
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair

2021 - 2022 Regular

Bill No: AB 1744 **Hearing Date:** May 31, 2022
Author: Levine
Version: March 2, 2022
Urgency: No **Fiscal:** No
Consultant: SJ

Subject: *Probation and mandatory supervision: flash incarceration*

HISTORY

Source: Chief Probation Officers of California

Prior Legislation: AB 597 (Levine), Ch. 44, Stats. 2019
SB 266 (Block), Ch. 706, Stats. 2016
AB 63 (Patterson), failed passage in Assembly Public Safety 2014
AB 986 (Bradford), Ch. 788, Stats. 2013
AB 109 (Com. on Budget), Ch. 15, Stats. 2011

Support: AFSCME Local 685; AFSCME Local 1587; AFSCME Local 1967; Arcadia Police Officers' Association; Burbank Police Officers' Association; California Coalition of School Safety Professionals; California State Association of Counties; California State Sheriffs' Association; Claremont Police Officers' Association; Corona Police Officers' Association; Culver City Police Officers' Association; Fullerton Police Officers' Association; Inglewood Police Association; Judicial Council of California; Los Angeles Schools Police Association; Newport Beach Police Association; Palos Verdes Police Officers' Association; Placer County Deputy Sheriffs' Association; Pomona Police Officers' Association; Riverside Police Officers' Association; Riverside Sheriffs' Association; Santa Ana Police Officers' Association; Upland Police Officers' Association

Opposition: California Attorneys for Criminal Justice

Assembly Floor Vote: 65 - 0

PURPOSE

The purpose of this bill is to extend authorization to use flash incarceration for individuals on probation or mandatory supervision until January 1, 2028.

Existing law defines "flash incarceration" as a period of detention in a county jail due to a violation of an offender's conditions of parole, post-release community supervision (PRCS), probation, or mandatory supervision. Provides that the length of the detention period may range between one and 10 consecutive days. Specifies in cases where there are multiple violations in a single incident, only one flash incarceration booking is authorized and may range between one and 10 consecutive days. (Pen. Code, §§ 1203.35, subd. (b), 3000.08, subd. (e), 3454, subd. (c).)

Existing law provides that in any case where the court grants probation or imposes a sentence that includes mandatory supervision, the county probation department is authorized to use flash incarceration for any violation of the 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. Prohibits the denial of probation based on a refusal to sign a waiver for flash incarceration. (Pen. Code, § 1203.35, subd. (a)(1).)

Existing law requires each county probation department to develop a response matrix that establishes protocols for the imposition of graduated sanctions for violations of the conditions of probation to determine appropriate interventions to include the use of flash incarceration. (Pen. Code, § 1203.35, subd. (a)(2).)

Existing law requires a supervisor to approve the term of flash incarceration prior to the imposition of flash incarceration. (Pen. Code, § 1203.35, subd. (a)(3).)

Existing law requires the probation department, upon a decision to impose a period of flash incarceration, to notify the court, public defender, district attorney, and sheriff of each imposition of flash incarceration. (Pen. Code, § 1203.35, subd. (a)(4).)

Existing law provides that if the person on probation or mandatory supervision does not agree to accept a recommended period of flash incarceration, upon a determination that there has been a violation, the probation officer is authorized to address the alleged violation by filing a declaration or revocation request with the court. (Pen. Code, § 1203.35, subd. (a)(5).)

Existing law provides that flash incarceration is not applicable to anyone put on probation for nonviolent drug possession, as specified. (Pen. Code, § 1203.35, subd. (c).)

Existing law provides that the provisions related to flash incarceration for probationers and those on mandatory supervision sunsets on January 1, 2023. (Pen. Code, § 1203.35, subd. (d).)

Existing law authorizes, as a general matter, the court to suspend a felony sentence and order the conditional and revocable release of the defendant in the community to probation supervision. (Pen. Code, § 1203.)

