
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: SB 652 **Hearing Date:** April 18, 2017
Author: Nielsen
Version: February 17, 2017
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Violent Felonies: Firearms: Unlawful Possession*

HISTORY

Source: Author

Prior Legislation: SB 1269 (Galgiani), failed passage in Senate Public Safety (2016)
AB 1188 (Pan), failed passage in Assembly Public Safety (2011)
AB 60 (Jeffries), failed passage in Assembly Public Safety (2011)
AB 16 (Swanson), held in Assembly Appropriations' Suspense file (2009)
SB 440 (Denham), failed passage in Senate Public Safety (2009)
AB 303 (Spitzer), held in Assembly Appropriations' Suspense file (2007)
AB 426 (Galgiani), failed passage in Senate Public Safety (2007)
SB 1642 (Romero), failed passage on the Senate Floor (2006)
AB 2016 (Maze), failed passage in Assembly Public Safety (2004)
AB 863 (Horton), failed passage in Assembly Public Safety (2003)
AB 1838 (Hertzberg), Ch. 606, Stats. 2002
AB 2660 (Pacheco), failed passage in Senate Public Safety (2002)
AB 455 (Wyman), failed passage in Assembly Public Safety (2001)
Proposition 21, passed by voters in 2000
Proposition 184, passed by voters in 1994
AB 971 (Jones), Ch. 12, Stats. 1994

Support: Unknown

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

PURPOSE

The purpose of this bill is to add the offense of unlawful possession of a firearm by a person previously convicted of a violent felony to the list of violent felonies.

Existing law provides that any person who was previously convicted of a violent felony, as defined, or serious felony, as defined, must serve double the term specified in statute on any new felony, and if a person has two or more prior convictions for a serious or violent felony, the person must receive a 25 years-to-life sentence on any new violent or serious felony. (Pen. Code §§ 667 and 1192.7.)

Existing law provides a lock-in date of November 7, 2012 of existing offenses that count as strikes for purposes of the Three Strikes law. (Pen. Code, § 667.1.)

Existing law limits the amount of credits an inmate may earn against his or her period of confinement to 15 percent if he or she was convicted of a violent felony. (Pen. Code § 2933.1.)

Existing law provides that any person who has been convicted of a felony under the laws of the United States, the State of California, or any other state, as specified, or who is addicted to the use of any narcotic drug, and who owns, purchases, receives or has in possession or under custody or control any firearm is guilty of a felony. (Pen. Code § 29800, subd. (a).)

Existing law provides that any person who has been previously convicted of any of the specified violent offenses and who owns or is in possession of any firearm is guilty of a felony. (Pen. Code § 29900.)

Existing law provides a list of specific crimes defined as "violent felony" which includes 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.

This bill additionally would define unlawful possession of a firearm by a person previously convicted of a violent felony to this section.

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).)

This bill would add new violent felony that would require a court to impose the three-year sentence enhancement.

COMMENTS

1. Need for This Bill

According to the Author:

The California Penal Code recognizes that certain felony crimes are more inherently violent or dangerous than others by classifying particular offenses as serious or violent felonies. All such classifications tend to suffer from some omissions. One such omission involves violent felons with firearms.

The law which prohibits a felon from owning a firearm makes little distinction between the offender convicted of tax fraud and another convicted of manslaughter. However, when a peace officer confronts a violent felon with a

firearm, the distinction becomes all too clear. In order to better protect our officers and the public they serve we must recognize the extraordinary risk an officer faces when he or she is confronted with an already-convicted violent felon carrying a firearm.

Unfortunately, the magnitude of this risk was painfully illustrated on February 20 of this year, when Whittier Police Officer Keith Boyer was murdered and a fellow officer wounded. The killer, Michael Christopher Mejia, a known gang member, is suspected of fatally shooting his own cousin hours earlier. Mejia was paroled less than two weeks before murdering Officer Boyer. His prior convictions included resisting arrest and robbery – a violent felony.

Existing Penal Code enumerates 23 offenses as “violent felonies.” These include crimes such as murder, rape, robbery, mayhem, and kidnapping.

Senate Bill 562 would make the unlawful possession of a firearm by a person previously convicted of a violent felony a new violent felony offense.

2. Three Strikes Sentencing Implications

In 1994, California voters passed Proposition 184, known as the “Three Strikes and You’re Out” law. That same year, the California Legislature passed similar legislation that was signed into law. (AB 971 (Jones), Chapter 12, Statutes of 1994.) Collectively, Proposition 184 and AB 971 became known as California’s Three Strikes law which imposes longer prison sentences for certain repeat offenders. 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 of November 7, 2012. 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.

3. Violent Felonies Compared to Serious Felonies

As stated above, strikes are defined as violent felonies and serious felonies. All violent felonies are also in the serious felony list. (Pen. Code §§ 667.5, subd. (c), 1192.7, subd. (c).) The serious felony list is more expansive than the violent felony list because some of the crimes on the serious felony list are not inherently violent. An example of a serious felony that is not a violent felony is the sale or furnishing of heroin, cocaine, PCP, or methamphetamine to a minor. (Pen. Code § 1192.7, subd. (c)(24).) Sometimes a crime can be either serious or violent depending on the circumstances. A residential burglary is a serious felony, but can be a violent felony if someone other than an accomplice is present. (Pen. Code 667.5, subd. (c)(21).)

