bill excludes defendants subject to Proposition 36 of 2000, and sunsets January 1, 2021.

3. Background – "Flash Incarceration" as Part of the Criminal Justice Realignment of 2011

The "2011 Realignment Legislation Addressing Public Safety" altered how convicted felons are handled under California law.[1] Two provisions in realignment changed the responsibilities of probation. First, realignment provided that some inmates released from state prison would be subject to PRCS instead of parole. Thus, probation, not parole, now supervises some felons coming out of prison. Second, realignment provided that certain persons convicted of felonies would not go to prison, but instead would be sentenced to local punishment which could include jail time, mandatory community supervision, or both (a "split sentence"). Mandatory supervision as part of a "split sentence" is done by probation.

With the creation of PRCS, probation was authorized by realignment to employ "flash incarceration" as an "intermediate sanction" for responding to PRCS violations.[2] 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.[3]

4. Current Practices

The sponsor of this bill has provided the Committee with an example from the Nevada County Probation Department demonstrating that, in some jurisdictions, courts now are including flash incarceration authority in their court orders for probation and mandatory supervision offenders. The Nevada County probation department, which the sponsor indicates is reflective of how most of the counties using flash incarceration for mandatory supervision and probation offenders are handling this issue, employs a waiver which explicitly describes flash incarceration, including when it may be used and what rights the offender is giving up with the waiver. The waiver document also provides the offender with the opportunity to not agree to flash incarceration, in which case probation would be authorized to address the alleged violation by filing a declaration or revocation request with the court. This bill essentially would codify this approach.

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[1] AB 109 (Committee on Budget) (Ch. 15, Stats. 2011) was the principal measure that established the 2011 public safety realignment.

[2] Parole likewise was authorized to use this tool.

[3] Legislative Analyst's Office, The 2012–13 Budget: The 2011 Realignment of Adult Offenders—An Update (Feb. 22, 2012).

5. Previous Legislation

Last session, this Committee heard SB 419 (Block), which addressed the same issue. As heard by the Committee, that bill would have required persons subject to probation or mandatory supervision to waive any right to a court hearing. SB 419 was amended in Committee to an approach similar to this bill, and passed this Committee unanimously. SB 419 was amended in the Assembly to address an unrelated matter.

6. Opposition

California Attorneys for Criminal Justice, which opposes this bill, argues in part that the "usage of flash incarceration is a waste of state resources when those resources could be better served by focusing on rehabilitation programs such as community education, counseling, and reentry services."

7. Author's Amendment

The author intends to amend this bill to give the court *discretionary* authority to include flash incarceration as a term of probation or mandatory supervision.

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