

Date of Hearing: March 21, 2017  
Counsel: Gabriel Caswell

ASSEMBLY COMMITTEE ON PUBLIC SAFETY

Reginald Byron Jones-Sawyer, Sr., Chair

AB 197 (Kiley) – As Introduced January 19, 2017

**SUMMARY:** Adds a number of offenses to the list of violent felonies and specifies that they are "strikes" under California's Three-Strikes Law. Specifically, **this bill** adds the following crimes to the list of violent felonies and specifies that they are to be treated as "strikes" under California's Three-Strikes Law:

- 1) Sodomy by a person over 21 of a person under the age of 16.
- 2) Oral copulation by a person over 21 of a person under the age of 16.
- 3) Lewd and lascivious acts with a 14 or 15 year old by a person who is at least 10 years older, if a felony.
- 4) Child abduction by a non-custodial person.
- 5) Deprivation of custody of a child.
- 6) Procurement of a child under 16 for lewd and lascivious acts.
- 7) Abduction of a minor for the purpose of prostitution.
- 8) Child abuse or endangerment, as specified.
- 9) Contact or communicating with a minor with the intent of committing a specified sexual offense.
- 10) Felony contacting a minor with the intent of committing a sexual offense.
- 11) Felony conviction of employing or using a minor to perform prohibited acts.
- 12) Harming or endangering an elder or dependent adult, as specified.
- 13) False imprisonment of an elder or dependent adult, as specified.
- 14) Animal abuse, as specified.

**EXISTING LAW:**

- 1) Defines a "violent felony" as any of the following (Pen. Code § 667.5(c).):

- a) Murder or voluntary manslaughter;
- b) Mayhem;
- c) Rape or spousal rape accomplished by means of force or threats of retaliation;
- d) Sodomy by force or fear of immediate bodily injury on the victim or another person;
- e) Oral copulation by force or fear of immediate bodily injury on the victim or another person;
- f) Lewd acts on a child under the age of 14 years, as defined;
- g) Any felony punishable by death or imprisonment in the state prison for life;
- h) 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;
- i) Any robbery;
- j) Arson of a structure, forest land, or property that causes great bodily injury;
- k) Arson that causes an inhabited structure or property to burn;
- l) 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;
- m) Attempted murder;
- n) Explosion or attempted explosion of a destructive device with the intent to commit murder;
- o) Explosion or ignition of any destructive device or any explosive which causes bodily injury to any person;
- p) Explosion of a destructive device which causes death or great bodily injury;
- q) Kidnapping;
- r) Assault with intent to commit mayhem, rape, sodomy or oral copulation;
- s) Continuous sexual abuse of a child;
- t) Carjacking, as defined;
- u) Rape or penetration of genital or anal openings by a foreign object;
- v) Felony extortion;

- w) Threats to victims or witnesses, as specified;
  - x) First degree burglary, as defined, where it is proved that another person other than an accomplice, was present in the residence during the burglary;
  - y) Use of a firearm during the commission of specified crimes; and,
  - z) Possession, development, production, and transfers of weapons of mass destruction.
- 2) Provides that when a defendant is convicted on a new felony offense and has a prior conviction for a specified violent felony, the defendant shall receive a consecutive three-year term for each prior separate prison term served by the defendant where the prior offense was one of the specified violent felonies specified, unless the defendant meets certain conditions. (Pen. Code § 667.5, subd. (a).)
  - 3) States that a conviction of a violent felony counts as a prior conviction for sentencing under the two and three strike law. (Pen. Code § 667.)
  - 4) Provides that if a defendant is convicted of a felony offense and it is pled and proved that the defendant has been convicted of one prior serious or violent offense as defined, the term of imprisonment is twice the term otherwise imposed for the current offense. (Pen. Code § 667)
  - 5) Specifies that notwithstanding any other law, any person who is convicted of a felony that is contained in the "violent" felony list shall accrue no more than 15% of work-time credit. (Pen. Code § 2933.1, subd. (a).)
  - 6) Defines a "serious felony" as any of the following: murder or manslaughter; mayhem; rape; sodomy; oral copulation; lewd acts on a child under the age of 14; any felony punishable by death or imprisonment for life; any felony in which the defendant inflicts great bodily injury; attempted murder; assault with the intent to commit rape or robbery; assault with a deadly weapon or instrument on a peace officer; assault by a life prisoner on a non-inmate; assault with a deadly weapon by an inmate; arson; exploding a destructive devise with the intention to commit murder or great bodily injury; first-degree burglary; armed robbery or bank robbery; kidnapping; holding of a hostage by a person confined to a state prison; attempting to commit a felony punishable by death or life in prison; any felony where the defendant personally used a dangerous or deadly weapon; selling or otherwise providing heroin, PCP or any type of methamphetamine-related drug; forcible sexual penetration; grand theft involving a firearm; carjacking; assault with the intent to commit mayhem, rape, sodomy or forcible oral copulation; throwing acid or other flammable substance; assault with a deadly weapon on a peace officer; assault with a deadly weapon on a member of the transit authority; discharge of a firearm in an inhabited dwelling or car; rape or sexual penetration done in concert; continuous sexual abuse of a child; shooting from a vehicle; intimidating a victim or witness; any attempt to commit the above-listed crimes except assault or burglary; and using a firearm in the commission of a crime and possession of weapons of mass destruction. (Pen. Code § 1192.7(c).)

