SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair
2015 - 2016 Regular

Bill No:	SB 821	**Hearing Date:**	April 5, 2016
Author:	Block		
Version:	March 8, 2016		
Urgency:	No	**Fiscal:**	Yes
Consultant:	JM		

Subject: ***Crimes: Criminal Threats***

HISTORY

Source: San Diego County District Attorney

Prior Legislation: SB 110 (Fuller) 2015 – Vetoed
SB 456 (Block) 2015 – Vetoed

Support: Association of California School Administrators; Association of Deputy District Attorneys; Association for Los Angeles County Deputy Sheriffs; Brady Campaign, California Chapter; California District Attorneys Association; California State Sheriffs' Association; Los Angeles Police Protective League; Peace Officers Research Association of California; Riverside Sheriffs Association

Opposition: California Attorneys for Criminal Justice; California Public Defenders Association; Legal Services for Prisoners with Children; Pacific Juvenile Defender Center

PURPOSE

The purpose of this bill is to provide that a threat to cause death or great bodily injury at a location or event is a crime if the threat is made under circumstances where a person perceiving the threat believes it to be unequivocal, unconditional and immediate, thereby causing the evacuation, lockdown or closure of a campus or event, or the cancellation of an event.

Existing law provides that "any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, … is to be taken as a threat, even if there is no intent of actually carrying it out, which … is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety," is guilty of an alternate felony-misdemeanor, punishable by jail term of up to one year, a fine of up to $1,000, or both, or by imprisonment in the state prison for 16 months,

two years or three years. (Pen. Code § 422)

This bill expands the criminal threats statute to cover circumstances where the perpetrator makes a threat to commit a crime that will result in death or great bodily injury "at a location or event."

This bill provides that a criminal threat to cause death or great bodily at a public or private location or event must "convey to a person perceiving the threat a gravity of purpose and an immediate prospect of execution of the threat, thereby caus[ing] the evacuation, lockdown, or closure of a campus, or the cancellation, evacuation, lockdown, or closure of an event."

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past several 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 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 December of 2015 the administration reported that as "of December 9, 2015, 112,510 inmates were housed in the State's 34 adult institutions, which amounts to 136.0% of design bed capacity, and 5,264 inmates were housed in out-of-state facilities. The current population is 1,212 inmates below the final court-ordered population benchmark of 137.5% of design bed capacity, and has been under that benchmark since February 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* (fn. omitted).) One year ago, 115,826 inmates were housed in the State's 34 adult institutions, which amounted to 140.0% of design bed capacity, and 8,864 inmates were housed in out-of-state facilities. (Defendants' December 2014 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). 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. Need for This Bill

According to the author:

> Currently Penal Code Section 422 prohibits a threat to commit a crime that will result in great bodily injury, which is directed at a specific person, and the person suffers sustained fear as a result of the threat. With the increasing availability of software that grants a user's anonymity, there have been [increasing] threats made against locations (i.e. schools and colleges) versus against specific individuals. These threats, together with an increase in actual incidents of mass shootings at events, such as at a work holiday party in San Bernardino, at movie theaters, and at schools throughout the country, instill terror in the public and require that threats directed at locations and events be taken seriously.
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> While some threats may not be credible, many are and have resulted in precautionary measures to ensure that the community remains safe, burdening law enforcement and the entities threatened. A recent study from the National School Safety and Security Services found that threats made toward a school campus have increased 158% between August and December of 2014; of this increase, 37% of them are being sent electronically. Approximately 30% of school threats led to the evacuation of the school, while 10% resulted in a campus closure on the day that the threat. The study found that California ranked second nationally, with 60 threats made in the first half of the 2014-2015 school year.
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> In March 2015, officers responded to threats at ten schools in the San Diego Unified School District, with at least four involving a threat of a shooting. There have been 12 district school shooting threats from July 2015 to January 2016. In December 2015, after members of the LA Board of Education received threats that mentioned explosive devices, assault rifles, and machine pistols, Los Angeles Unified School District closed all 900 campuses, impacting more than 640,000 students and their families. Superintendent of Public Instruction, Tom Torlakson noted the possibility that the LAUSD might not receive nearly $29 million in average daily attendance funding due to the shut-down.
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> A person who communicates a threat such as the one that shut-down all LAUSD schools cannot be charged under current law (Pen. Code§ 422), since the threat did not target a specific individual. SB 821 amends Section 422 to ensure that a violation is not limited to proof of a specifically targeted individual, or a demonstration of a sustained fear by any one particular person, but can include a threat to commit a crime made against a location or event which will result in death or great bodily harm of a person or persons. This change reflects the

present-day nature of criminal threats. The harm caused by a threat to the public at a location or event is often greater than the harm caused by a threat to an individual.

2. The New Crime Defined by this Bill Would not Require Proof That the Threat Recipient or Perceiver Reasonably Believed the Threat

The existing criminal threats statute prohibits threats to cause great bodily injury or death made to a specific person that are so credible that person to whom the threat is made *reasonably* believes that the threat will be carried out, placing the victim in sustained fear. Under this bill, while the person who received or perceived the threat might find it credible, a reasonable person might find the threat to be spurious. Arguably, where a person can be subject to criminal penalties for making a threat, the decision to evacuate a school or cancel an event should be reasonable, not an over-reaction to a threat of dubious validity. Further, the persons at apparent risk could be placed in serious fear because of the conduct of the authorities who ordered the evacuation or cancellation, not the nature or credibility of the threat.

