SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2017 - 2018 Regular

Bill No:	SB 1266	**Hearing Date:**	April 24, 2018
Author:	Portantino		
Version:	March 19, 2018		
Urgency:	No	**Fiscal:**	Yes
Consultant:	SC		

Subject: ***Burglary***

HISTORY

Source: Author

Prior Legislation: SB 1129 (Monning), Ch. 724, Stats. 2016
AB 2492 (Jones-Sawyer), Ch. 819, Stats. 2014
SB 244 (Liu), 2013, failed Assembly Public Safety
AB 640 (Huber), 2009, vetoed
AB 858 (Gilmore), 2009, failed Assembly Public Safety

Support: California District Attorneys Association

Opposition: American Civil Liberties Union of California; California Public Defenders Association

PURPOSE

The purpose of this bill is to require a person who has been convicted of second degree burglary to serve a minimum of 180 days in county jail if he or she has a prior conviction for burglary, and to require that any person convicted of burglary to be subject to global positioning system (GPS) monitoring as a condition of parole.

Existing law defines "burglary" as entering a residential or commercial building with the intent to commit a felony or a theft once inside. (Pen. Code, § 459.)

Existing law divides burglary into two degrees. First degree burglary is burglary of an inhabited dwelling. All other burglaries are second degree burglary. (Pen. Code, § 460.)

Existing law specifies that "inhabited" means currently being used for dwelling purposes, whether occupied or not. A house, trailer, vessel designed for habitation, or portion of a building is currently being used for dwelling purposes if, at the time of the burglary, it was not occupied solely because a natural or other disaster caused the occupants to leave the premises. (Pen. Code § 459.)

Existing law provides the following punishment for burglary:

- First degree burglary is punishable by imprisonment in the state prison for two, four, or six years; and,

- Second degree burglary is punishable as a misdemeanor by imprisonment in the county jail not exceeding one year, or as a felony punishable by imprisonment in county jail for 16 months, or for 2 or 3 years. (Pen. Code, § 461.)

This bill would require a person sentenced for a conviction for second degree burglary who has a prior burglary conviction to serve a minimum of 180 days in county jail.

This bill would require a person convicted of burglary and released on parole to be subject to GPS monitoring as a condition of parole.

COMMENTS

1. The Need for this Bill

According to the author of this bill:

> Anyone who has experienced a residential burglary knows how unsettling it is to have their home invaded, and the long lasting feeling of insecurity it leaves behind. Criminals who show dangerous and repetitive behavior, specifically, burglary should not get released right back into our community. Additionally, upon release law enforcement should monitor the offender's activity upon release.
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> In order to protect our communities from those who have committed multiple burglaries, SB 1266 will require that anyone with a prior burglary offense, who is subsequently convicted of 2nd Degree Burglary (entering an uninhabited dwelling) serve a mandatory minimum of 180 days in county jail. Additionally, the bill also requires that anyone convicted of burglary to be subject to GPS monitoring as a condition of parole.

2. Burglary Degrees

A burglary takes place when a person enters a building or other enclosure, including a vehicle, with the intent to commit larceny. (Pen. Code, § 459.) Existing law defines burglary of a residence or inhabited dwelling as first degree burglary; all other types of burglary are second degree. (Pen. Code, § 460.) First degree burglary is punishable by imprisonment in the state prison for two, four or six years; second degree burglary is punishable as either a misdemeanor with up to one year imprisonment in county jail, or as a felony with imprisonment in the county jail for 16 months, or 2 or 3 years. (Pen. Code, § 461.) Common examples of second degree burglary are theft from a commercial building and theft from a vehicle.

3. Minimum Mandatory Sentencing

Setting the penalty, or range of penalties, for a crime is an inherently legislative function. The Legislature does have the power to require a minimum term or other specific sentence. (*Keeler* v. *Superior Court* (1970) 2 Cal.3d 619, 631.)

