
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: SB 976 **Hearing Date:** April 17, 2018
Author: Bates
Version: April 9, 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 Assembly Appropriations
AB 67 (Rodriguez), 2017, held 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: Los Angeles County Professional Peace Officers Association; Orange County District Attorney

Opposition: American Civil Liberties Union of California; California Public Defenders Association; Ella Baker Center for Human Rights; San Francisco Public Defender

PURPOSE

The purpose of this bill is to expand the definition of a “violent felony” to include offenses that are considered a “serious felony” or requires registration as a sex offender in order to exclude those offenders from Proposition 57’s parole provisions.

Existing law provides a list of specific crimes defined as a "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. (Pen. Code § 667.5, subd. (c).)

Existing law defines a “serious felony” as the following, which includes all felonies listed as a “violent felony”:

- Murder or voluntary manslaughter.
- Mayhem.
- Rape.
- Sodomy by force, violence, duress, menace, or fear of bodily injury.

- Oral copulation by force, violence, duress, menace or fear of bodily injury.
- Lewd act with child under fourteen years of age (violent) and continuous sexual abuse of a child.
- Any felony punishable by death or life imprisonment
- Any felony in which defendant inflicts great bodily injury on defendant or personally uses a firearm.
- Attempted murder.
- Assault with intent to commit a sex crime, robbery or mayhem.
- Assault with a deadly weapon on peace officer.
- Assault by life prisoner on a non-inmate.
- Assault with a deadly weapon by inmate.
- Arson.
- Exploding a destructive device with intent to injure.
- Explosion causing great bodily injury or mayhem.
- Explosion with intent to murder.
- Burglary of inhabited dwelling.
- Robbery, bank robbery or carjacking.
- Kidnapping.
- Inmate taking a hostage.
- Attempted crime carrying a life sentence or death penalty
- Any felony where defendant personally uses a dangerous or deadly weapon.
- Sale or furnishing heroin, cocaine, PCP, or methamphetamine to a minor.
- Forcible foreign object rape.
- Grand theft involving a firearm.
- Any violation of 10-20-life firearm use and discharge enhancement law.
- Any gang-related felony offense.
- Witness intimidation.
- Credible threats to kill or cause great bodily injury.
- Discharge of a firearm at an inhabited dwelling, vehicle or aircraft.
- Shooting from a vehicle.
- Possession, development, production, and transfers of weapons of mass destruction
- Any conspiracy to commit a serious felony. (Pen. Code, § 1192.7, subd. (c).)

Existing law requires persons convicted of specified offenses to register as a sex offender. (Pen. Code, § 290 *et seq.*)

Existing law specifies that individuals convicted of a nonviolent felony offense shall be eligible for parole consideration after completing the term for their primary offense and requires the California Department of Corrections and Rehabilitation (CDCR) to adopt regulations to implement this change. (Proposition 57, approved by California voters on Nov. 8, 2016.)

This bill specifies that for purposes of Proposition 57, a “violent felony” as defined in subdivision (c) of 667.5 is not a nonviolent felony offense.

This bill specifies that for purposes of Proposition 57, a “violent felony” includes any “serious felony” and any offense that requires a person to register as a sex offender.

COMMENTS

1. Need for This Bill

According to the author of this bill:

Californians passed Proposition 57 (Prop 57) in 2016 that makes perpetrators eligible for early parole and eventual release from state prison. Although the measure passed, it was misleading on many fronts. The measure intended to save the state money and rehabilitate criminals; however, Prop 57 has instead increased the number of victims on our streets which is only going to cost more to California taxpayers in the long run. The many ambiguous terms stated in the language of Prop 57 shows the need for clean-up legislation.

SB 976 is needed to ensure our communities are safe from violent and dangerous criminals. The passage of Prop 57 threatens every home, neighborhood and school. A 50-year-old child molester who preys on children does not deserve a shorter sentence. The California Department of Corrections and Rehabilitation has addressed some of the sex crimes in their emergency regulations, but it needs to be added in statute. A new administration could propose changes and those changes would still never have to go back to the voters.

It is imperative that SB 976 be signed into law to prevent these perpetrators from re-entering our communities before their time has been served. Just as victims begin putting their lives back together, these dangerous felons may be released again, forcing victims to re-live the crimes committed against them over and over. Lastly, permitting the worst career criminals to be treated as first-time offenders only discounts stronger sentences imposed by a judge for good reason. SB 976 will prevent these criminals from re-entering our communities before their time has been served.