Existing law provides if any probation officer, parole officer, or peace officer has probable cause to believe that a supervised person is violating any term or condition of his/her supervision, the officer may, without a warrant and at any time until the final disposition of the case, rearrest the supervised person and bring the person before the court for further disposition such as modification, revocation, or termination of the person's supervision, as specified. (Pen. Code, § 1203.2.)

Existing law gives the sentencing judge discretion to impose two types of sentences to county jail. Provides the court may commit the defendant for the entire term allowed by law, or the court may impose a "split sentence" in which part of the term is served in custody and the remaining part of the term is comprised of a period of mandatory supervision. Provides that the presumption is that the defendant receive a split sentence, unless the court finds that, in the interests of justice, it is not appropriate in a particular case. (Pen. Code, § 1170, subd. (h)(5).)

Existing law provides that the traditional procedures used to modify probation as well as those used for violations of probation are applicable to mandatory supervision. (Pen. Code, §1170, subd. (h)(5)(B).)

This bill extends authorization for the use of flash incarceration for individuals on probation or mandatory supervision until January 1, 2028.

COMMENTS

1. Need For This Bill

According to the author:

Under current law, if a person violates the conditions of their probation, the probation department can offer them an option to admit to the violation and serve flash incarceration rather than typical probation violation proceedings which can result in the person serving up to 180 days in custody. Flash incarceration is a tool that can be used to help deter future violations of court-ordered probation by imposing a length of detention of one to ten days in county jail. Intermediate sanctions, like flash incarceration, balance the need to hold offenders accountable for violations of their conditions of supervision while focusing on shorter disruptions from work, home, or programing, which can result from longer term formal revocations. The authority to grant flash incarceration is currently set to expire on January 1, 2023.

AB 1744 would extend the sunset on the authority for probation departments to use flash incarceration until January 1, 2028. This bill would continue to allow an individual to decline flash incarceration at any time and request a court revocation hearing or proceeding; prohibiting the court from denying probation for refusing to sign a waiver; and notifying the court, public defender, district attorney and sheriff upon imposition of flash incarceration. Flash incarceration has proven to be an effective tool to hold someone accountable for probation violations while promoting greater engagement in rehabilitative services and support. Should probation departments no longer have the authority to use flash incarceration as an intermediate response to violations, individuals on probation would be subject to lengthy court proceedings and excessive time in custody. This bill is another tool necessary to help reduce the state's prison and jail population and promote rehabilitative services necessary to help these individuals become contributing members of society.

2. Flash Incarceration

AB 109 (Com. on Budget), Chapter 15, Statutes of 2011, realigned responsibility of some offenders from the state to the counties. Specifically, offenders convicted of non-violent and non-serious felonies were rehoused in the state's county jails. Additionally, supervision of this population was transferred from CDCR's Division of Adult Parole Operations to county probation departments and was named post-release community supervision. As part of their duty

to supervise the PRCS population, probation departments were authorized to impose newly created intermediate sanctions, including flash incarceration, for violations of supervised release. Flash incarceration is defined as a period of detention in a county jail due to a violation of an offender's conditions of parole, PRCS, probation, or mandatory supervision that may range between one and 10 consecutive days. (Pen. Code, §§ 3000.08, subd. (e), 1203.35, subd. (b), 3455, subd. (c).)

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.)

The intent of intermediate sanctions, such as flash incarceration, is to hold offenders accountable for violating the conditions of supervision while creating shorter disruptions from work, home, or programming which often result from longer term revocations. Because flash incarceration had been used successfully by probation departments on the PRCS population, SB 266 (Block), Chapter 706, Statutes of 2016, extended the use of flash incarceration to individuals granted probation or placed on mandatory supervision. At the time of its enactment, SB 266 drew opposition based on concerns that there would be a lack of due process afforded to individuals on probation or mandatory supervision with respect to the use of flash incarceration. Proponents of the bill argued that the sanction is less punitive than initiating a formal revocation proceeding which takes weeks or months, and during which time the probationer or supervisee is incarcerated in jail.

