
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: AB 1176 **Hearing Date:** May 10, 2016
Author: Cooper
Version: May 4, 2016
Urgency: No **Fiscal:** Yes
Consultant: JRD

Subject: *Theft: Firearms*

HISTORY

Source: Author

Prior Legislation: SB 452 (Galgiani) – died Senate Appropriations, 2015

Support: Law Center to Prevent Gun Violence; California Peace Officers' Association; Coalition Against Gun Violence, a Santa Barbara County Coalition; National Rifle Association; California State Sheriffs' Association

Opposition: American Civil Liberties Union of California; California Attorneys for Criminal Justice; California Public Defenders Association

Assembly Floor Vote: Not Relevant

PURPOSE

The purpose of this legislation is to: (1) clarify that theft of a firearm is grand theft and is punishable as a felony, as specified; (2) provide that every person who buys or receives a stolen firearm is guilty of an alternate felony/misdemeanor offense, as specified; and, (3) add the following misdemeanor theft of a firearm (Penal Code § 490.2) and receipt of stolen property to offenses for which a conviction results in a 10-year prohibition on possession of a firearm.

This bill would provide that it would become effective only upon approval of the voters, and would provide for the submission of this measure to the voters for approval at the next statewide general election.

Firearm Theft

Existing law provides that every person who feloniously steals, takes, carries, leads, or drives away the personal property of another is guilty of theft, as specified. (Penal Code § 484.)

Existing law defines “grand theft” as any theft where the money, labor, or real or personal property taken or when the property is taken from the person of another is of a value exceeding \$950. (Penal Code §§ 487(a) and (c).)

Existing law provides that grand theft is committed when the money, labor, or real or personal property taken is of a value in excess of \$950, except as specified. (Penal Code § 487(a).)

Existing law provides that, notwithstanding the default value of \$950 to establish grand theft, grand theft is committed in any of the following cases:

- When domestic fowls, avocados, or other farm crops are taken of a value exceeding \$250;
- When fish or other aqua-cultural products are taken from a commercial or research operation that is producing that product of a value exceeding \$250;
- Where money, labor or property is taken by a servant or employee from his or her principal and aggregates \$950 or more in any consecutive 12-month period;
- When the property is taken from the person of another;
- When the property taken is an automobile, firearm, horse, mare, gelding, bovine animal, caprine animal, mule, jack, jenny, sheep, lamb, hog, sow, boar, gilt, barrow, or pig;
- When the property is taken from the person of another; or
- When the property taken is an automobile and firearm.

(Penal Code § 487(b) through (d).)

Existing law states that if the grand theft involves the theft of a firearm, punishable by imprisonment in the state prison for 16 months, or two or three years. (Penal Code § 489(a).)

Existing law provides that grand theft is an alternate felony-misdemeanor, punishable by imprisonment in the county jail for up to one year, a fine of up to \$1,000, or both, or by a felony jail sentence of 16 months, two years or three years pursuant to Penal Code Section 1170, subdivision (h), and a fine of up to \$10,000. (Penal Code § 489(b).)

Existing law provides that, notwithstanding Section 487, or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars (\$950) shall be considered petty theft and shall be punished as a misdemeanor, except that such person may instead be punished pursuant to subdivision (h) of Section 1170 if that person has a prior conviction for a serious or violent felony or an offense requiring registration pursuant to 290, as specified. (Penal Code § 490.2(a).)

This bill would make the theft of a firearm grand theft in all cases, punishable by imprisonment in the state prison for 16 months, or 2 or 3 years.

Receipt of Stolen Firearm

Existing law provides that any person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision (h) of Section 1170. However, if the value of the property does not exceed nine hundred fifty dollars (\$950), the offense shall be a misdemeanor, punishable only by imprisonment in a county jail not exceeding one year, if such person has no prior convictions for

an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290. A principal in the actual theft of the property may be convicted pursuant to this section. However, no person may be convicted both pursuant to this section and of the theft of the same property. (Penal Code § 496 (a).)