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 Apr. 9, 2018].)

Proposition 57 requires the California Department of Corrections and Rehabilitation (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. Proponents of this legislation want the offenses included in this bill to be considered violent felonies for purposes of

Proposition 57 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 list of violent felonies, the regulations exclude sex offenders from the parole provisions in Proposition 57. This aligns with the Governor's 2017-2018 budget proposal to exclude all sex offenders from early parole consideration, regardless of whether their crimes were designated as "violent". (See Governor's Budget Summary 2017-2018 at 75 (Jan. 10, 2017) <<http://www.ebudget.ca.gov/2017-18/pdf/BudgetSummary/PublicSafety.pdf>> [as of Mar. 20, 2017].) 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. CDCR plans to appeal the order and will move forward with the regulations without any changes. (*Id.* at p. 2.)

The purpose of this bill is to prevent consideration for the parole provisions of Proposition 57 for the additional offenses specified. However, considering that CDCR's regulations are moving forward as expected, and the pending lawsuit is not final, should the Legislature pass legislation trying to make changes to the Proposition? Any bills that attempt to do so will likely be vetoed.

3. 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).

Although the state is currently in compliance with the court-ordered population cap, the state must create a durable solution to prison overcrowding. Excluding persons eligible for the parole provisions created by Proposition 57 is contrary to the court's mandate.

4. "Violent Felony" Designation

This bill would add to the violent felony list any felony that is considered a "serious felony" as defined in Penal Code section 1192.7 as well as any offense that requires registration as a sex offender.

All violent felonies are also on 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. Examples of crimes that are considered a serious felony but not a violent felony include grand theft involving a firearm and 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. Any felony committed for the benefit of a gang is a serious felony (Pen. Code, § 1192.7, subd. (c)(28)), but only extortion or criminal threats committed for a benefit of a gang are violent felonies (Pen. Code, § 667.5, subd. (c)(18)-(19)).

The list of crimes that require sex offender registration is quite large. (Pen. Code, § 290 *et seq.*) Some are included in the list of violent felonies and some are “wobblers” meaning they can be charged as either a felony or a misdemeanor. Currently, the violent felony list does not contain any wobblers.

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 add to Penal Code section 667.5, subdivision (c) or change the “lock-in” date to create new strikes. Thus, specified enhancements, credit earning limitations, and the Three Strikes law do not appear to be implicated.

6. Argument in Support

According to the Los Angeles County Professional Peace Officers Association

The California Penal Code is outdated and requires improvements in order to correctly identify the severity of certain crimes. In the 2016 general election, California voters approved Proposition 57 to decrease the state’s prison population by granting parole boards the power to consider the early release of prisoners who are serving time for “non-violent” crimes. However, it is unclear what constitutes “non-violent” offense that may lead to early release. As Prop 57 stands, crimes such as human trafficking, elder and dependent adult abuse, assault with a deadly weapon, and rape of an unconscious person may not be considered violent crimes.

7. Argument in Opposition

The San Francisco Public Defender writes in opposition:

California now has the regrettable distinction of meting out some of the longest sentences in the nation, driven largely by sentencing enhancements. The California prison system remains under Federal oversight for overcrowded conditions. The ongoing prison overcrowding litigation indicates that prison capacity and related issues concerning conditions of confinement remain unresolved.

For many years, California has sought to address prison overcrowding and reduce unnecessary expenditures on incarceration. It costs California more than \$70,000 a year to incarcerate one person.

California law has hundreds of sentence enhancements on the books, and these have had a devastating impact on families and communities. Research shows horrific intergenerational impacts from these failed policies, which disproportionately harm poor communities of color. The rapidly increasing rates of incarceration for women has further worsened the devastation for families and children.

California voters have made a clear and evident cultural shift away from prioritizing incarceration over community investment, as demonstrated by the passage of Propositions 47, 57, and 64. In 2014, Proposition 47 reduced many non-violent felonies to misdemeanors. In 2016, Proposition 64 decriminalized possession of cannabis and eliminated most felonies for growing or selling cannabis. In 2017, voters also passed Proposition 57, which reduced incarceration by increasing credit-earning and parole opportunities. SB 976 runs counter to the consistent will of the voters by increasing the prison population and appears to be an end-run around Proposition 57 by reducing the number of inmates that would be eligible for parole under that law.

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