
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: AB 2823 **Hearing Date:** June 19, 2018
Author: Nazarian
Version: March 22, 2018
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Violent Felonies*

HISTORY

Source: Author

Prior Legislation: SB 75 (Bates), 2017, failed Senate Public Safety
SB 652 (Nielsen), 2017, failed Senate Public Safety
SB 770 (Glazer), 2017, failed Senate Public Safety
AB 27 (Melendez), 2017, held in Assembly Appropriations
AB 67 (Rodriguez), 2017, held in Assembly Appropriations
AB 197 (Kiley), 2017, failed Assembly Public Safety
Proposition 57, passed by voters on November 8, 2016
SB 1269 (Galgiani), 2016, failed Senate Public Safety
AB 1188 (Pan), 2011, failed Assembly Public Safety
AB 60 (Jeffries), 2011, failed Assembly Public Safety
AB 16 (Swanson), 2009, held in Assembly Appropriations
SB 440 (Denham), 2009, failed Senate Public Safety
AB 303 (Spitzer), 2007, held in Assembly Appropriations
AB 426 (Galgiani), 2007, failed Senate Public Safety
AB 2016 (Maze), 2004, failed Assembly Public Safety
AB 863 (Horton), 2003, failed Assembly Public Safety
AB 1838 (Hertzberg), Ch. 606, Stats. 2002
AB 2660 (Pacheco), 2002, failed Senate Public Safety
AB 455 (Wyman), 2001, failed passage in Assembly Public Safety
Proposition 21, passed by voters March 7, 2000

Support: Association of Regional Center Agencies; California District Attorneys Association; Peace Officers Research Association of California; Riverside Sheriffs' Association

Opposition: American Civil Liberties Union of California; California Attorneys for Criminal Justice; California Public Defenders Association; Ella Baker Center for Human Rights

Assembly Floor Vote: 67 - 3

PURPOSE

The purpose of this bill is to expand the violent felony list to include human trafficking and sex offenses, as specified.

Existing law provides a list of specific crimes defined as a "violent felony" which includes the following:

- 1) Murder or voluntary manslaughter;
- 2) Mayhem;
- 3) Rape or spousal rape accomplished by means of force or threats of retaliation;
- 4) Sodomy by force or fear of immediate bodily injury on the victim or another person;
- 5) Oral copulation by force or fear of immediate bodily injury on the victim or another person;
- 6) Lewd acts on a child under the age of 14 years, as defined;
- 7) Any felony punishable by death or imprisonment in the state prison for life;
- 8) 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;
- 9) Any robbery;
- 10) Arson of a structure, forest land, or property that causes great bodily injury;
- 11) Arson that causes an inhabited structure or property to burn;
- 12) 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;
- 13) Attempted murder;
- 14) Explosion or attempted explosion of a destructive device with the intent to commit murder;
- 15) Explosion or ignition of any destructive device or any explosive which causes bodily injury to any person;
- 16) Explosion of a destructive device which causes death or great bodily injury;
- 17) Kidnapping;
- 18) Assault with intent to commit mayhem, rape, sodomy or oral copulation;
- 19) Continuous sexual abuse of a child;
- 20) Carjacking, as defined;
- 21) Rape or penetration of genital or anal openings by a foreign object;
- 22) Felony extortion;
- 23) Threats to victims or witnesses, as specified;
- 24) First degree burglary, as defined, where it is proved that another person other than an accomplice, was present in the residence during the burglary;
- 25) Use of a firearm during the commission of specified crimes; and,
- 26) 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 provides a separate list of serious felonies which includes nearly all violent felonies. (Pen. Code, § 1192.7.)

Existing law imposes a five-year sentence enhancement for each prior conviction of a serious felony upon a conviction of a new offense that is a serious felony. (Pen. Code, § 667, subd. (a).)

Existing law entitles a defendant, subject to certain exceptions, to credits for each day of custody from the time of his arrest until the date of his or her sentence credit. These are commonly known as pre-sentence custody credits. (Pen. Code, § 2900.5.)