**FISCAL EFFECT:** Unknown

**COMMENTS:**

- 1) **Author's Statement:** According to the author, "Assembly Bill 197 aims to fix some of the most egregious effects of Proposition 57 by adding child molestation, violence against the elderly, animal abuse, and other serious crimes against defenseless populations to California's 'violent felonies' list. This bill would ensure that criminals who prey on the most vulnerable members of our community remain behind bars."
- 2) **"Violent" Felony Designation:** This bill adds 14 new offenses to the list of "violent" crimes that causes an offender to receive fewer "custody credits" toward release on parole. Inmates who receive convictions for violent felonies must serve 85% of their time in custody. Additionally, these new offenses will be considered "strikes" for purposes of California's Three Strikes Law. In essence, any person who is convicted one of these offenses after committing two prior strikes can be sentenced to 25-years to life in state prison.
- 3) **Three Strikes Implications:** In general, violent felonies on the violent felonies list are considered "strikes" for purposes of California's Three Strikes Law. However, Proposition 36, which was passed by California voters on November 6, 2012 specifies that only the crimes that were included in the "violent felonies" list prior to November 7, 2016 shall be treated as strikes for purposes of the three-strikes law.

*"Notwithstanding subdivision (h) of Section 667, for all offenses committed on or after November 7, 2012, all references to existing statutes in subdivisions (c) to (g), inclusive, of Section 667, are to those statutes as they existed on November 7, 2012." (Pen. Code § 667.1.)*

This bill seeks to modify the date in Proposition 36 to 2018. As a result, the offenses in this bill, and any other offenses added to the violent felonies list prior to 2018 will become "strikes" under California's Three Strikes Law. This committee recently passed AB 27 (Melendez), and AB 67 (Rodriguez) which added various offenses related to human trafficking and rape of unconscious or intoxicated persons to the violent felony list. If this bill passes, all of those bills will likely be considered strikes as well because the bills may be double-joined.

- 4) **Wobblers (or Alternate Felony/Misdemeanors):** This bill, as drafted, would add seven offenses that can be charged alternatively as either felonies or misdemeanors to the list of violent felonies. On three occasions, the bill specifies that they should only count as violent felonies if they are charged as a felony. The following offenses are alternate felony/misdemeanors or wobblers that are being added to the violent felonies list:
  - a) Lewd and lascivious acts with a 14 or 15 year old by a person who is at least 10 years older, if a felony.
  - b) Child abduction by a non-custodial person.
  - c) Deprivation of custody of a child.

- d) Child abuse or endangerment, as specified.
- e) Felony conviction of employing or using a minor to perform prohibited acts.
- f) Harming or endangering an elder or dependent adult, as specified.
- g) Animal abuse, as specified.

