SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair
2015 - 2016 Regular

Bill No:	SB 722	**Hearing Date:**	April 28, 2015
Author:	Bates		
Version:	February 27, 2015		
Urgency:	No	**Fiscal:**	Yes
Consultant:	AA		

Subject: ***Sex Offenders: GPS Monitoring: Penalties for Removal***

HISTORY

Source: Author

Prior Legislation: SB 57 (Lieu) – Chapter 776, Statutes of 2013

Support: California District Attorneys Association; Crime Victims United of California; Peace Officers Research Association of California; Orange County District Attorney's Office; Orange County Board of Supervisors; Orange County Sheriff's Department; California State Sheriffs' Association

Opposition: American Civil Liberties Union; California Public Defenders Association; Legal Services for Prisoners with Children; California Attorneys for Criminal Justice; Public Interest Advocacy

PURPOSE

The purpose of this bill is to enact a new felony, punishable by imprisonment in the state prison for 16 months, or two or three years, for the willful removal or disabling of a GPS device "if the device was affixed as a result of a criminal sentence or juvenile court disposition for specified forcible sex crimes," as specified.

Current law generally authorizes the use of electronic monitoring or global positioning system devices ("GPS") in the criminal justice system, as specified. The following statutes authorize the use of these devices, reflecting a variety of criminal justice circumstances where they can be employed:

- Alternative custody programs for female inmates in the Department of Corrections and Rehabilitation ("CDCR") (Penal Code § 1170.05(e));
- Probation for certain sex offenders who have been assessed as high risk, as specified (Penal Code § 1202.8);
- Probation for other offenders, as specified (Penal Code §§ 1210.12; *See also 1210.7 et seq.*);
- Home detention programs for county inmates, as specified (Penal Code §§ 1203.016, 1203.017);
- County inmates being held in lieu of bail, as specified (Penal Code § 1203.018);

- Persons subject to an order protecting a victim or witness of violent crime from all contact, as specified (Penal Code § 136.2);
- Persons on parole, as specified (Penal Code §§ 3004, 3010);
- Persons on post release community supervision (Penal Code §§ 3450, 3454); and
- Prisoners subject to medical parole supervision (Penal Code § 3550).

Current law generally provides that removing or otherwise defeating the operation of a GPS device is a violation of parole or probation, or subject to return to custody from an alternative custody program. (*Id.*)

Current law provides that parolees who are registered sex offenders and are required to have a GPS device as a condition of parole shall be subject to parole revocation and incarcerated in a county jail for 180 days if they remove or otherwise disable the device, as specified. (Penal Code § 3010.10.)

Existing law includes an enhanced sentencing structure that applies to crimes of rape, oral copulation, sodomy, and sexual penetration committed by force, duress or threats; lewd conduct with a child under the age of 14 and continuous sexual abuse of a child[1] which, depending on the number and kinds of aggravating factors attendant to the crime, require a term of 15 or 25-years-to-life, or life without parole for specified crimes against a minor. (Pen. Code § 667.61.)

This bill would enact a new felony, providing that a "person who willfully removes or disables an electronic, global positioning system, or other monitoring device affixed to his or her person or the person of another, if the device was affixed as a result of a criminal sentence or juvenile court disposition for" any of the sex crimes described above is guilty of a felony, punishable by imprisonment in the state prison for 16 months, or two or three years."

This bill would provide that its provisions would "not apply to the removal or disabling of a monitoring device by a physician, emergency medical services technician, or by any other emergency response or medical personnel when doing so is necessary during the course of medical treatment of the person subject to the device. This section does not apply if the removal or disabling of the device is authorized or required by a court, by law enforcement, or by any other entity that is responsible for placing the device upon the person or that has the authority and responsibility to monitor the device."

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

[1] Specifically, Penal Code section 667.61(c) enumerates the following crimes: (1) Rape, in violation of paragraph (2) or (6) of subdivision (a) of Section 261. (2) Spousal rape, in violation of paragraph (1) or (4) of subdivision (a) of Section 262. (3) Rape, spousal rape, or sexual penetration, in concert, in violation of Section 264.1. (4) Lewd or lascivious act, in violation of subdivision (b) of Section 288. (5) Sexual penetration, in violation of subdivision (a) of Section 289. (6) Sodomy, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d), of Section 286. (7) Oral copulation, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d), of Section 288a. (8) Lewd or lascivious act, in violation of subdivision (a) of Section 288. (9) Continuous sexual abuse of a child, in violation of Section 288.5.

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 February of this year 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:

> A recent serial-killing spree in Orange County, that left four (and possibly five) women dead, has elevated the need for tighter penalties when a GPS device is removed. Existing law does nothing to deter sex offenders from cutting off or altering their ankle bracelets and in consequence does little to prevent future crimes from happening again.