SB 266 sought to address the due process concerns in several ways. First, an offender has to agree to the use of flash incarceration as a condition of probation or mandatory supervision at the time probation is granted or mandatory supervision is ordered. Additionally, a defendant may refuse the imposition of flash incarceration at the time a condition of release is violated, and instead request a revocation hearing in front of a judge. Finally, the bill specifically stated that a refusal to sign a waiver cannot be used as a reason to deny probation.

The existing code section that authorizes the use of flash incarceration for individuals on probation or mandatory supervision sunsets on January 1, 2023. This bill seeks to extend the sunset until January 1, 2028.

3. Argument in Support

According to the bill's sponsor, the Chief Probation Officers of California:

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

Flash incarceration is one tool used as a graduated response that is used in instances of violations of court ordered probation terms and is a short period of detention in county jail, not exceeding 10 days. The length of the detention period can range from one to ten consecutive days. Probation understands change is a process, and in the vast majority of cases, it is not immediate. Therefore, violations of an individual's agreed upon terms of probation are often part of an individual's change process and probation uses options short of using flash or filing a petition for revocation when at all possible.

Without flash incarceration as an intermediate response to violations that rise to the level of bringing someone back before the court, the existing mechanism to address these types of violations of probation is to initiate formal revocation court proceedings which is a much lengthier process and can result in longer periods of custody. However, graduated responses, like flash, balance the need to hold individuals accountable for violations of their conditions of supervision while focusing on shorter disruptions from work, home, or programing which can result from longer term formal revocations, thereby keeping more continuity in rehabilitative services and supports.

AB 1744 would allow for the continued ability to use flash incarceration as a graduated response for individuals on felony probation and mandatory supervision that was previously authorized via AB 597 (Levine, Statutes of 2019, Chapter 44) and SB 266 (Block, Statutes of 2015, Chapter 706). Further, AB 1744 would maintain current requirements in statute to allow an individual to decline flash incarceration and have a court revocation hearing as well as includes notification for example to the court and public defender upon imposition of flash incarceration.

4. Argument in Opposition

California Attorneys for Criminal Justice writes:

We acknowledge that the use of flash incarcerations has been a tool of law enforcement supervision to punish people who have been suspected of violating their terms of probation or community supervision. This tool provides the supervising officer to allege a violation of condition, offer the offender to admit a violation of condition and serve 10 days in county jail as an immediate punishment. The person found in violation is held in custody, waives his/her right to a court hearing, waives his right to counsel, and agrees to not challenge the alleged violation outside of any court proceeding or review. For some offenders this is an option they seek to agree to.

Flash incarcerations were implemented ... temporarily ... to observe its use and effectiveness of community supervision of people on probation or community released supervision. We have experienced its use regularly across all counties in the state. While it has been an accepted method for some supervised persons to resolve their alleged violation in a timely manner, we also must report that its indefinite use should not be implemented at this time because the laws of incarceration without review are in a flux of change at this time including incarceration and bail reforms that no longer permit immediate incarceration for some alleged violations of probation or community supervision, and some prosecutors have been asking clients to prematurely waive any rights to hearings on violations including accepting flash incarcerations as a punishment in order to reach agreements on plea bargaining. We feel that plea bargaining should not include an agreement to waive a person's due process rights to fair hearings if violations are alleged in the future.

In an effort to acknowledge the continued desire of policy makers to offer flash incarcerations to resolve alleged violations, while protecting the due process rights of those accused, and avoid a conflict in law with current law reforms, we propose that this bill be amended by: extending the current law to January 1, 2024, providing time to work with new reform laws that avoids permanent conflicts in the law related to reform and custody status' for alleged violations of conditions, and adding language to the current law that prohibits plea bargaining a waiver of rights to due process hearings for alleged future violations. Lastly, we recommend that language be added to this statute stating that a person's due process and acceptance of a flash incarceration with admission of violation cannot be used as a basis to deny expungement relief under Penal Code Sections 1203.4 so that their willingness to waive counsel and hearing rights is not unfairly used against them in the future when they have rehabilitated successfully and are otherwise eligible this relief.

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