
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: AB 1542 **Hearing Date:** July 11, 2017
Author: Dababneh
Version: May 1, 2017
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Violent Felonies: Video Recording*

HISTORY

Source: Author

Prior Legislation: None

Support: Association of Deputy District Attorneys; California Association of Code Enforcement Officers; California Association of Highway Patrolmen; California College and University Police Chiefs Association; California Narcotic Officers Association; Crime Victims United; Los Angeles County Professional Peace Officers Association; Los Angeles County Sheriff's Department; Los Angeles Deputy Sheriffs; Los Angeles Police Protective League; Peace Officers Research Association of California; Orange County District Attorney's Office; Riverside Sheriffs Association

Opposition: California Attorneys for Criminal Justice; California Public Defenders Association

Assembly Floor Vote: 76 - 1

PURPOSE

The purpose of this bill is to create a one-year state prison enhancement for recording the commission of a violent felony.

Existing law defines "violent felony" to include the following:

- Murder or voluntary manslaughter;
- Mayhem;
- Rape or spousal rape accomplished by means of force or threats of retaliation;
- Sodomy by force or fear of immediate bodily injury on the victim or another person;
- Oral copulation by force or fear of immediate bodily injury on the victim or another person;

- Lewd acts on a child under the age of 14 years, as defined;
- Any felony punishable by death or imprisonment in the state prison for life;
- Any felony in which the defendant inflicts great bodily injury on any person other than an accomplice, or any felony in which the defendant has used a firearm, as specified;
- Any robbery;
- Arson of a structure, forest land, or property that causes great bodily injury;
- Arson that causes an inhabited structure or property to burn;
- Sexual penetration accomplished against the victim's will by means of force, menace or fear of immediate bodily injury on the victim or another person;
- Attempted murder;
- Explosion or attempted explosion of a destructive device with the intent to commit murder;
- Explosion or ignition of any destructive device or any explosive which causes bodily injury to any person;
- Explosion of a destructive device which causes death or great bodily injury;
- Kidnapping;
- Assault with intent to commit mayhem, rape, sodomy or oral copulation;
- Continuous sexual abuse of a child;
- Carjacking, as defined;
- Rape or penetration of genital or anal openings by a foreign object;
- Felony extortion;
- Threats to victims or witnesses, as specified;
- First degree burglary, as defined, where it is proved that another person other than an accomplice, was present in the residence during the burglary;
- Use of a firearm during the commission of specified crimes; and,
- Possession, development, production, and transfers of weapons of mass destruction.

(Pen. Code, § 667.5, subd. (c).)

Existing law imposes a three-year sentence enhancement for each prior separate prison term served by the defendant if the prior offense was a violent felony and the new offense is a violent felony. (Pen. Code, § 667.5, subd. (a).)

Existing law imposes a one-year sentence enhancement

Existing law provides that all persons concerned in the commission of a crime, whether it be a felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, are principals in any crime so committed. (Pen. Code, § 31.)

Existing law defines conspiracy as two or more persons conspiring to commit any crime, together with proof of the commission of an overt act by one or more of the parties to such agreement in furtherance of the agreement. (Pen. Code, §§ 182, subd. (a)(1), & 184.)

Existing law makes it a crime to record or eavesdrop on any confidential communication without the consent of all parties to the conversation. (Pen. Code § 632, subd. (a).)

This bill creates a one-year state prison enhancement for any person who commits a violent felony, either directly or as an aider or abettor, to willfully record a video, or conspire with another person to record a video, of the commission of the violent felony.

This bill requires the additional year to be served consecutive to the penalty prescribed for the underlying violent felony.

This bill clarifies that the enhancement created by this bill does not preclude prosecution or the imposition of penalties under any other law.

This bill states that for purposes of this section, a violent felony is any felony listed in subdivision (c) of Penal Code section 667.5.

COMMENTS

1. Need for This Bill

According to the author:

Assembly Bill 1542 (Dababneh), also known as Jordan’s Law, will prevent social media motivated attacks – violent crimes where the perpetrator commits the crime for the purpose of videotaping and distributing on social media to gain attention and notoriety.

Technology, specifically the ability to film with smartphones and immediately share those videos with thousands of people, has brought great change to our social interactions. While many of these technological changes have improved our lives, we are clearly seeing a rise in violent crime for the purposes of videotaping and sharing on social media. Though no official statistics are kept on social media motivated attacks, our office has observed exponential, year-to-year growth in their frequency through analysis of media reports. Unfortunately,

California's Penal Code has not kept up with this troubling and tragic emerging trend associated with social media.

AB 1542, Jordan's Law, will deter social media motivated attacks by increasing the sentence for a violent felony if the attacker, or an aider and abettor, videotapes the attack.