Concerns may be expressed that because authorities cannot afford to take chances with public safety, a reasonableness standard would be too restrictive. However, a history or pattern of executed threats in the area where the threat was made, or executed threats that occurred in similar circumstances, would establish that the reaction of authorities was reasonable

SHOULD THE DECISION TO EVACUATE A PLACE OR CANCEL AN EVENT IN RESPONSE TO A THREAT BE REASONABLE BEFORE THE THREAT MAKER CAN BE CHARGED WITH A CRIME?

3. The Crime Defined by this Bill Does not Require that the Persons Under Threat be Aware of the Threat

This bill neither requires that the person or persons who would be injured or killed by the threatened action receive the threat, nor even be aware of the threat. Essentially, the bill does not require that any person actually be placed in fear by the threat. In many cases, students at a school or attendees of an event will become aware of the threat when a location is evacuated or an event cancelled. In many cases, the persons who would be harmed by the threatened action would experience serious and sustained fear. However, there may be numerous cases where the persons at apparent risk would neither be aware of the threat or placed in fear.

It may be argued that a major harm caused by a threat to cause injury at a location or event is the substantial disruption, inconvenience and costs experienced by those affected by the threat. Disruptions could include closure of a school or cancellation of a large event. However, that is a different kind of harm than the sustained fear suffered by a victim of a crime under the existing threat statute.

SHOULD THIS BILL REQUIRE THAT THE PERSONS AT A LOCATION OR EVENT WHO ARE SUBJECT TO A CRIMINAL THREAT BE AWARE THE THREAT WAS MADE?

4. First Amendment Issues - Free Speech and Limits on Threatening Speech

Courts have long held that speech concerning public issues is entitled to great protection under the First Amendment. (*Burson* v. *Freeman* (1992) 504 U.S. 191.) The California Constitution also protects free speech. (Cal. Const. Art. I, § 2.) "[T]he government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." (*Texas* v. *Johnson* (1989) 491 U.S. 397, 414.)

However, the First Amendment is not absolute. Speech or expressive conduct intended to intimidate is not protected by the First Amendment. (*Virginia* v. *Black* (2003) 538 U.S. 343.) "True threats" are a specific form of unprotected, intimidating speech. Alleged threats should be considered in light of their entire factual context, including the surrounding events and reactions of the listeners. … A threat made such that "a reasonable person would foresee that the listener will believe he will be subjected to physical violence… is unprotected by the First Amendment." (*Planned Parenthood of the Columbia/Willamette* v. *American Coalition of Life Activists* (2002) 290 F.3rd 1058, 1077.)

5. Federal Court Decisions in Threats Cases – Unresolved Issues

The United States Supreme Court in *Elonis v. United States* (2015) 135 S.Ct. 2001, reversed a federal conviction in a case where the defendant placed threatening statements and misogynist rants on his Facebook page, largely in the form of rap lyrics. The targets were his ex-wife, co-workers, a kindergarten class and law enforcement officials. Although the defendant wrote some notes that the lyrics were artistic expressions, the threats were often very detailed and specific.

It was widely believed that the Court in *Elonis* would decide whether or not a true threat must include an intent to carry out the threat. However, the Supreme Court sidestepped the intent issue and reversed *Elonis*' conviction on grounds that he could have been convicted under a negligence standard, while a criminal conviction requires a more culpable and knowing state of mind. Commentators have argued that the decision raises more issues than it settles. It appears that the Court did not specifically rule what mental state is required for a true threats conviction. Justice Alito's opinion argued that recklessness would suffice, but no other justice agreed.

Federal District Court decisions appear to hold that federal threat statutes do not require that a threat be made directly to the threatened person. However, it is not clear what level of connection between the maker and the target of the threat would constitute a criminal threat under federal law. In one case, the defendant's statements to his insurance adjuster that he wanted to kill a congressman "were held not to be threats because the statements were not made directly to the intended victim, with absolutely no connection between the recipient [insurance adjuster] and the intended victim." (*U.S. v. Schuelier* (2015) 2015 U.S. Dist. Lexis 138768, citing and explaining *U.S. v. Fenton* (W.D. Pa 1998) 30 F.Supp. 2d 520, 526.) Other federal cases have focused on the explicit and certain nature of a threat – not whether it was communicated to the intended victim. A federal threat conviction will be upheld if the defendant called upon a specific person to take action against the target of the threat. (*U.S. v. Wheeler* (10th Cir. 2015) 776 F.3d 736, 746.) Finally, the court in *Schuelier* stated that the U.S. Supreme Court has not extended special First Amendment protection to threats that arise out of personal disputes, rather than matters of politics and other public interests. (See, *Watts v. U.S.* (1969 394 U.S. 705, 708.)

It is likely that a conviction under this bill, especially for a felony, may be challenged on due process and First Amendment grounds. The applicable decisional law is not nearly so clear as to suggest the outcome of such litigation.

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