The violent felony list contains the most serious crimes under California law, including crimes such as murder, attempted murder, mayhem, forcible sex crimes, arson, and robbery. The violent felony list does not contain any crimes classified as alternate felony/misdemeanors as they are not deemed to be of a serious enough nature if they can alternatively be charged as a misdemeanor. To add the alternate felony/ misdemeanor offense, if charged as a felony to the list of violent felonies would be unprecedented.

- 5) **Proposition 57:** On November 8, 2016 the voters of California approved Proposition 57. Proposition 57 was known as the "Parole for Non-Violent Criminals and Juvenile Court Trial Requirements Initiative." The initiative allows parole consideration for non-violent felons. It also authorizes sentence credits for rehabilitation, good behavior, and education. Additionally the proposition provides juvenile court judge decides whether juvenile will be prosecuted as adult.

As a result of the initiative, state prison inmates convicted of non-violent felony offenses are considered for early release. The state prison system may award additional sentencing credits to inmates for good behavior and approved rehabilitative or educational achievements. Additionally, minors must have a hearing in juvenile court before they can be transferred to adult court.

The California Department of Corrections (CDCR) has been tasked with drafting regulations on how the parole process will be implemented. The initiative specifies that early parole may only be given to non-violent offenses. However, the initiative does not specify what is considered a non-violent felony. Advocates for this legislation want the offense included in this bill to be considered violent felonies by including them on the violent felonies list as codified in the penal code. It is not clear however if that is the standard that CDCR is going to employ.

- 6) **Prison Overcrowding:** In January 2010, a three-judge panel issued a ruling ordering the State of California to reduce its prison population to 137.5% of design capacity because overcrowding was the primary reason that CDCR was unable to provide inmates with constitutionally adequate healthcare. (*Coleman/Plata vs. Schwarzenegger* (2010) No. Civ S-90-0520 LKK JFM P/NO. C01-1351 THE.) The United State Supreme Court upheld the decision, declaring that "without a reduction in overcrowding, there will be no efficacious remedy for the unconstitutional care of the sick and mentally ill" inmates in California's prisons. (*Brown v. Plata* (2011) 131 S.Ct. 1910, 1939; 179 L.Ed.2d 969, 999.)

After continued litigation, 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.

CDCR's February 2017 monthly report on the prison population notes that the in-state adult institution population is currently 114,124 inmates, which amounts to 134.1% of design capacity. This is an increase of 1.1% from February of last year. Additionally, there are still 4,400 prisoners being housed out of state. ([http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/Monthly/TPOPIA/TPOPIAd1702.pdf](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/TPOPIA/TPOPIAd1702.pdf) )

The Governor's January proposed budget for 2017-2018 anticipates that "[t]he adult inmate average daily population is projected to decrease from 129,015 in 2016-17 to 128,159 in 2017-18, a decrease of 856 inmates, or 0.7 percent. The average daily parolee population is projected to increase from 43,686 in 2016-17 to 44,761 in 2017-18, an increase of 1,075 parolees, or 2.5 percent. The decrease in the adult inmate population is due to a projected reduction related to the implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016, which offsets a projected increase in felon admissions." (<http://ebudget.ca.gov/budget/2017-18/#/Department/5225>)

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).)

The provisions of this bill not only specify that anyone convicted of these offenses added to the violent felonies list would have to spend 85% of their sentence in custody, but the legislation also adds "strikes" to the list of offenses that can trigger a 25-years to life sentence. This bill would most definitely exacerbate California's prison overcrowding crisis.

- 7) **Argument in Support:** According to the *Los Angeles County Professional Peace Officers Association*, "Proposition 57, as approved by the voters on November 8, 2016, increases parole chances for felons convicted of nonviolent crimes and gives them more opportunities to earn credits for good behavior. Proposition 57 bases parole eligibility for persons convicted of nonviolent offenses on the sentence imposed for a single count and ignores any additional punishment imposed for commission of multiple offenses, use of a deadly weapon, and numerous other enhancements. Because the language in Proposition 57 is not precise there is a substantial risk that it could result in the release of felony child abductors."
- 8) **Argument in Opposition:** According to the *American Civil Liberties Union*, "The American Civil Liberties Union of California regrets to inform you of our opposition to AB 197, which would add numerous offenses to the list of violent felonies for the purpose of sentencing enhancements and for purposes of inclusion as 'strikes' under the Three Strikes Law.