This bill provides that every person who buys or receives a stolen firearm is guilty of an alternate felony/misdemeanor offense punishable by imprisonment in the county jail for a period of not more than one year, or by imprisonment in the county jail pursuant to realignment, as specified.

Firearms Prohibition

Existing law requires that firearms dealers obtain certain identifying information from firearms purchasers and forward that information, via electronic transfer to Department of Justice (DOJ) to perform a background check on the purchaser to determine whether he or she is prohibited from possessing a firearm. (Penal Code § 28160-28220.)

Existing law requires that, upon receipt of the purchaser's information, DOJ shall examine its records, as well as those records that it is authorized to request from the State Department of Mental Health pursuant to Section 8104 of the Welfare and Institutions Code, in order to determine if the purchaser is prohibited from purchasing a firearm. (Penal Code § 28220.)

Current federal law provides that certain people are prohibited from owning or possessing a firearm:

Any person who:

- Has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
- Is a fugitive from justice;
- Is an unlawful user of or addicted to any controlled substance, as defined;
- Has been adjudicated as a mental defective or who has been committed to a mental institution;
- Being an alien —
 - is illegally or unlawfully in the United States; or
 - except as specified, has been admitted to the United States under a nonimmigrant visa, as defined;
- Has been discharged from the Armed Forces under dishonorable conditions;
- Having been a citizen of the United States, has renounced his citizenship;
- Is subject to a court order that —
 - was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
 - restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
 - includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

- by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or
- Has been convicted in any court of a misdemeanor crime of domestic violence.

(18 USC § 922(g).)

Current California law provides that certain people are prohibited from owning or possessing a firearm, including:

Lifetime Ban

- Anyone convicted of a felony;
- Anyone addicted to a narcotic drug;
- Any juvenile convicted of a violent crime with a gun and tried in adult court;
- Any person convicted of a federal crime that would be a felony in California and sentenced to more than 30 days in prison, or a fine of more than \$1,000;
- Anyone convicted of certain violent misdemeanors, e.g., assault with a firearm; inflicting corporal injury on a spouse or significant other, or brandishing a firearm in the presence of a police officer.

(Penal Code §§ 29800, 23515 and 29805.)

Existing law provides that a violation of these provisions is a felony. (*Id.*)

Ten Year Ban

Anyone convicted of numerous misdemeanors involving violence or threats of violence. (Penal Code § 29805.)

Existing law provides that a violation of these provisions is a wobbler, as specified. (*Id.*)

Five Year Ban

Any person taken into custody, assessed, and admitted to a designated facility due to that person being found to be a danger to themselves or others as a result of a mental disorder, is prohibited from possessing a firearm during treatment and for five years from the date of their discharge. (Welfare and Institutions Code §§ 8100 and 8103(f).)

Existing law provides that a violation of these provisions is a wobbler, as specified. (*Id.*)

Temporary Bans

Persons who are bound by a temporary restraining order or injunction or a protective order issued under the Family Code or the Welfare and Institutions Code, may be prohibited from firearms ownership for the duration of that court order. (Penal Code § 29825.)

Existing law provides that the violation of these provisions is a wobbler or a misdemeanor, as specified. (*Id.*)

This bill would add the following misdemeanor offenses to those for which a conviction results in a 10-year prohibition on possession of a firearm: (1) theft of a firearm (Penal Code § 490.2) and (2) receipt of stolen property, if the property is a firearm (Penal Code § 496).

This bill provides that the provisions of this legislation that amend Proposition 47 (the firearm theft and receipt of a stolen firearm penalty provisions) shall become effective only when submitted to and approved by the voters at a statewide election. This legislation further provides that a special election is hereby called, to be held throughout the state on November 8, 2016. The special election shall be consolidated with the statewide general election to be held on that date. The consolidated election shall be held and conducted in all respects as if there were only one election, and only one form of ballot shall be used. This legislation additionally provides that the Secretary of State shall submit the specified portions of this legislation to the voters for their approval at the November 8, 2016, statewide general election.

This bill calls an election within the meaning of Article IV of the Constitution and states that it goes into effect immediately.

