



Legislative Fiscal Bureau

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Joint Committee on Finance

Paper #279

Elimination of Probation Supervision for Certain Misdemeanants (Corrections -- Sentencing Modifications)

[LFB 2009-11 Budget Summary: Page 215, #6]

CURRENT LAW

If a person is sentenced to probation, the person is subject to the control of the Department of Corrections under conditions set by the court and rules and regulations established by the Department.

GOVERNOR

Require that the Department establish by rule a system for risk assessment that classifies a probationer's level of risk for committing another offense. Specify the system established must contain levels of risk, with a person who poses the most risk classified at the highest level of risk. Require the Department to assess the risk of each person sentenced to probation for a misdemeanor and classify the person according to his or her risk. Specify that the Department will only supervise a person sentenced to probation for a misdemeanor under certain conditions.

If the Department determines that it cannot supervise the person, the Department must make a reasonable attempt to provide written notification to the victim of the person or a member of the family of the victim that the person will not be supervised while he or she is on probation.

DISCUSSION POINTS

1. Under current law, if a person is convicted of a crime, a court may grant probation, either by withholding a sentence or by imposing a sentence and staying its execution. The person is then placed on probation under the supervision of the Department of Corrections. The court may

impose any conditions on the probationer that appear to be reasonable and appropriate. Corrections may also impose rules and regulations on the offender. The period of probation may be made consecutive to a sentence on a different charge, whether imposed at the same time or previously. The court may not, however, provide consecutive probationary periods. No offender convicted of any of the following offenses may be placed on probation: (a) an offense punishable by life imprisonment; (b) repeat serious sexual offenses; (c) repeat serious violent crimes (felony murder and second-degree intentional homicide); and (d) operating a vehicle under the influence of an intoxicant or other drug for a first, second and third offense.

2. Under the statutes, the lengths of terms of misdemeanor probation are as follows:

a. For a misdemeanor involving domestic abuse, firearm possession, fourth-degree sexual assault, crimes against children, or intoxicated use of a motor vehicle, not less than six months nor more than two years probation.

b. For one Class A misdemeanor (the most serious misdemeanor), not less than six months nor more than one year.

c. For one Class B, Class C, or unclassified misdemeanor, not more than one year.

d. For not less than two nor more than four misdemeanors at the same time, the maximum original term of probation may be increased to one year.

e. For five or more misdemeanors at the same time, the maximum original term of probation may be increased to two years.

3. Current law specifies that the court may require, as a condition of probation, that a probationer be confined in a county jail, Huber (work release) facility, work camp or tribal jail for up to one year during the term of probation. An offender placed in a county jail as a condition of probation is eligible to earn good time credit of up to 25% of the period of confinement.

Further, a court may require, as a condition of probation, that the probationer perform community service work for a public agency or a nonprofit charitable organization. The number of hours of community service may not exceed what would be reasonable considering the seriousness of the offense. Community service work may only be ordered if agreed to by the probationer and the organization or agency. A court is required to ensure that a probationer is provided a written statement of the terms of the community service order and that the community service order is monitored. If the court requires community service and confinement time, a probationer reduces the period of confinement by one day for each three, eight-hour days of work performed.

4. The Department of Corrections may initiate the probation revocation process if a probationer violates a condition of probation. Under this process, the Department of Administration's Division of Hearings and Appeals or Corrections, if a probationer waives a hearing, conducts an administrative hearing and enters an order to either revoke or not revoke an offender's probation. If an offender is revoked, the person is either: (a) ordered to be brought before the court for sentencing, if sentence had been withheld; or (b) ordered to prison or jail if the

probationer had already been sentenced and the original sentence was stayed.

5. Prior to the expiration of any probation period, a court, for cause and by order, may extend probation for a specified period or modify the terms and conditions. Any of the following situations constitute a cause for the extension of probation: (a) the probationer has not made a good faith effort to discharge court-ordered payment obligations or to pay the required probation and parole supervision fees owed to the Department of Corrections; (b) the probationer is not presently able to make required restitution payments and the probationer and the person to whom restitution is owed consent to the performance of community service work in satisfaction of restitution ordered for that person, for which an extended period of probation is required; or (c) the court finds that extension would serve the purposes for which probation was imposed and the probationer agrees to the extension. If a probationer does not agree to an extension or modification of probation, revocation proceedings may begin that could result in the original stayed sentence being imposed or result in the imposition of a sentence if one had originally been withheld. If probation is not extended and restitution or fees are still owed, a civil judgment may be entered against a probationer.