"AB 197, like several other bills introduced this session to add crimes to the list of violent felonies, directly contradicts the will of the voters when they passed Proposition 57 just this past November. Prop 57 allows an offender convicted of a non-violent felony to be eligible for parole upon completion of the prison term for the primary offense, and authorizes the Department of Corrections and Rehabilitation to offer enhanced credit-earning opportunities to prisoners – opportunities 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 lewd and lascivious acts with a child of 14 or 15, or false imprisonment of an elder by violence, to take two examples of the many crimes in AB 197, would be eligible for early parole under the Proposition.<sup>1</sup>

"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.<sup>2</sup> California voters passed the measure with over 64% of the vote. AB 197 would undermine that choice before it even has a chance to go into effect. The bill would set a precedent for limiting the cost-saving and rehabilitative benefits of Prop 57 by defining more and more crimes as violent felonies.

"AB 197 goes further than other similar bills in the breadth of the crimes that would be added and in proposing to make these proposed new violent felonies – and any other crimes added to the violent felony list this year – into “strikes” under the Three Strikes Law. AB 197 would add fourteen crimes to the violent felony list. Some of these crimes are not only not violent felonies, but not necessarily felonies, punishable under existing law as either misdemeanors or felonies. These include keeping a child from its lawful custodian (Penal Code §278), depriving a person of a lawful custody of a child or a right to visitation with a child (Penal Code §278.5), or false imprisonment of an elder or dependent adult (Penal Code §368(f)). Offenders who commit these crimes, or the others covered in AB 197, should not be denied the potential for earlier parole available under Prop 57.

"Equally alarmingly, AB 197 would rewrite the Three Strikes law so that the included crimes, and any other crimes added as violent felonies this year, would count as strikes. This goes further than simply undoing the positive effects of Prop 57 and would start California down the road – again – of ever increasing sentences for an ever expanding set of crimes.

"Governor Brown has criticized our state's criminal laws, particularly the number of sentencing enhancements, observing, “[t]here are now 400 separate enhancements that can add up to 25 years, each one of them, and now you have over 5,000 separate criminal provisions.”<sup>3</sup> As the Governor stated in his veto message of several bills last session, “[t]his multiplication and particularization of criminal behavior creates increasing complexity without commensurate benefit.”<sup>4</sup>

"The broader application of violent crime sentencing enhancements proposed under this bill, including the lengthy sentences available under the Three Strikes Law, will not benefit public safety. Studies have concluded that the severity of punishment does not generally have an

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<sup>1</sup> Official Voter Information Guide for General Election, November 8, 2016, Arguments Against Proposition 57, available at <http://voterguide.sos.ca.gov/en/propositions/57/arguments-rebuttals.htm>

<sup>2</sup> *Id.*

<sup>3</sup> Scott Shafer, Prosecutors Cry Foul Over Jerry Brown's Ballot Measure, KQED, Feb. 12, 2016, available at <http://ww2.kqed.org/news/2016/02/12/prosecutors-cry-foul-over-jerry-browns-ballot-measure>

<sup>4</sup> Patrick McGreevy, With Strong Message Against Creating New Crimes, Gov. Brown Vetoes Drone Bills, LA Times, Oct. 3, 2015, available at <http://www.latimes.com/politics/la-me-pc-gov-brown-vetoes-bills-restricting-hobbyist-drones-at-fires-schools-prisons-20151003-story.html>

increased effect on deterrence.<sup>5</sup> Rather, researchers have found that certainty of punishment has a greater deterrent effect than the severity of the punishment itself.<sup>6</sup>

"The United States has the highest rate of incarceration in the world.<sup>7</sup> While California has recently made some progress in reducing its incarceration rate, that progress cannot continue if additional enhancements and longer sentences are imposed for an ever-growing list of offenses."