In 2012, two men on release from state prison for prior convictions of child molestation cut off their state-mandated GPS ankle bracelets and left California on a bus. By the time police caught up to the pair, the penalty they ended up receiving for removing the devices was minor and they served only a few short months' time. One was sentenced to ten months in federal prison and the other received just eight months. Again, upon their release, they were required to wear ankle bracelets to track their whereabouts throughout Orange County.

In early 2014, four women went missing in Orange County. Within five months, all four of the women's bodies had been found dead. Shortly after, the two men mentioned above were arrested for being linked to the murders (and later convicted). During the investigation (prior to arresting either man), one of the men was told he could remove his bracelet after having served his full term on probation. During the two week period to which he had no tracking device, the killing spree continued and a 27 year old mother was found murdered. When it was discovered 11 days later that this man was deemed homeless, a federal judge ordered he be outfitted with a new GPS device to continue monitoring his whereabouts.

After all these deaths late last year former State Senate Pro Tem Darrell Steinberg ordered the Inspector General (IG) to generate a review and report after the arrests of both men who were connected to the four killings. He wanted the review to assess whether sex offenders are adequately monitored in California.

The Orange County Register later reported that although the men were prohibited from being together, records and interviews showed they routinely violated this term of release without facing serious consequences. One news source went as far as calling them "friends for years." Twice these individuals have cut off their tracking devices and absconded to other states, clearly indicating they were in this business together.

The IG report did allude to the need for a serious discussion about the effectiveness of GPS devices as a crime deterrent. Absent of harsh-enough penalties for removing or altering an ankle bracelet, why would a convicted sex offender not be tempted to cut off his or her device knowing that the worst case scenario they'd be given a few months behind bars and then be sent back to where they left off?

SB 722 is needed in order to send the message to convicted sex offenders that cutting off or altering their ankle bracelet is a serious offense and will not be taken lightly. The two men mentioned earlier are known to have re-offended on two different occasions. When they first cut off their devices and fled to Nevada, they should have been prosecuted with more than just a short few months in county jail as this was a deliberate attempt to run from law enforcement.

Additionally, the offenses listed in SB 722 deliberately spell out the most serious, egregious sex crimes. These offenses are rape, spousal rape, sexual penetration, lewd or lascivious acts and children, sodomy, oral copulation, and continuous sexual abuse of a child. SB 722 is needed today more than ever to ensure that justice is being served to those that defy law enforcement.

2. Summary of What This Bill Would Do and Current Law

As explained in detail above, there are several circumstances when criminal offenders can be required to wear a GPS device during a period of community supervision or conditional release. Under current law, the consequence for disabling or removing a GPS device generally is the loss of the conditional release (for example, loss of placement in alternative custody and a return to jail), or a revocation of probation or parole. For sex offender parolees who are required to have a GPS device as a condition of parole, the sanction for removing or otherwise disabling a GPS device is incarceration in a county jail for 180 days. (Penal Code §3010.10.) This sanction was enacted in 2013 pursuant to SB 57 (Lieu).

This bill would enact a new felony, punishable by imprisonment in the state prison for 16 months, or two or three years, for the willful removal or disabling of a GPS device "if the device was affixed as a result of a criminal sentence or juvenile court disposition for specified forcible sex crimes."

3. Recent Special Review by The Inspector General

As noted by the author, in October of 2014 the Office of the Inspector General (OIG) issued a report entitled, *Special Review: Assessment of Electronic Monitoring of Sex Offenders on Parole and the Impact of Residency Restrictions.* This review, conducted at the request of the Senate Rules Committee pursuant to Penal Code section 6126(b), included the following observations:

- There exists little objective evidence to determine to what extent, if any, GPS tracking is a crime deterrent, although a small 2012 study funded by the National Institute of Justice of 516 high-risk sex offenders found that offenders who were not subjected to GPS monitoring had nearly three times more sex-related parole violations than those who were monitored by GPS technology. Despite the rarity of studies defending GPS as a crime deterrent, the OIG's interviews with parole agents and local law enforcement personnel found that they value GPS technology as a tool for its ability to locate parolees, track their movements, and provide valuable information in solving crimes.
- GPS technology adds to parole agents' workloads in certain aspects, while affording time-savings in others. For example, agents spend approximately two hours reviewing and analyzing parolees' tracks for a single-day period. On the other hand, GPS facilitates mandatory face-to-face contacts between parole agents and parolees by allowing the agent to locate parolees more quickly than might be the case in locating a non-GPS parolee.
- Over 60 percent of parole agents who supervise sex-offender parolees have caseloads exceeding established departmental ratios (parolee-to-agent) when taking into consideration the mix of high-risk vs low-risk parolees per caseload. In addition, the department has a disparity of caseloads across its parole units, with 14 of the 37 parole units that supervise sex offenders reporting caseload sizes exceeding the department's established ratios for all agents assigned to those units. Simultaneously, five other parole units report