This bill adds the unlawful possession of a firearm by a person previously convicted of a violent felony to the list of violent felonies. This would be the only crime that is listed as a violent felony but not a serious felony.

While it is concerning that a person who is prohibited from possessing a firearm is in possession of a firearm, this offense is not inherently violent like the other offenses on the violent felony list. Practically speaking, a firearm that is unlawfully possessed is unlikely to be discovered until the firearm is used in the commission of another crime. Thus, it will usually be charged along with other more serious offenses such as robbery or carjacking which would count as strikes.

4. Firearms-Specific Enhancements in Existing Law

Existing law contains a variety of enhancements that can be used to increase the term of imprisonment a defendant will serve. Multiple enhancements can be imposed in a single case. 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.

Firearm-specific enhancements impose some of the longest sentences. Existing law provides a 1-year sentencing enhancement for being armed with a firearm during the commission of a felony and 3 years if the firearm is an assault weapon or machine gun. (Pen. Code § 12022, subd. (a).) A person who personally uses a firearm in the commission of a felony is subject to an additional and consecutive term in state prison for 3, 4 or 10 years. (Pen. Code § 12022.5, subd. (a).) If the person personally uses the firearm or assault weapon during the commission of a felony, the court shall impose an additional and consecutive term of 5, 6 or 10 years. (Pen. Code § 12022.5, subd. (b).) Existing law specifies that for certain felonies, if a person personally uses a firearm, that person shall be punished by an additional and consecutive term of imprisonment for 10 years; if the person personally and intentionally discharged the firearm during the commission of one of the enumerated felonies, the additional term is 20 years; and if the person personally and intentionally discharged the firearm during the commission of one of the enumerated felonies and it great bodily injury to another person, other than an accomplice, then the additional term is 25-years to life. (Pen. Code §12022.53.)

A person who commits a drug felony while armed would face an additional a 3, 4, or 5 years of imprisonment. (Pen. Code § 12022, subd. (c).) A person who is armed while committing a specified sex crime would face 1, 2, or 5 years of additional imprisonment. (Pen. Code § 12022.3.) If the person is a gang member, carrying a firearm during a street-gang crime leads to an additional term of 1, 2, or 3 years. (Pen. Code § 12021.5.) If the firearm has a detachable magazine, the enhancement would be 2, 3, or 4 years. (*Id.*) A person who discharges a firearm from a vehicle and causing great bodily injury or death would receive an additional 5, 6, or 10 years imprisonment. (Pen. Code § 12022.55.)

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 expands the existing three-year prison prior term enhancement so that a court would be required to impose an additional three years on top of a person's sentence for being a felon in possession of a firearm if he or she has a prior violent felony conviction. 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.

This bill amends existing subdivision (c) of Penal Code section 667.5, consequently it would require a person convicted of the offense to complete at minimum 85 percent of their sentence as opposed to the 50 percent allowed for most other inmates. It would also prohibit inmates who currently qualify as a non-violent second striker (persons whose sentence was doubled because of a prior strike) to be considered for parole after serving 50% of their sentence. This is a measure that is currently being implemented by the Department of Corrections and

Rehabilitation (CDCR) as a way to reduce the prison population as required by the federal court order.

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

6. 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 non-violent felons after the inmate has served the full base term of his or 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://voterguide.sos.ca.gov/en/propositions/57/analysis.htm>> [as of Mar. 17, 2017].)

Proposition 57 requires CDCR to draft regulations on how the parole process will be implemented. The initiative specifies that early parole may only be given to persons who have committed non-violent offenses. However, the initiative does not specify what is considered a non-violent felony. Adding a new crime that would be designated a violent felony would likely prevent persons convicted of the added offense from being eligible for parole consideration and the credit earning provisions of Proposition 57.

7. Similar Legislation

There are several other bills that have been introduced this year to designate additional offenses as violent felonies. SB 75 (Bates) would add several specified felony offenses as well as alternate felony-misdemeanor offenses to the violent felonies list. SB 770 (Glazer) would add human trafficking, elder and dependent adult abuse, assault with a deadly weapon, rape under specified circumstances, discharge of a firearm at an occupied building, and specified crimes against peace officers and witnesses, as violent felonies. AB 27 (Melendez) would add specified sexual offenses to the list of "violent felonies." AB 67 (Rodriguez) and AB 197 (Kiley) would add a number of specified felony offenses to the violent felonies list.

8. Argument in Opposition

The California Public Defenders Association is in opposition and writes:

SB 652 would add a 24th paragraph to the already overlong list of violent felonies in section 667.5. It would strain the definition of "violent" by adding a crime of mere unlawful possession of a firearm by a person previously convicted of a violent felony. While that possession has the potential to become violent if the gun is used, it is not violent itself.

More important, the subject matter of this bill is already adequately, and more realistically, covered by Penal Code sections 29900 and 29905. Those sections provide for increased punishment, and minimum incarceration time (even if probation is granted), for firearm possession by a person previously convicted of a violent felony.

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