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# SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

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**Bill No:** AB 2888                      **Hearing Date:** June 28, 2016  
**Author:** Low, Dodd  
**Version:** June 21, 2016  
**Urgency:** No                                      **Fiscal:** Yes  
**Consultant:** AA

**Subject:** *Sex Crimes: Mandatory Prison Sentence*

## HISTORY

**Source:** Santa Clara County District Attorney

**Prior Legislation:** None

**Support:** Crime Victims United of California

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

**Assembly Floor Vote:** Not Applicable

## PURPOSE

*The purpose of this bill is to prohibit probation in certain felony sex crimes.*

*Current law* provides that probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any person who is convicted of violating the following crimes:

- Forcible sexual intercourse (Penal Code § 261(a)(2) or (6));
- In concert sexual assault (Penal Code § 264.1);
- Pimping and pandering (Penal Code §§ 266h and 266i);
- Procuring or obtaining a minor under the age of 16 for lewd and lascivious act (Penal Code § 266j)
- Aggravated sexual assault of a child under 14 (Penal Code § 269)
- Forcible or in concert sodomy( Penal Code § 286(c)(2), (3) or (d));
- Forcible or in concert oral copulation (Penal Code § 288a(c)(2),(3) or (d));
- Sexual intercourse or sodomy of a child 10 or younger (Penal Code § 288.7);
- Forcible foreign object sexual penetration (Penal Code § 289(a)); or
- Making child pornography (Penal Code § 311.4 (b)).

(Penal Code § 1203.065(a).)

*Current law* provides that “(e)xcept in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any person who is convicted of” the following crimes:

- Rape by threat of use of public official authority (Penal Code § 261 (a)(7));
- Sodomy by threat of use of public official authority (Penal Code § 286(k));
- Oral copulation by threat of use of public official authority (Penal Code § 28a(k));  
subdivision Foreign object sexual penetration by threat of use of public official authority (Penal Code § 289(g)); or
- Assault with intent to commit a specified sexual offender (Penal Code § 220).

(Penal Code § 1203.056(b)(1).)

*Current law* provides that when probation is granted under this subdivision, “the court shall specify on the record and shall enter on the minutes the circumstances indicating that the interests of justice would best be served by the disposition.” (Penal Code § 1203.065(b)(2).

*This bill* would provide that the following additional crimes would be ineligible for probation under subdivision (a) of Penal Code section 1203.065, cited above:

- Forcible sexual intercourse where the victim is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused (Penal Code § 261(a)(3));
- Forcible sexual intercourse where the victim is at the time unconscious of the nature of the act, and this is known to the accused (Penal Code § 261(a)(3));
- Sodomy where the victim is at the time unconscious of the nature of the act and this is known to the person committing the act (Penal Code § 286(f));
- Sodomy where the victim is prevented from resisting by an intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused (Penal Code § 286(i));
- Oral copulation where the victim is at the time unconscious of the nature of the act and this is known to the person committing the act (Penal Code § 288a(f));
- Oral copulation where the victim is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused (Penal Code § 288a(i));
- Foreign object sexual penetration when the victim is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused (Penal Code § 289(e)); or
- Foreign object sexual penetration when the victim submits under the belief that the person committing the act or causing the act to be committed is someone known to the victim other than the accused, and this belief is induced by any artifice, pretense, or concealment practiced by the accused (Penal Code § 289(f).)

*This bill* would make additional technical revisions to this section, as specified.

#### 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. Stated Need for This Bill

The author states:

In March 2015, a Stanford University student was convicted on 3 felony counts of sexual assault of an intoxicated and unconscious woman. Despite the fact that the defendant was eligible for a sentence of up to 14 years in prison, the trial judge

sentenced the defendant to 6 months in jail and 3 years' probation. The sentence has been justifiably criticized by many as unethically lenient, given the horrific nature of the crime. However, while the judge's decision has been viewed as morally wrong and inappropriate, such a decision was within the judge's legal discretion, and therefore complied with the rules of court.

Each year, nearly 300,000 people are sexually assaulted in the United States. Unfortunately, many of these assaults involve individuals who are under the influence of alcohol or other substances. Women in college are 3 times more likely to experience sexual violence than women not enrolled, and at least 50% of sexual assaults involve alcohol intoxication. Studies have shown more than 55% of those assaulted consumed alcohol at the time of the assault, and more than 75% of those perpetrating the assault also consumed alcohol.

The majority of felony sexual assault crimes fall into two sentencing categories: "Presumptive Ineligibility of Probation" [PIP] or "Mandatory Denial of Probation" [MDP]. If a crime triggers a PIP situation, the court may grant probation if it finds and notes on the record an unusual circumstance, out of those listed under Judicial Rule 4.413.

However, not all forms of sexual assault involving penetration are included in the list of offenses that would trigger a mandatory denial of probation. Current law clarifies that a defendant's use of force triggers a mandatory prison sentence. However, when a victim is unconscious or severely intoxicated, the victim is unable to resist, and the perpetrator does not have to use force. This distinction between assault accomplished through force or predatory behavior provides courts the discretion to sentence perpetrators of sexual assault against intoxicated and unconscious victims to probation, which may include little or no jail time.