2. Aiding and Abetting

Penal Code section 31 provides that one who aids and abets another in the commission of a crime is a principal and is just as culpable as the offender. An aider and abettor is a person who, acting with (1) knowledge of the unlawful purpose of the perpetrator and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates the commission of the crime. (*People v. Beeman* (1984) 35 Cal.3d 547, 561.) A defendant may be held criminally responsible as an accomplice not only for the crime he or she intended to aid and abet (the target crime), but also for any other crime that is the "natural and probable consequence" of the target crime. (*People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5.)

However, in general neither presence at the scene of a crime nor knowledge of, but failure to prevent it, is sufficient to establish aiding and abetting its commission. (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409; *People v. Durham* (1969) 70 Cal.2d 171, 181; *People v. Terry* (1970) 2 Cal.3d 362, 401-402.)

Because some social-media-motivated crimes one person commits the actual physical act while another records it, this bill specifies that both the direct perpetrator as well as the person filming the crime can be subject to the enhancement for recording the commission of a violent crime.

3. Conspiracy

"The doctrine of conspiracy plays a dual role in criminal law. First, conspiracy is a substantive offense in itself—'an agreement between two or more persons that they will commit an unlawful object (or achieve a lawful object by unlawful means), and in furtherance of the agreement, have committed one overt act toward the achievement of their objective.' [Citations.] Second, proof of a conspiracy serves to impose criminal liability on all conspirators for crimes committed in furtherance of the conspiracy." (*People v. Salcedo* (1994) 30 Cal.App.4th 209, 215.) This latter concept is known as uncharged conspiracy theory of liability.

Pursuant to an uncharged theory of liability, both parties would be subject to the recording enhancement if they conspired to film the violent crime.

4. Convictions for Violent Crimes Already Impose Substantial Penalties

This bill creates a one-year state prison enhancement for any person who records the commission of a violent felony, either as the direct perpetrator, or as an aider and abettor or conspirator of the offense. The additional year must be served consecutive to the sentence for the underlying crime.

Violent felonies, enumerated in Penal Code section 667.5, include some of the most serious crimes. As such, these offenses impose years-long sentences that must be served in state prison, rather than county jail.

Under existing law, there are a variety of ways that a person can get an increased or enhanced sentence. If the crime implicates the Three Strikes Law because it is an enumerated “violent felony” or “serious felony,” the person’s sentence can be increased substantially. Any new felony, if the person has a prior “strike,” is enhanced by doubling the underlying term. (Pen. Code, §§ 667, subd. (e)(1), 1170.12, subd. (c)(1).) If the person has a prior prison term, an additional one to three years may apply. (Pen. Code, § 667.5, subs. (a) & (b).) There is also an existing sentencing enhancement for a person who commits any felony in which he or she personally inflicts great bodily injury and infliction of great bodily injury is not an element of the underlying offense, which is defined as “a significant or substantial physical injury.” (Pen. Code, § 12022.7, subd. (f).) This does not require the victim to suffer “permanent,” “prolonged,” or “protracted” disfigurement, impairment, or loss of bodily function. (*People v. Escobar* (1992) 3 Cal.4th 740.) This enhancement can add three to six years to the term of imprisonment depending on the circumstances. (Pen. Code, § 12022.7, subs. (a)-(e).) Any felony that is enhanced with the great bodily injury enhancement becomes a strike. (Pen. Code, 667.5, subd. (c)(8).) This enhancement would only apply to the direct perpetrator of the crime.

Separate from enhancements, a person may get a higher term of imprisonment based on the factual circumstances of his or her case. A person sentenced for a felony typically faces a sentencing triad, meaning there are three possible terms specified by statute. (Pen. Code, § 1170.) Where three terms are specified, the court is free to choose any of the three terms, using valid discretion. The judge must still state reasons for the term selected. (Pen. Code, § 1170, subd. (b); see also Cal. Rules of Court, rules 4.406(b)(4), 4.420(e).) “[T]he sentencing judge may consider circumstances in aggravation or mitigation, and *any other factor* reasonably related to the sentencing decision. The relevant circumstances may be obtained from the case record, the probation officer’s report, other reports and statements properly received, statements in aggravation or mitigation, and any evidence introduced at the sentencing hearing.” (Cal. Rules of Court, rule 4.420(b), see also Pen. Code, § 1170, subd. (b).) The Rules of Court provides lists of both aggravating factors and mitigating factors. In each category there are factors relating to the crime and factors relating to the defendant. (See Cal. Rules of Court, rule 4.421 and rule 4.423.) If a court determines that the higher term is appropriate due to a factor in aggravation, the court can sentence the defendant to the highest of the three terms specified in statute.