6. A probationer is discharged from probation when the court-ordered period of probation has expired and the probationer has satisfied the conditions of his or her probation. Upon completion of probation, Corrections is required to do all of the following: (a) notify the probationer that his or her period of probation has expired; and (b) notify the court that placed the probationer on probation that the period of probation has expired.

7. Under the bill, "risk assessment" is defined as the application of an objective evaluation instrument supported by research to determine how likely an offender is to commit another offense.

8. The bill specifies that Corrections will only supervise a person sentenced to probation for a misdemeanor if one of the following applies:

a. The Department classifies the person at a high level of risk using the risk assessment evaluation instrument;

b. The person is a violent offender, defined as a person who: (1) has been charged with or convicted of an offense in a pending case, and during the course of the offense, he or she carried, possessed, or used a dangerous weapon, used force against another person, or a person died or suffered serious bodily harm; or (2) has one or more prior convictions for a felony involving the use or attempted use of force against another person with the intent to cause death or serious bodily harm;

c. The person is required to register as a sex offender;

d. The person has, in his or her lifetime, been convicted of or adjudicated delinquent for committing any crime involving the use or possession of a weapon or of one of the following offenses: (1) domestic abuse incidents; (2) burglary of a building or dwelling; (3) burglary of a motor home or other motorized type of home or a trailer home; (4) manufacturing, distribution, or

delivery of schedule I and II narcotic drugs, schedule I, II and III non-narcotic drugs, cocaine and cocaine base, heroin, phencyclidine, amphetamine, methamphetamine, and methcathinone, or tetrahydrocannabinols; (5) possession with intent to manufacture, distribute, or deliver of schedule I and II narcotic drugs, schedule I, II and III non-narcotic drugs, cocaine and cocaine base, heroin, phencyclidine, amphetamine, methamphetamine, and methcathinone, or tetrahydrocannabinols; (6) using a child for illegal drug distribution or manufacturing purposes; (7) distribution of a controlled substance or analog to a person under age 18; or (8) an offense under Chapter 940 (Crimes Against Life and Bodily Security); or

e. The person had been charged with a felony for the conduct that resulted in the current misdemeanor conviction.

9. The bill specifies that misdemeanor supervision provisions first apply to persons sentenced on February 1, 2003.

10. According to Corrections, as of November 1, 2008 (the latest date currently available), there were 25,464 misdemeanor offenders on probation. Of that total, Corrections estimates that approximately 72% of these offenders would remain under supervision based on conviction for an assaultive offense and previous convictions. Further, based on use of a risk assessment, an unknown number of additional misdemeanor probation offenders would also remain on supervision.

11. Corrections indicates that most misdemeanants are supervised at either medium or minimum supervision levels. As such, at a minimum, agents spend approximately 1.5 hours a month on face-to-face contact with offenders under medium supervision and 1.0 hour per month with minimum supervision offenders. In his comments to the Joint Committee on Finance, the Secretary of the Department of Corrections indicated that, under the provision, certain misdemeanor offenses would be addressed not through probation, but instead through fines, jail time or other locally based sanctions. The provision would allow agents to "focus their supervision efforts on offenders who need the most attention."

12. It is estimated that, based on the maximum number of offenders Corrections estimates would be eligible for the elimination of supervision (7,225 as of November, 2008), the minimum number of monthly supervision hours for an offender on minimum supervision, and the amount of staff time for offender supervision, adoption of provision would free up supervision time equivalent to approximately 64 agents. There are currently 1,183 probation, parole and extended supervision agents. It should be noted that to the extent that any of the variables differs from the assumptions above, the number of agents available will also differ.