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. Proposition 47: Effect of this Legislation

Proposition 47, also known as the Safe Neighborhoods and Schools Act, was approved by the voters in November 2014. Proposition 47 reduced the penalties for certain drug and property crimes and directed that the resulting state savings be directed to mental health and substance abuse treatment, truancy and dropout prevention, and victims' services. The initiative reduced the penalties for theft, shoplifting, receiving stolen property, writing bad checks, and check forgery valued at \$950 or less from felonies to misdemeanors. The measure limited the reduced penalties to offenders who do not have prior convictions for serious or violent felonies and who are not required to registered sex offenders. (See Legislative Analyst's Office analysis of Proposition 47, <http://www.lao.ca.gov/ballot/2014/prop-47-110414.pdf>.)

Grand Theft of a Firearm

Proposition 47 added Penal Code section 490.2 which provides a new definition for grand theft: "*Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars (\$950) shall be considered petty theft and shall be punished as a misdemeanor*" (Pen. Code, § 490.2, subd. (a), emphasis added.) In other words, Proposition 47 put in a blanket \$950 threshold for conduct to be grand theft. Previously, there were a number of carve-outs which made conduct grand theft based on the conduct involved or the manner in which the crime is committed or based on the value being less than \$950.

Because the new statute specifically states "notwithstanding Section 487," it supersedes all of Penal Code section 487, including subdivision (d)(2), which says that grand theft occurs when the property taken is a firearm. The question becomes whether, notwithstanding newly-created Penal Code section 490.2, theft of a firearm remains a felony.

The drafters of Proposition 47 state that they did not intend to reduce the penalty for theft of a firearm and explain:

Proposition 47 maintained California's numerous gun laws—the strictest in the country—enabling felony prosecution for any and all criminal activity related to guns. This includes gun thefts regardless of the value of the gun. Gun crimes are, by definition, serious crimes. Proposition 47 is exclusively limited to non-serious and nonviolent crimes. Additionally, dozens of felony provisions related to gun crimes are maintained by Proposition 47, including (but not limited to): possession of a concealed stolen gun or possession of a loaded stolen gun; use of a firearm to facilitate any crime (including when the gun involved is being stolen and theft is crime in question); stealing guns from residences, stores during non-business hours, or locked automobiles; taking a firearm from the person of another with force or fear; or possession of a concealed stolen weapon by a gang member or possession of a gun by a felon.

(<http://www.safeandjust.org/prop47faq>.)

A recent appellate court decision concluded otherwise in dicta. (*People v. Perkins* (2016) 244 Cal.App.4th 129.) In *People v. Perkins*, *supra*, the defendant was convicted of burglary, receiving stolen property, three counts of grand theft of a firearm, and several other offenses. He was sentenced to state prison. After California voters passed Proposition 47, the defendant filed a petition for resentencing to convert some of his offenses to misdemeanors. (*Id.* at p. 132-133.) The petition was denied and he appealed. The Court of Appeal did not squarely address the issue of whether Proposition 47 reduced the theft of a firearm to a misdemeanor when its value is less than \$950. Rather, what was at issue in the case was the adequacy of the petition. The defendant actually had petitioned only for resentencing on the receiving stolen property count because the form provided by the superior court excluded the option of petitioning for resentencing grand theft offenses. (*Id.* at p. 136.) In affirming denial of the petition without prejudice, the court noted, “Proposition 47 added a new provision, section 490.2, subdivision (a), which reclassifies felony section 487, subdivision (d)(2) grand theft violations into misdemeanors. Thus, petitioner would be entitled to resentencing on each conviction, provided he can meet his burden of showing, separately for each firearm, that its value does not exceed \$950.” (*Id.* at p. 141.)

Whether Proposition 47 made theft of a firearm a misdemeanor is clearly subject to interpretation and debate. Given that the proponents contend that Proposition 47 did not change the penalties for gun theft, clarifying the intent of the proponents by stating that theft of a firearm remains a felony is seemingly innocuous.

SHOULD THE LAW BE CLARIFIED TO EXPLICITLY STATE THAT THEFT OF A FIREARM IS A FELONY?