Sentencing, however, is solely a judicial power. (*People* v. *Tenorio* (1970) 3 Cal.3d 89, 90-93; *People* v. *Superior Court* (*Fellman*) (1976) 59 Cal.App.3d 270, 275.) California law effectively directs judges to impose an individualized sentence that fits the crime and the defendant's background, attitude and record. (Cal. Rules of Court, rules 4.401-4.425.) This bill limits judicial discretion and requires the same minimum penalty to be imposed in each case regardless of the facts of the case and the defendant's record. This minimum mandatory sentence would apply to a defendant who had a prior burglary regardless of the time in between the prior offense and the new offense, or whether the prior was second degree burglary or the more serious and inherently dangerous first degree burglary.

Imposing mandatory jail time of 180 days on a person will most likely result in the loss of employment and create problems for the defendant that may lead to further criminal acts. Courts have found success in fashioning other remedies that have kept offenders employed, outside of county jails at the public expense, and freed up jail space for more dangerous offenders.

Minimum mandatory terms of imprisonment also contributes to jail overcrowding and overcrowding necessitates early releases from custody:

> After reaching a high of 84,275 inmates in September 2007, the monthly average daily jail population declined steadily to 71,777 inmates in September 2011—a decrease of 15%, or 12,498 inmates. After realignment began, the jail population began to rise; as of October 2014, the month before the passage of Proposition 47, it stood at 82,005 inmates, a gain of 14%—and about 2,000 inmates over the rated capacity of 80,000 (set by the California Board of State and Community Corrections). To address these capacity constraints, counties released 14,321 pre-sentenced and sentenced inmates in October 2014—an increase of 4,102 (or 40%) from September 2011.

(Public Policy Institute of California (PPIC), *California's County Jails – Just the Facts* (Nov. 2017) < http://www.ppic.org/publication/californias-county-jails/> [as of Apr. 12, 2018].) The passage of Proposition 47 reduced the overall jail population but county jails still face capacity constraints. (*Id*.) Creating new mandatory minimum sentences would reverse the progress made in jail overcrowding by Proposition 47, and is contrary to a recent policy efforts to remove minimum mandatory sentences in existing law. (See SB 1129 (Monning), Ch. 724, Stats. 2016; AB 2492 (Jones-Sawyer), Ch. 819, Stats. 2014.)

4. GPS Monitoring as a Parole Condition

This bill requires all offenders who have been convicted of burglary and released on parole to be subject to GPS monitoring as a condition of parole. Parolees who are ordered to wear a GPS monitor may be required to pay the cost of GPS monitoring and if they fail to keep the GPS device charged that could lead to a parole violation which can result in imprisonment in county jail for up to 180 days. (Pen Code, § 3000.08, subd. (g).)

In 2014, the Office of the Inspector General (OIG) issued a report assessing GPS monitoring of sex offenders on parole. Among the various issues the report address was whether there are any tangible indicators of GPS function and effectiveness to deter or prevent crime. (*Special Review: Assessment of Electronic Monitoring of Sex Offenders on Parole and the Impact of Residency Restrictions*, State of California Office of the Inspector General (Oct. 2014).) The report found that while there are some advantages to electronic monitors such as the ability to locate parolees to conduct unannounced inspections, access historical location and movement data to either identify or eliminate a parolee as a suspect in criminal activity, and the ability to monitor and enforce special conditions of parole such as prohibitions against entering specific locations, these advantages come at the expense of creating tasks that divert agents from direct in-person supervision of parolees. Agents are required to review GPS tracks for each working day for all GPS-monitored offenders, log their tracking reviews daily, and respond to after-hours alerts from the GPS monitoring center. (*Id*. at p. 7.)