> caseload sizes below the department's established ratios for all of their parole agents.[2]

The OIG also presented data over the five years prior to the report demonstrating that "transient sex offenders have committed a majority of parole violations among parolee sex offenders over the five year period. In fact, in the most recently completed fiscal year (2013–14), over 76 percent of the sex offender parolees whom the department charged with violating their parole terms were transient. . . . ¶ According to the parole administrators the OIG talked to, there are various reasons transient sex offenders violate the conditions of their parole more often than those with a residence. Among the reasons voiced were increased prevalence of mental health issues, lack of a stable support network, increased exposure to drugs and prostitution on the streets, and challenges finding employment."

With respect to recidivism among sex offender parolees the OIG report states:

> . . . (T)he OIG's analysis of CDCR's records of violations by sex offender parolees, . . . reveals that a very low proportion of violations — roughly 1 percent — over the five-year period were for sex-related crimes. This runs contrary to the popular belief that sex offenders have a high rate of recidivism compared to other types of felons, an underlying premise to placing Proposition 83 (Jessica's Law) on the California ballot. It also reflects the findings of studies released by the U.S. Department of Justice in 2003 and by CDCR in 2012.
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> A 2003 study of over 9,000 male sex offenders released from State prisons in 14 different states conducted by the U.S. Department of Justice provides some objective evidence as to recidivism rates of sex offenders. The study found that "Compared to non-sex offenders released from State prison, sex offenders had a lower overall re-arrest rate" for any type of crime (not just sex crimes) — 43 percent for sex offenders as compared to 68 percent for non-sex offenders. However, a more telling statistic concerns reconvictions for a sex crime; the study found that "of the 9,691 released sex offenders, 3.5 percent (339 of 9,691) were reconvicted of a sex crime within the three-year follow up period."
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> A study released by CDCR's Office of Research in October 2012 provides further context to sex offenders' recidivism rate in California. Based on its study of inmates released three years earlier, the recidivism rate of sex offenders required to register under California Penal Code Section 290 was just over 69 percent. However, the study's deeper analysis of the recidivist group found that nearly 87 percent were returned to prison for technical parole violations unrelated to sex crimes. Only 1.9 percent (111 offenders out of 8,490 studied) were returned to prison for new sex crimes.[3]

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[2] Office of the Inspector General, *Special Review: Assessment of Electronic Monitoring of Sex Offenders on Parole and the Impact of Residency Restrictions* (footnotes omitted) (http://www.oig.ca.gov/media/reports/Reports/Reviews/OIG_ Special_Review_Electronic_Monitoring of_Sex_Offenders_on_Parole_and_Impact_of_Residency_Restrictions_November_2014.pdf.)

[3] *Id.* at 18-19 (footnotes omitted).)

Members may wish to discuss the potential scope of this bill, and the amendments suggested in Comment 6 below. "Willful" removal or disabling "implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage." (Penal Code § 7.) Thus, members may wish to discuss whether a felony would be an effective and proportionate penalty in every case where a GPS has been "willfully" removed or disabled for these particular offenders -- for example, an otherwise-compliant transient sex offender who may or may not have easy access to an outlet and fails to re-charge a GPS device before it goes dead, or cases where there is a reasonable explanation for a break in contact (i.e. a device got wet, the parolee was in a location where the signal was temporarily blocked, etcetera).

ARE THE EXISTING SANCTIONS FOR SEX OFFENDERS WHO DISABLE OR REMOVE A GPS DEVICE INADEQUATE?

SHOULD THE PENALTY FOR DISABLING OR REMOVING A GPS DEVICE BE BASED ON THE OFFENDER'S UNDERLYING OFFENSE, REGARDLESS OF THE OFFENDER'S INTENT OR THE CIRCUMSTANCES?

4. Recent Legislation Compared to This Bill; Likely Effect of This Bill

As explained above, this bill would apply to a limited class of persons who have been convicted of serious sex crimes, including child molestation. While the bill's literal scope as drafted would include any of these offenders if a GPS device has been affixed as a result of a criminal sentence or juvenile court disposition, as a practical matter the bill would appear to be limited primarily to persons on parole or postrelease community supervision. Probation generally is prohibited under current law for these categories of sex offenses. (Penal Code §§ 1203.06, 1203.066.) Similarly, prison inmates with these convictions would be ineligible for the alternative custody program described above. While the jail alternative custody statutes do not expressly exclude these offenders from eligibility, it seems likely that county jail administrators would not include them in their local programs. Thus, this bill would appear to apply to parolees and persons coming out of prison on postrelease community supervision.