Existing law entitles defendants charged with non-violent felonies to presentence behavior credits, subject to some exceptions. These are commonly known as conduct credits. (Pen. Code, § 4019.)

Existing law entitles a sentenced prisoner to receive, upon good behavior and work participation, half-time credits of one day for every day served. (Pen. Code, § 2933.)

Existing law provides that any person convicted of a “violent felony,” as specified, shall accrue no more than 15 percent credit on his or actual time of confinement for behavior and worktime, a limitation which applies to pre-sentence credits. (Pen. Code, § 2933.1, subds. (a) & (c).)

Existing law states that any person convicted of a non-violent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense. (Cal. Const., art. I, § 32.)

Existing law provides authority to the Department of Corrections and Rehabilitation (CDCR) to award credits earned for good behavior and approved rehabilitative or educational achievements. (Cal. Const., art. I, § 32.)

This bill adds the following crimes to the list of violent felonies:

- 1) Sex trafficking; and,
- 2) Rape, sodomy, oral copulation, or sexual penetration if the victim was:
 - a) Incapable of consenting due to a disability;
 - b) Unconscious;
 - c) Too intoxicated to consent;
 - d) Submitted to the act under the belief that the person committing the act was someone known to the victim other than the accused; and or,
 - e) Threatened by authority of a public official.

This bill names the violent felonies statute as the “Standing with Survivors Act of 2018.”

COMMENTS

1. Need for This Bill

According to the author of this bill:

Proposition 57 of 2016 was passed with the intent to reduce the burden on California’s overcrowded prisons and incentivize improved inmate behavior. To achieve this goal, Prop. 57 moves up parole consideration of “non-violent” offenders who have served the full term of the sentence for their primary offense and demonstrate that their release into the community would not pose an unreasonable risk of violence.

....

Adding these reprehensible crimes to the list of violent felonies is vital to community safety and ensures that justice is served on behalf of survivors.

2. Proposition 57

On November 8, 2016, California voters approved Proposition 57. Proposition 57 was known as the "Parole for Non-Violent Criminals and Juvenile Court Trial Requirements Initiative." The purpose of Proposition 57 was to increase rehabilitation services and decrease the prison population. It requires juvenile court judges, rather than district attorneys, to decide whether a juvenile will be prosecuted as adult. The initiative allows parole consideration for nonviolent felons after the inmate has served the full base term of his/her primary offense, exclusive of enhancements or alternative sentences. It also authorizes sentence credits for rehabilitation, good behavior, and education. (Official Voter Information Guide, Proposition 57, California General Election, Nov. 8, 2016 < <http://vig.cdn.sos.ca.gov/2016/general/en/pdf/complete-vig.pdf> > [as of June 11, 2018].)

As pertains to this bill, Proposition 57 provided:

- a) The following provisions are hereby added to enhance public safety, improve rehabilitation, and avoid the release of prisoners by federal court order, notwithstanding anything in this article or any other provision of law....
 - (1) Parole consideration: Any person convicted of a *non-violent felony offense* and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense....
 - (b) The Department of Corrections and Rehabilitation shall adopt regulations in furtherance of these provisions, and the Secretary of the Department of Corrections and Rehabilitation shall certify that these regulations protect and enhance public safety.” (Cal. Const., art. I, § 32, emphasis added.)

Proposition 57 requires CDCR to draft regulations on how the parole process will be implemented. The initiative specifies that early parole may only be considered for persons who have committed non-violent offenses. However, the initiative does not specify what is considered a non-violent felony. Proponents of this legislation want the offenses in this bill to be considered violent felonies so that inmates who have committed those crimes will not be eligible for its parole provisions.