The additional workload and burden on both the parole officer and parolee may not be justified considering the reported incidents of the unreliability of GPS monitoring devices which can lead to false alerts and inaccurate location data:

> Unfortunately, with the proliferation of electronic devices comes increased reports of their failing. In 2011, California officials conducted tests on the monitoring devices worn by 4,000 high-risk sex offenders and gang members, and according to the LA Times, found that "batteries died early, cases, cracked, tampering alerts failed, and reported locations were off by as much as three miles". Parolees were able to thwart the devices by covering them in tinfoil or going indoors. Parole officers were inundated with as many as a thousand alerts per day, and meaningless alerts led officers to worry that they were missing actual instances of fleeing parolees.
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> Trouble with monitoring devices is not limited to California. An audit in Tennessee found that 80 percent of alerts from offender monitoring devices were not checked by officers. Similar issues came to light in Colorado and New York when officers missed or ignored repeated alerts of device failure and then several parolees committed violent crimes. Officers in Florida were so overwhelmed with alerts that they stopped all real-time notifications, save those relating to device removal, and as a result, did not notice when one parolee broke his curfew 53 times in one month before killing three people.
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> The costs of electronic monitoring pose a financial hurdle for those monitored as well. According to NPR, 49 states either allow or require the cost of monitoring to be passed along to the wearers. Fees range, but typically wearers are charged $10 to $15 per day to be monitored. Some courts have a sliding scale based on the user's ability to pay, but in other jurisdictions, those who aren't able to pay the fees are sent to jail. Such was the case for one man who spent 12 months in jail for stealing a beer from a convenience store because he couldn't pay for his court-ordered monitoring device.

(Karsten and West, *Decades later, electronic monitoring of offenders still prone to failure*, Brookings Institution (Sept. 21, 2017)

https://www.brookings.edu/blog/techtank/2017/09/21/decades-later-electronic-monitoring-of-offenders-is-still-prone-to-failure/> [as of Apr. 14, 2018].)

Additionally, applying this condition across the board to all parolees convicted of burglary would likely lead to legal challenges. A condition of parole is invalid if it: (1) has no relation to the commitment offense; (2) bars conduct that is not in itself criminal; and (3) requires or forbids conduct that is not reasonably related to future criminality. (*People v. Lent* (1975) 15 Cal.3d 481.) Requiring GPS monitoring on every parolee convicted of burglary may not have enough of a connection to the crime or be reasonably related to future criminality to be valid.

5. Argument in Support

California District Attorneys Association (CDAA) writes in support:

> On behalf of CDAA, we are pleased to support your Senate Bill 1266, which would require a person convicted of burglary in the second degree, who has a prior conviction for burglary, to serve a minimum of 180 days in county jail. The bill would also require a person convicted of burglary, who is released from prison on parole, to be subject to global position system monitoring as a condition of parole.

6. Argument in Opposition

According to the American Civil Liberties Union of California:

> SB 1266, like other mandatory minimum sentence laws before it, shifts sentencing discretion from the judge to the prosecutor, where bias and prosecutorial discretion often remain unchecked. The prosecutor decides what charges to bring, and, in turn, what the sentencing range will be. If the prosecutor thinks someone should not go to jail, then he or she will offer a plea bargain and change the charge to something that allows a non-jail sentence. But under laws like SB 1266, if the judge thinks someone should not go to jail – for example, someone with severe mental illness, or someone with a substance use disorder – there is nothing the judge can do about it.
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> In addition to removing judicial discretion in sentencing, SB 1266 also removes judicial and parole agency discretion in requiring a person convicted of burglary to submit to GPS monitoring upon release from prison on parole. Today, a court, the Board of Parole Hearings, or a supervising parole agency may already require, as a condition of release on parole or reinstatement on parole, or as an intermediate sanction in lieu of return to custody, that an inmate or parolee convicted of burglary submit to GPS monitoring. (Penal Code, §3004 (a).) Under current law, the decision as to whether a person must submit to GPS monitoring is based on the facts and circumstances surrounding the individual being released. Given that GPS monitoring imposes a significant restriction on one's liberty and privacy, it is critical that it be used only sparingly, and only when necessary to justify these intrusions. A blanket requirement that all people who are convicted of burglary submit to GPS monitoring absent a showing that such monitoring is necessary raises constitutional concerns. Moreover, there has been no

demonstrated need to strip away GPS decision-making authority from the courts, the Board of Parole Hearings, or parole agencies. Like the mandatory minimum sentence provision, the GPS requirement will serve only to widen the disparities that plague our criminal justice system, given that people of color are policed, arrested, convicted, and sentenced at much higher rates than white people.

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