Last session, this Committee passed SB 57 (Lieu), which originally sought to enact a new felony for felons being supervised in the community – either on parole or postrelease community supervision -- who willfully defeat their GPS/electronic monitoring. The bill was passed by the Committee as amended to impose the mandatory jail term in current law.

Members may wish to discuss this bill compared to the Lieu bill of last session, and whether the likely effect of this bill would be very similar to the Lieu bill before it was amended in Committee.

SHOULD THE CURRENT SANCTION FOR PAROLEES WHO VIOLATE THEIR GPS REQUIREMENTS – WHICH WERE ENACTED IN 2013 -- BE INCREASED TO A FELONY?

WOULD A NEW FELONY OF 16 MONTHS, 2 OR 3 YEARS, BE MORE EFFECTIVE THAN THE NEW SANCTION ENACTED IN 2013?

5. Research on 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.[4]

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. A related literature focuses specifically on enforcement of drug laws and the relationship between those criminal sanctions and the outcomes of drug use and drug prices.[5]

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. . . .

> 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."[6]

Members may wish to discuss whether the "rationalistic view" of crime described above likely would apply to persons who willfully disable or remove a GPS device – that is, whether the new felony would discourage the wrongful conduct.

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[4] 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.)

[5] *The Growth of Incarceration in the United States* (2014), Jeremy Travis, Bruce Western and Steve Redburn, Editors, Committee on Causes and Consequences of High Rates of Incarceration, The National Research Council, p. 131 (citations omitted) (http://johnjay.jjay.cuny.edu/nrc/NAS_report_on_incarceration.pdf,)

[6] *Id.* at 132-133.

WOULD A NEW FELONY DETER THE SEX OFFENDERS TARGETED BY THIS BILL FROM REMOVING OR DISABLING A GPS DEVICE?

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 post-release criminality.*
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> 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.[7]

WOULD MAKING THE DISABLING OR REMOVING OF A GPS DEVICE BY THE SEX OFFENDERS TARGETED BY THIS BILL A FELONY RESULT IN CRIME PREVENTION BENEFITS?

6. Amendments for Possible Consideration

Members and the author may wish to discuss tightening this bill to ensure this new felony would apply only to dangerous persons under supervision who intentionally evade supervision with the purpose of causing further harm, as distinguished from hapless supervised persons who, without this intent, nevertheless allow or cause their GPS to fail. Understanding that the current law mandating 180 days in county jail for sex offender parolees who defeat their GPS still would apply, members may wish to consider the following refined scope for this bill:

> A person who willfully removes or disables, *or permits another person to remove or disable,* an electronic, global positioning system, or other monitoring device

[7] *Id.* at 155-156 (emphasis added).

affixed to his or her person ~~or the person of another~~, if the device was affixed *as a condition of parole, postrelease community supervision or probation as a result of a conviction of any offense specified in subdivision (c) of Section 667.61, if the person intended to evade supervision and either does not surrender, or is not apprehended, within one week of the issuance of a warrant for absconding* ~~as a result of a criminal sentence or juvenile court disposition for any offense specified in subdivision (c) of Section 667.61,~~ is guilty of a felony, punishable by imprisonment in the state prison for 16 months, or two or three years. *There shall be a rebuttable presumption that the person intended to evade supervision.*

Thus, the elements for the new felony would be:

- The new felony would apply to persons on parole, PRCS or probation for a serious sex offense (defined under the 1-strike rape law);
- The person willfully thwarts the GPS affixed as a condition of supervision, as specified;
- The person intended to evade supervision;
- The person did not surrender or was not apprehended within one week of the issuance of a warrant for absconding (In 2013, when this Committee considered SB 57 (Lieu), a similar bill, it was learned that parole has a "zero tolerance" approach to sex offender parolees, where agents issue warrants immediately when contact with a parolee is broken.); and
- There shall be a rebuttable presumption that the person intended to evade supervision.

In addition, members may wish to consider amending this bill to ensure that a person convicted of its new felony also would be subject to the level of supervision – commonly known as the Containment Model -- now applicable to sex offenders coming out of prison on parole. Otherwise, sex offenders convicted of this new offense would avoid supervision pursuant to the Containment Model, which could inadvertently incentivize commission of this new crime.[8]

SHOULD THESE AMENDMENTS BE MADE?

-- END –

[8] A cross-reference to a new felony enacted by this bill should be added to Penal Code sections 1203.067 and 3008.