CDCR submitted emergency regulations to the Office of Administrative Law on March 24, 2017. In addition to the current list of violent felonies in Penal Code section 667.5, the regulations exclude those serving life sentences and sex offenders from the parole provisions in Proposition 57. The regulations were subject to public hearing and comment period which provided opportunities for stakeholders and the public to provide input. The emergency regulations went into effect July 1, 2017 and CDCR has submitted them for final approval to make them permanent.

On February 9, 2018, a trial court ruled on a challenge brought by the Alliance for Constitutional Sex Offense Laws claiming that CDCR’s regulations impermissibly exclude nonviolent sex offenders from early parole consideration, contravening the voters’ intent in passing Proposition 57. The court agreed with petitioners and found that the regulations are overbroad. The court

disagreed with petitioners, however, in their interpretation that “nonviolent offense” must mean all offenses not found on the violent felony list contained in Penal Code section 667.5:

[T]he Legislature’s list of violent offenses in section 667.5 may not be the only way to define what is a “nonviolent” offense. The court notes Proposition 57 never mentions section 667.5. If the voters intended to define the term “nonviolent” felony to mean any felony the Legislature has not listed in section 667.5, they presumably would have said so.

(Petition for Writ of Mandate, NO. 34-2017-80002581, *Alliance for Constitutional Sex Offense Laws v. California Department of Corrections and Rehabilitation* (2-9-18), p. 13.) The court remanded the case to CDCR to adopt new regulations defining the term “nonviolent felony offense” consistent with their ruling. (*Id.* at p. 2.) The court issued a final order on March 5, 2018 setting aside CDCR’s regulations implementing Proposition 57 but declined to direct CDCR to specifically exclude those felonies the Legislature designates as “violent” in Penal Code section 667.5. (Order After Hearing on Petition for Writ of Mandate, NO. 34-2017-80002581, *Alliance for Constitutional Sex Offense Laws v. California Department of Corrections and Rehabilitation* (3-5-18), p. 3.) CDCR plans to appeal the order and has informed this committee that it will move forward with the regulations without any changes. (<<https://www.usnews.com/news/best-states/california/articles/2018-03-05/california-to-appeal-ruling-on-earlier-sex-offender-parole>>.)

The purpose of this bill as stated by the author is to prevent consideration for parole under Proposition 57 for the additional offenses specified as violent felonies. However, nearly all of the offenses encompassed by this bill require sex offender registration (see Pen. Code, § 290, subd. (c)), thus the persons convicted of those crimes would not be eligible for consideration for earlier parole under CDCR’s regulations implementing Prop. 57.

Considering that CDCR’s regulations are moving forward as expected and the pending lawsuit is not final, should the Legislature pass legislation that makes changes to Proposition 57? Any bills that attempt to do so will likely be vetoed.

3. Violent Felony Designation

Penal Code section 667.5 enhances prison terms for persons convicted of 23 designated violent felonies. The statute contains Legislative findings and declarations stating that “these specified crimes merit special consideration when imposing a sentence to display society’s condemnation of these extraordinary crimes of violence against the person.” (Pen. Code, § 667.5, subd. (c).) The list includes some, but not all, sex offenses.

The first implication for the conviction of a crime designated to be a violent felony is that the offender will receive fewer “custody credits” toward release on parole. Inmates who receive convictions for violent felonies must serve 85% of their time in custody. (Pen. Code, § 2933.1, subds. (a) & (c).) They are only entitled to earn 15% conduct credits, while most prisoners earn 50%.

Additionally, designation as a violent felony may subject an offender to a longer prior-prison-term enhancement in the event he or she is convicted for a new offense. Penal Code section 667.5 subdivision (a) provides for a three-year enhancement when both the current offense and the prior conviction are violent felonies listed in the statute. There is also a five-year sentence enhancement when both the current offense and the prior conviction are serious felonies.

Because almost all violent felonies are also found on the serious felony list, these defendants are also eligible for the five-year enhancement which is often applied instead of the three-year enhancement because it adds more time to a defendant's total incarceration.