13. On the other hand, while elimination of probation supervision for certain misdemeanants would reduce the caseload of probation, parole and extended supervision agents, it could also result in judges being less likely to place individuals on probation if the judges believe that the offenders will not be supervised for the duration of their probation. As a result, more individuals could receive either jail time or only a fine, for offenses for which probation would have

otherwise been given.

In addition, while the provision is intended to allow for the concentration of resources on offenders who have been determined to pose a high risk to the community, and while all probationers (even those not supervised) are under the legal authority of the Department, probation without supervision may seem to some as inappropriate. If the Committee wishes, therefore, the provision could be deleted. [Alternative 3]

14. An important component of the AB 75 provision is that supervision is dependant on a risk assessment that is "an objective instrument supported by research to determine how likely an offender is to commit another offense." The bill, further, requires Corrections to establish by rule a system for risk assessment that classifies a probationer's level of risk for committing another offense. The system must contain levels of risk, with a person who poses the most risk classified at the highest level of risk. The bill specifies that the Department is required to assess the risk of each person sentenced to probation for a misdemeanor and classify the person according to his or her risk. These provisions would apply to any person sentenced on or after February 1, 2003, and would become effective on the effective date of the bill.

15. If the Committee adopts the provision, it may wish to consider any of the following modifications:

a. **Risk Assessment Rules.** As identified above, Corrections is required to establish a system by rules for risk assessment that classifies a probationer's level of risk for committing another offense. These rules serve to determine which offenders (not otherwise excluded because of offense type, offense history, violence indicator or requirement to register as a sex offender) will be supervised by establishing the levels of risk. Under the bill, these rules are not legislatively approved, but rather departmentally adopted. No legislative input is required. If the Committee wishes, however, the bill could be modified to require administrative rules related to risk assessment classification be approved by the appropriate standing committees of the Legislature. Corrections could be required to submit the proposed rules to the Legislature no later than three months after the effective date of the bill. [Alternative 2a]

b. **Applicability Date.** Provisions of the bill would apply to offenders sentenced on or after February 1, 2003. As a result, after applying a risk assessment, Corrections could cease supervision of any eligible probationer who was placed on probation on or after February, 1, 2003. However, as a policy matter, the Committee may wish to make the provision apply prospectively. While any workload reductions achieved from the provision would be reduced, prospective application would make certain that prior placements on probation would be implemented as the sentencing judges had anticipated. If the Committee wishes, the provision could be made to first apply to persons placed on probation on the effective date of the provision. [Alternative 2b]

c. **Effective Date.** The elimination of probation supervision for certain misdemeanants provisions of the bill would become effective on the effective date of the bill. On that date, Corrections will be required to begin assessing each person placed on probation for a misdemeanor

and classifying those individuals based on level of risk. The system for risk assessment would also need to be in place to properly implement the provision. Questions may be raised as to the ability of the Department to implement these provisions on such an expedited basis. In order to allow the Department time to develop an assessment process, the risk assessment itself, and have time to train staff in the proper use to the system, the Committee may wish to delay the effective date of the provision for one year from the date of enactment of the budget bill. [Alternative 2c]

ALTERNATIVES

1. Approve the Governor's recommendation to require that the Department: (a) establish by rule a system for risk assessment that classifies a probationer's level of risk for committing another offense; (b) establish levels of risk, with a person who poses the most risk classified at the highest level of risk; (c) assess the risk of each person sentenced to probation for a misdemeanor and classify the person according to his or her risk; and (d) only supervise a person sentenced to probation for a misdemeanor under certain conditions.

2. Approve any of the following modifications to the misdemeanor probation provision:

a. **Risk Assessment Rules.** Require administrative rules related to probation risk assessment classification be approved by the appropriate standing committees of the Legislature. Required Corrections to submit the proposed rules to the Legislature no later than three months after the effective date of the bill.

b. **Applicability Date.** Specify that the probation supervision for misdemeanants provision apply prospectively. Specify that the provision first apply to persons placed on probation on the effective date of the provision.

c. **Effective Date.** Delay the effective date of the probation supervision for misdemeanants provision for one year from the date of enactment of the budget bill.

3. Delete provision.

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