**9) Related Legislation:**

- a) AB 27 (Melendez), adds specified sexual assault offenses to the list of violent felonies codified in the Penal Code. AB 27 has been referred to the Assembly Appropriations Committee.
- b) AB 67 (Rodriguez), adds human sex trafficking and specified sexual assault offenses to the list of violent felonies codified in the Penal Code. AB 67 has been referred to the Assembly Appropriations Committee.
- c) SB 75 (Bates) adds vehicular manslaughter, human trafficking involving a minor, assault with a deadly weapon, solicitation of murder, rape under various specified circumstances, and grand theft of a firearm as violent felonies for purposes of imposing specified sentence enhancements. The bill would also make conforming changes. SB 75 is set for hearing on March 21 in the Senate Public Safety Committee.
- d) SB 652 (Nielsen) defines as a "violent felony" the unlawful possession of a firearm by a person previously convicted of a felony enumerated as a violent felony. SB 652 has been referred to the Senate Public Safety Committee but has not been set for hearing.
- e) SB 770 (Glazier) adds 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 for purposes of the above specified sentence enhancements. SB 770 has been referred to the Senate Public Safety Committee but has not been set for hearing.

**10) Prior Legislation:**

- a) AB 2888 (Low), Chapter 863, Statutes of 2016, prohibits judges from granting probation when specified felony sexual assault offenses, contained in this bill, are committed.
- b) SB 1269 (Galgiani), of the 2015-2016 Legislative Session, would have included human trafficking in the list of violent felonies, for which Three Strike sentencing, sentencing

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<sup>5</sup> Valerie Wright, Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment (Sentencing Project 2010) *available at* <http://www.sentencingproject.org/doc/deterrence%20briefing%20.pdf>

<sup>6</sup> *Id.*

<sup>7</sup> Michelle Ye Hee Lee, Yes, U.S. Locks People Up at a Higher Rate than Any Other Country, Washington Post, July 7, 2015, *available at* [https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/?utm\\_term=.8b07c2ccf330](https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/?utm_term=.8b07c2ccf330)

credit limits, enhancements for prior violent felony prison terms and other consequences apply. SB 1269 failed passage in the Senate Public Safety Committee.

- c) AB 60 (Jeffries), of the 2011-2012 Legislative Session, would have added felony battery on specified peace officers to the list of strikes under California's three-strikes law. AB 60 failed passage in the Assembly Public Safety Committee.
- d) AB 1188 (Pan), of the 2011-2012 Legislative Session, would have added four new offenses relating to child abuse to the list of "violent" felonies, and added five new offenses related to human trafficking and the abuse of a child to the "serious" felony list. AB 1188 failed passage in the Assembly Public Safety Committee.
- e) AB 16 (Swanson), of the 2009-2010 Legislative Session, would have added human trafficking to the list of serious and violent felonies codified in the penal code. AB 16 failed passage in the Assembly Appropriations Committee.
- f) SB 440 (Denham), of the 2009-2010 Legislative Session, added the crimes of child abuse likely to produce great bodily injury or death, physical child abuse, killing, mutilating, or torturing a domestic animal, elder abuse for which the defendant was incarcerated in state prison, and escape or attempted escape by force or violence to the lists of "serious felonies" as well as to the list of "violent felonies," as specified; and added the crimes of human trafficking, stalking, solicitation to commit murder, fleeing or attempting to elude a pursuing peace officer, willful flight or attempting to elude a pursuing peace officer, and felon in possession of a firearm, to the list of "serious felonies," as specified. SB 440 failed passage in the Senate Public Safety Committee.
- g) AB 303 (Spitzer), of the 2007-2008 Legislative Session, would have specified that gross vehicular manslaughter while intoxicated is a "strike" under the "Three Strikes Law". AB 303 failed passage in the Assembly Appropriations Committee.
- h) AB 426 (Galgiani), of the 2007-2008 Legislative Session, would have added human trafficking to the list of serious and violent offenses as codified under the California Penal Code. AB 426 failed passage in the Senate Public Safety Committee.

## **REGISTERED SUPPORT / OPPOSITION:**

### **Support**

California Police Chiefs Association  
Los Angeles Professional Peace Officers Association  
Peace Officers Research Association of California

### **Opposition**

American Civil Liberties Union  
California Attorneys for Criminal Justice  
California Public Defenders Association  
Friends Committee on Legislation of California  
Root and Rebound Re-entry Advocates

**Analysis Prepared by:** Gabriel Caswell / PUB. S. /