4. Three Strikes Implications

Generally, violent felonies and serious felonies are considered "strikes" for purposes of California's Three Strikes Law. The Three Strikes law requires a person who is convicted of a felony and who previously has been convicted of one or more violent or serious felonies, known as strikes, to be subject to enhanced penalties. Specifically, if the person has one prior strike, the sentence on any new felony conviction must be double what is specified by statute. If the person has two prior strikes, the sentence on any new felony conviction was 25 years to life, although this portion was amended by Proposition 36, approved by voters in 2012, to require that the third strike must be a serious or violent felony in order to impose the life term.

The Three Strikes law contains a statutory "lock-in" date that was most recently amended to November 7, 2012, the effective date of Proposition 36. The effect of the lock-in date is to provide that the listed offenses are "strikes" as of that date. As long as an offense is deemed a strike as of the listed date, the Three Strikes sentencing provisions apply to enhance a person's sentence even if the person was convicted of the offense prior to it being deemed a strike. The specified date also acts to disallow adding a new strike unless the date is extended. This bill does not extend this date, thus it appears that the added crime would not constitute a strike.

This bill does not change the statutory lock-in date, thus the new offenses listed in this bill would not be considered "strikes" under California's Three Strikes Law. However, there are still potential implications for the Three Strikes Law because any future amendment to the lock-in date in Penal Code section 667.1 to a later date would make these offenses "strikes" under California law.

5. Ex Post Facto Concerns

Ex post facto laws are prohibited by the United States Constitution, article I, section 9, and the California Constitution, article I, section 9. Although the Latin phrase "ex post facto" literally encompasses any law passed "after the fact," the constitutional prohibition on ex post facto application of laws applies only to penal statutes which disadvantage the offender affected by them. Legislative enactments prohibited by the ex post facto clause include those which: (1) criminalize conduct which was innocent when done, (2) increase the punishment for past conduct or, (3) eliminate a defense available at the time the crime was committed. (*Collins v. Youngblood* (1990) 497 U.S. 37, 42.) "Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated . . ." (*Weaver v. Graham* (1981) 450 U.S. 24, 30.) Thus, when considering an ex post facto challenge, the court does not look at the impact that a change has on a particular defendant, but rather at the overall effect of the challenged law. (*Id.* at p. 33.)

This bill's designation of offenses as violent felonies has several implications including limitations on credit earning. The question of whether a credits statute is an ex post facto law depends on whether it is being applied retrospectively to the defendant. (*In re Efstathiou* (2011) Cal.App.4th 725, 729.) The question for analyzing the retrospective component is "whether the law changes the legal consequences of acts completed before its effective date." (*Weaver v.*

Graham, supra, 450 U.S. at p. 31.)

In *Weaver, supra*, the United States Supreme Court held that a new statute which reduced the amount of sentence reduction conduct credits an inmate could earn when applied to a person who committed the crime before the statute was enacted violated the Ex Post Facto Clause. The Supreme Court concluded that the statute was retrospective because it changed the “legal consequences” of crimes committed before the effective date and the “quantum of punishment” even though technically not part of the sentence. (*Id.* at pp. 31-32.) The court noted that an inmate’s credits would be reduced even if he abided by prison rules and performed all assignments; the statute simply lessened the available conduct credits available to an inmate as of the date of enactment. (*Id.* at pp. 33-34.)

The application of the 15% credits limitation found in Penal Code section 2933.1 for persons convicted of violent felonies as applied to a person who committed any of the crimes in this bill which would now be designated as violent felonies could violate ex post facto principles. The 15% limitation in Penal Code section 2933.1 applies to all persons convicted of a violent felony, however the constitutional amendment enacted by Proposition 57 gives CDCR authority to award credits earned for good behavior and approved rehabilitative or educational achievements. Thus, it appears that the 15% limitation in section 2933.1 now only applies to a defendant’s pre-sentence custody credits which the court is required to determine at the time of sentencing. (*People v. Black* (2009) 176 Cal.App.4th 145, 154; *People v. Buckhalter* (2001) 26 Cal.4th 20, 30-31.) Because ex post facto principles protects against retrospective changes in the law that disadvantages the defendant after the crime has been committed, applying the more restrictive credit calculation at sentencing to crimes that occurred prior to the change in the law would likely violate the Ex Post Facto Clause.