Of the enumerated factors in aggravation, there are at least two that could apply to situations this bill attempts to cover: the crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness (Cal. Rules of Court, rule 4.421, subd. (a)(1)); or the defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission (Cal. Rules of Court, rule 4.421, subd. (a)(1)). While there are enumerated factors that the court may consider, the court is also authorized to consider any other factor in aggravation to order the highest term of imprisonment. This could include recording the offense.

5. Ongoing Concerns over 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.

The court also ordered California to implement the following population reduction measures in its prisons:

- Increase prospective credit earnings for non-violent second-strike inmates as well as minimum custody inmates.
- Allow non-violent second-strike inmates who have reached 50 percent of their total sentence to be referred to the Board of Parole Hearings (BPH) for parole consideration.
- Release inmates who have been granted parole by BPH but have future parole dates.
- Expand the CDCR's medical parole program.
- Allow inmates age 60 and over who have served at least 25 years of incarceration to be considered for parole.
- Increase its use of reentry services and alternative custody programs.

(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).) Following the implementation of these measures along with the passage of Proposition 47, approved by California voters in November 2014, California met the federal court's population cap in December 2015. (Defendants' December 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*.) The administration's most recent status report states that as "of December 14, 2016, 114,031 inmates were housed in the State's 34 adult institutions" which amounts to approximately 135.3% of design capacity, and 4,704 inmates were housed in out-of-state facilities. (Defendants' December 2016 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 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).)

This bill creates a new one-year enhancement that must be served in state prison because the underlying offense must be served in state prison. Existing law contains a variety of enhancements that can be used to increase the amount of time a defendant will serve. Enhancements can range from adding a specified number of years to a person's sentence, or doubling a person's sentence or even converting a determinate sentence into a life sentence. Multiple enhancements can be imposed in a single case to significantly increase the person's sentence.

Although the state is currently in compliance with the court-ordered population cap, creating new enhancements will increase the length of time that an inmate must serve in prison and reverse the progress made in reducing the state prison population. This is contrary to the court's order for a durable solution to prison overcrowding.

6. Social Media Assists in Investigation and Prosecution of Crimes

This bill creates an enhanced penalty for those who, while committing a violent felony either directly, or as an aider and abetter or conspirator, records the commission of the crime. While these types of videos may be distributed or posted online by the perpetrator to gain notoriety, they can also serve as evidence for law enforcement. It is estimated that more than 80 percent of law enforcement agencies use social media to investigate crimes:

Law enforcement agencies across the nation are using social media to identify, detect and solve crimes. According to a recent survey by LexisNexis Risk Solutions of more than 1,200 law enforcement professionals with federal, state, and local agencies. 83% of the respondents are using social media, particularly Facebook and YouTube, to further their investigations. More than two-thirds (67%) of respondents believe that social media helps solve crimes more quickly.

(See < <https://blog.x1discovery.com/2012/11/16/5-case-studies-of-social-media-evidence-in-criminal-investigations/>> citing *Role of Social Media in Law Enforcement Significant and Growing*, LexisNexis Risk Solutions (2012) [as of June 30, 2017].) Videos shared on social media, which are often times posted by the perpetrators of the crimes themselves, have led to quicker investigation of those crimes or in some instances the discovery of crimes that have already been committed.

This bill could lead to fewer people recording these crimes, or fewer people posting these crimes on social media. Consequently, could this bill have the effect of taking away an important tool in the investigation and prosecution of these crimes?

7. Argument in Support

According to the Orange County District Attorney:

With the widespread use of social media, a troubling trend has emerged. Some individuals are committing violent crimes for the purposes of videotaping and sharing on social media. The unprovoked assault on high school student Jordan Peisner in your district is a tragic example of why new laws are needed. He was viciously attacked by another teen while an associate videotaped the crime....

AB 1542 would address this gap in accountability for those who commit violent crimes to share and boast about on social media.

8. Argument in Opposition

The California Attorneys for Criminal Justice writes in opposition to this bill:

This measure creates a new criminal enhancement surrounding the recording of violent felonies either directly or as an aider or abettor. This lengthens the length of time for the existing felonies which may underlie the recording.

AB 1542 is one such potential law that does not add to the quality of life in California. There is no evidence of any epidemic of felonies being committed for the purpose of filming. In creating a new enhancement, an already strained criminal

justice system will be further strained. Additionally, if passing this bill did somehow have the intended effect of discouraging filming, it actually removes a potential source of evidence which could be used to convict criminals of the actual underlying crimes.

California voters have more than once in the last several elections made it clear that they favor de-institutionalization. (Los Angeles Times, “California's prison spending is out of whack” (January 14, 2016), found at <http://www.latimes.com/opinion/editorials/la-ed-de-incarceration-dividend20160114-story.html>.) . . .

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