Receipt of Stolen Property: Firearm

Proposition 47 amended Penal Section 496 to state: “Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision (h) of Section 1170. However, ~~if the district attorney or the grand jury determines that this action would be in the interests of justice, the district attorney or the grand jury, as the case may be, may, if the value of the property does not exceed nine hundred fifty dollars (\$950), specify in the accusatory pleading that the offense shall be a misdemeanor, punishable only by imprisonment in a~~

county jail not exceeding one year, *if such person has no prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290.*” Unlike theft of a firearm, pre-Proposition 47 receipt of a stolen firearm was not a felony (it was a wobbler) and, thus, was not a serious felony. (*See* Penal Code § 1192.7.)

The court explains how Proposition 47 changed the receipt of stolen property provision in the Penal Code,

Receiving Stolen Property [punishment: up to one year in jail]. If the value of the property received does not exceed \$950, section 496(a) specifies the crime is a misdemeanor. Previously section 496(a) gave the district attorney the discretion to charge the crime as a misdemeanor if the property did not exceed \$950; now the district attorney must charge the crime as a misdemeanor if the value of the property does not exceed \$950.

(<http://www.courts.ca.gov/documents/Prop-47-Information.pdf>)

This legislation would add a provision to the Penal Code making receipt of a stolen firearm a wobbler.

SHOULD RECEIPT OF A STOLEN FIREARM BE A WOBBLER?

3. Firearms Prohibitions for Misdemeanor Offenses

As detailed above, current state and federal laws prohibit persons who have been convicted of specific crimes from owning or possessing firearms. For example, anyone convicted of any felony offense is prohibited for life from firearms ownership under both federal and state law. (18 U.S.C. § 922(g); Penal Code § 29800.) California goes further and imposes a 10-year firearms prohibition on persons convicted of numerous misdemeanor offenses that involve either violence or the threat of violence. (Penal Code § 29805.) Additionally, anyone who has been found to be a danger to themselves or others due to mental illness is subject to a five-year prohibition (Welfare and Institutions Code §§ 8100, 8103(f)), and people under domestic violence restraining orders are subject to a prohibition for the duration of that court order. (Penal Code § 29825.)

According to a study published in the Journal of American Medical Association:

Handgun purchasers with only 1 prior misdemeanor conviction and no convictions for offenses involving firearms or violence were nearly 5 times as likely as those with no prior criminal history to be charged with new offenses involving firearms or violence.

(Wintemute GJ. *Prior Misdemeanor Convictions as a Risk Factor for Later Violent and Firearm Related Criminal Activity Among Authorized Purchasers of Handguns*. Journal of the American Medical Association 1998; 280: 2083-2087.)

To this end, this bill would expand the number of misdemeanor convictions resulting in a 10-year prohibition by adding theft of a firearm and receipt of a stolen firearm.

4. California Constitutional Limitations on Amending a Voter Initiative

Because Proposition 47 was a voter initiative, the Legislature may not amend the statute without subsequent voter approval unless the initiative permits such amendment, and then only upon whatever conditions the voters attached to the Legislature's amendatory powers. (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 568; see also Cal. Const., art. II, § 10, subd. (c).) The California Constitution states, "The Legislature may amend or repeal referendum statutes. It may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval." (Cal. Const., art. II, § 10, subd. (c).) Therefore, unless the initiative expressly authorizes the Legislature to amend, only the voters may alter statutes created by initiative.

As to the Legislature's authority to amend the initiative, Proposition 47 states: "This act shall be broadly construed to accomplish its purposes. The provisions of this measure may be amended by a two-thirds vote of the members of each house of the Legislature and signed by the Governor so long as the amendments are consistent with and further the intent of this act. The Legislature may by majority vote amend, add, or repeal provisions to further reduce the penalties for any of the offenses addressed by this act." (<http://vig.cdn.sos.ca.gov/2014/general/pdf/text-of-proposed-laws1.pdf#prop47>.)

This bill provides that the Proposition 47 provisions go to the voters for ratification.

– END –