6. 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:

- 1) 143% of design bed capacity by June 30, 2014;
- 2) 141.5% of design bed capacity by February 28, 2015; and,
- 3) 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:

- 1) Increase prospective credit earnings for non-violent second-strike inmates as well as minimum custody inmates.
- 2) 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.
- 3) Release inmates who have been granted parole by BPH but have future parole dates.
- 4) Expand the CDCR’s medical parole program.
- 5) Allow inmates age 60 and over who have served at least 25 years of incarceration to be considered for parole.
- 6) 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*.)

CDCR's June 2018 monthly report on the prison population notes that the in-state adult institution population is currently 129,319 inmates, which amounts to 135.1% of design capacity. Additionally, there are still 3,072 prisoners being housed out of state.

(<https://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/TPOP1A/TPOP1Ad1805.pdf>) Thus, while CDCR is currently in compliance with the three-judge panel's order on the prison population, the state needs to maintain a "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 would add 25 offenses to the list of violent felonies. It would adversely affect the court's mandate of maintaining a durable solution to prison overcrowding because those inmates sentenced for the specified crimes after the effective date of the law would be entitled to less credits and be ineligible for parole consideration under Proposition 57, therefore serving more time on their sentences. (See Pen. Code, § 2933.1, subds. (a) & (c).) Additionally, in the future, more inmates would potentially be subject to a three-year or five-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 also violent felony. (Pen. Code § 667.5, subd. (a).)

7. Arguments in Support

According to the Riverside Sheriffs' Association:

While law enforcement agencies throughout the region are expanding efforts to curtail and ultimately prevent human trafficking, any legislative help is certainly welcomed.

By clarifying human sex trafficking as an inherently violent crime, California will be better equipped to hold those responsible for profiting off the pain and misery of those that are trafficked throughout the state and across the county for sex.

According to the California District Attorneys Association:

These crimes are particularly abhorrent and designating them as violent felonies would prescribe them a more appropriate, stronger punishment.

8. Argument in Opposition

According to the American Civil Liberties Union of California:

AB 2823 directly contradicts the will of the voters when they passed Proposition 57 in November of 2016. Prop 57 allows an offender convicted of a non-violent felony to be eligible for parole when he or she has completed the prison term for his or her primary offense, and authorizes the Department of Corrections and

Rehabilitation to offer enhanced credit-earning opportunities to prisoners – opportunities that are likely also to be limited to non-violent offenders once the regulations are adopted. The arguments in opposition to Prop 57 expressly noted that someone convicted of rape of an unconscious victim, rape by intoxication, or human trafficking would be eligible for early parole under the Proposition.

Proponents of the measure noted that California's prison population had increased by 500% in just a few decades, and that the measure would save tens of millions of taxpayer dollars. California voters passed the measure with over 64% of the vote. AB 2823 would undermine that choice when it has only recently been implemented. It would set a precedent for limiting the cost-saving and rehabilitative benefits of Prop 57 by defining more and more crimes as violent felonies, and thus allowing fewer and fewer offenders to be eligible for earlier release.

California law already provides significant punishments for the crimes that would become violent felonies under AB 2823. Under existing Penal Code section 236.1, the lowest penalty possible for human trafficking is five years in state prison. (Pen. Code, § 236.1 (a).) The highest penalty is life imprisonment. (Pen. Code, § 236.1(c)(2).) Persons convicted of most of the sex crimes included in this bill are subject to mandatory sentences, with no possibility of probation. The punishments provided for any of the crimes are often further enhanced by myriad existing sentence enhancements.

-- END --