Under this interpretation of the law, a perpetrator at a college party who chooses to forcibly rape a conscious victim will go to prison. However, a different perpetrator at the same party who chooses to watch and wait for a victim to pass out from intoxication before sexually assaulting her may get probation. Whether penetration is accomplished through physical aggression [force] or predatory behavior is a distinction without a difference. Both perpetrators seek prey that are vulnerable; disadvantaged by his/her capacity to resist. Both perpetrators represent a danger to the community. Additionally, the aftermath suffered by an unconscious victim or a victim incapable of giving consent due to intoxication is not ameliorated by the absence of memory. Indeed, the fear and terror that accompanies the absence of memory of a known sexual assault should not be viewed as less serious than the fear and terror that a victim experiences during a recalled forcible sexual assault.

AB 2888 would amend Penal Code § 1203.065 to include to the list of offenses that are ineligible for probation, all sexual assaults felonies perpetrated against intoxicated and unconscious victims.

## 2. Recent Gut and Amend

Until June 16<sup>th</sup> and as passed out of the Assembly, this bill pertained to the Department of Food and Agriculture, concerning the expenditure of \$100,000 “for any exhibit or exhibits located on any state-supported fair demonstrating, in a creative and innovative manner, the process of production and use of food and fiber from the producer to the consumer in this state,” and the annual provision of a “conference of fair judges” to help the department with regulations, as specified.

On June 16<sup>th</sup>, the bill was amended to the general subject matter of the bill now before the Committee.

The bill before the Committee was amended on June 21<sup>st</sup>.

## 3. What This Bill Would Do; Policy Considerations

As explained in detail above, this bill would prohibit probation for certain sex offenses. Under current law, the crimes affected by this bill are prison felonies. Current law generally authorizes judges to suspend imposition of a felony sentence and impose terms and conditions of probation. If any of those terms or conditions is violated, probation is revoked and the defendant is committed to prison. There are several crimes, particularly sex crimes, for which probation is prohibited, or for which probation is granted only if the court makes certain findings. These provisions are not set forth in one section, although one of them is the section this bill would amend.

Members and the authors may wish to discuss whether prohibiting probation as a matter of law in crimes targeted by this bill – where, for example, a victim may not have witnessed the crime because they were unconscious – could make it more difficult for prosecutors to obtain convictions in cases that might be difficult to prevail in at trial. In other words, members may wish to consider whether a statutory prohibition could result in justice *not* being done in some cases – for example, charges having to be dropped in order to be able to reach a plea, or a defendant being acquitted at trial.

WOULD THIS BILL LIMIT THE ABILITY OF PROSECUTORS TO NEGOTIATE PLEAS IN DIFFICULT CASES?

WOULD THIS BILL RESULT IN PLEAS THAT DO NOT FULLY REFLECT WHAT HAPPENED TO A VICTIM?

WOULD THIS BILL PROMOTE THE INTERESTS OF JUSTICE?

Members also may wish to discuss whether there would be no conceivable set of facts and circumstances where in a felony conviction for the crimes targeted by this bill the suspension of the execution of judgment and the imposition of terms and conditions of probation could be appropriate.

IS THERE NO CONCEIVABLE SET OF FACTS AND CIRCUMSTANCES WHERE JUDICIAL DISCRETION IN THESE CASES WOULD BE APPROPRIATE?

As noted above, current law provides what is essentially a presumption against the granting of probation in certain cases unless the court makes certain findings. That mechanism is in subdivision (b) of the section this bill would amend. Members may wish to consider whether this approach, notwithstanding the application of this subdivision in any particular case, would better address the broader concerns of policymakers without risking the inadvertent consequences described above.

SHOULD THIS BILL BE AMENDED TO PROVIDE THAT THESE CRIMES CAN ONLY BE GRANTED PROBATION IN “UNUSUAL CASES WHERE THE INTERESTS OF JUSTICE WOULD BE BEST SERVED IF THE PERSON IS GRANTED PROBATION”?

#### **4. Drafting Error?**

As noted by the author, in the Stanford swimmer case the defendant was convicted of three felonies: assault with intent to commit a felony, foreign object rape (victim intoxicated) and foreign object rape (victim unconscious).

This bill adds several crimes to the list of offenses for which probation is prohibited. It does not add the crime of foreign object rape where the victim is unconscious (Penal Code § 289(d).) It is assumed that this is a drafting error the authors would intend to correct in Committee.

#### **5. Support**

The Crime Victims United of California supports this bill, stating in part:

CVUC was dismayed earlier this year when a Stanford University student was convicted on three felony counts of sexual assault of an intoxicated and unconscious woman, but only sentenced to six months in jail and probation for three years. This deplorable act was eligible – and deserving – of a sentence of up to 14 years in prison; however, the trial judge ultimately imposed the less onerous sentence.

While the sentence was indeed within the legal discretion of the judge, CVUC strongly believes it was an unethical blow to justice for the victim. In California each year we stand in support of victims of sexual assault and vow to eliminate such activity through occasions like Denim Day. If we intend to hold true, we must hold these offenders accountable with sentences that match the severity of the crime and help bring a sense of true justice to victims.

#### **6. Opposition**

The American Civil Liberties Union opposes this bill, stating in part:

AB 2888 appears to be a hastily-drafted response to the Stanford rape case. Public outrage over the sentence imposed in a single case should not result in the Legislature rushing to reduce courts’ discretion across the board. The impact of limiting judicial discretion in this fashion will fall primarily on minorities and the

economically disadvantaged, who are much more likely to be charged with crimes than the type of defendant involved in the Stanford case.

**-- END --**