
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: SB 1080 **Hearing Date:** April 19, 2016
Author: Morrell
Version: February 17, 2016
Urgency: No **Fiscal:** Yes
Consultant: JM

Subject: *Memorials*

HISTORY

Source: American G.I. Forum

Prior Legislation: None

Support: American Legion – Department of California; AMVETS – Department of California; California Association of County Veterans Service Officers; California State Commanders Veterans Council; Los Angeles County Professional Peace Officers Association; Military Officers Association of America, California Council of Chapters; VFW – Department of California; Vietnam Veterans of America – California State Council

Opposition: American Civil Liberties Union

PURPOSE

The purpose of this bill is to define an alternate felony-misdemeanor committed where a person does any of the following: 1) receives, retains or disposes of a stolen grave marker or memorial structure of a military veteran, peace officer, firefighter or first responder; 2) damages, defaces destroys, mutilates or removes an American flag, veteran's commemorative flag holder, veteran's grave marker or metal plaque, or commemorative flag holder representing service in the police and fire department, from the grave of a veteran, peace officer, firefighter, or other first responder; or 3) damages, defaces destroys, mutilates or removes any object or structure memorializing a veteran, peace officer, firefighter or other first responder.

Existing law includes numerous vandalism and vandalism-related crimes committed where a person defaces with graffiti, damages or destroys and personal or real property. (Pen. Code § 594 et seq.) Generally, vandalism that causes less than \$400 in damage is a misdemeanor, punishable by a jail term of up to one year, \$1,000, or both. Vandalism that causes at least \$400 in damage is an alternate felony-misdemeanor, punishable by a misdemeanor jail term of up to one year, or by an executed sentence of 16 months, two years or three years pursuant to Penal Code Section 1170, subdivision (h). The fine for either a misdemeanor or felony conviction

under the wobbler provision is a fine of up to \$10,000, except that where the damage exceeds \$10,000, the maximum fine is \$50,000. (Pen. Code § 594 (a)-(b)(1)-(2).)

Existing law provides that where the vandalism damage is less than \$400, but the defendant has a prior conviction for vandalism or a specified vandalism-related offense, the crime is a misdemeanor, with a maximum jail term of one year, a fine of up to \$5,000, or both. (Pen. Code § 594 (a)-(b)(1).)

Existing law provides that any person who maliciously destroys any property in a mortuary or cemetery shall be punished by imprisonment in the state prison for 16 months, 2 or 3 years, or by imprisonment in the county jail for up to one year. (Health and Saf. Code 8101.)

Existing law provides that it is an alternate felony-misdemeanor, punishable by a misdemeanor jail term of up to one year, a fine of up to \$1,000, or both, or by an executed felony 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 where a person does any of the following at, or in relation to, a cemetery, mortuary or its operation:

- Destroys, cuts, mutilates, effaces, injures, tears down, or removes any tomb, monument, memorial, or marker in a cemetery, or any gate, door, fence, wall, post or railing, or any enclosure that protects cemetery or mortuary property.
- Obliterates any grave, vault, niche, or crypt.
- Destroys, cuts, breaks or injures any mortuary building or any building, statuary, or ornamentation within the limits of a cemetery.
- Disturbs, obstructs, detains or interferes with a person carrying or accompanying human remains to a cemetery or funeral establishment, or engaged in a service or interment. (Pen. Code § 594.35.)

Existing law provides that it is an alternate felony-misdemeanor to knowingly receive stolen property exceeding \$950 in value, and a misdemeanor in other circumstances. A felony conviction for receiving stolen property is punished pursuant to Penal Code Section 1170, subdivision (h). (Pen. Code § 496.)

This bill describes an alternate felony-misdemeanor, punishable by imprisonment in a county jail for up to one year, a fine of up to \$5,000, or both, or by an executed felony sentence pursuant to Penal Code § 1170, subdivision (h), for 16 months, two years or three years and a fine of up to \$10,000, that is committed where a person any of does the following:

- Receives, retains or disposes of a grave marker or memorial structure at the grave of a veteran, peace officers, firefighter or first responder, as specified, that the person knows or should know has been stolen. The crime does not apply if the person received the marker or memorial for the purpose of returning the item to a cemetery, law enforcement, the Department of Veterans Affairs, a veterans' service organization, a town or court veteran's agent, or to someone who performs a similar function.

- Damages, defaces, destroys, mutilates or removes an American flag, veteran's grave marker, metal plaque, veteran's commemorative flag holder or commemorative flag holder representing service in both the police and fire department.
- Damages, defaces, destroys, mutilates or removes any object or structure memorializing a veteran, peace officer, firefighter or other first responder.

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.

COMMENT

1. Need for This Bill

According to the author:

Veteran, peace officer, firefighter, or other first responders risk their lives in order to protect their communities, California and the nation. Vandalism to their memorials or grave markers impacts the community because of the high regard that they are held in. An example, is when the Mexican-American Soldier Memorial in Sacramento was vandalized last summer. The community was devastated because of what the memorial meant to the community. The statue was commissioned by a group of Mexican-American mothers whose sons died during World War II. Law enforcement needs to have a way to not only to penalize the vandals but also to track the amount of vandalism to these specific memorials and grave markers. By creating a separate code section, SB 1080 will allow law enforcement to track any patterns of vandalism against Veteran, peace officer, firefighter, or other first responders' memorials or grave markers, which mean so much to the community.

2. Substantial Overlap with Existing Law

Existing law includes alternate felony-misdemeanor penalties for vandalism generally and for vandalism and related acts at a cemetery or mortuary facility. Existing law also includes the crime of receiving stolen property. This bill substantially overlaps with those crimes, although the existing cemetery vandalism statute is broader in some regards than this bill would be. It appears that virtually all of the acts covered by this bill could be prosecuted under existing law.

3. Malice Element is not Included in the new Vandalism Crimes; and There is No Element of Criminal Intent or Knowledge in any of the New Crimes

Existing vandalism and cemetery desecration laws include an element that the defendant acted "maliciously" in causing damage or a related harm. Malice means a "wish to vex, annoy, or injure another person, or an intent to do a wrongful act." (Pen. Code §7.) The jury instruction on vandalism (CALCRIM 2900) defines malice as follows: "Someone acts maliciously when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to annoy or injure someone else." Malice does not require the intent to cause a specific harm or result. The vandalism and related offenses in this crime do not include a malice element.

None of the crimes defined by the bill include an element of wrongful intent or guilty knowledge. A crime is essentially a combination of a wrongful act and a culpable state of mind, generally the intent to do wrong or criminal knowledge "scienter." *People v. McCoy* (2001) 24 Cal.4th 1111, 1117.) The only scienter requirement in the new form of receiving stolen veterans' memorials, markers or structures is that the defendant knew or should have known that the item was stolen. There is no element that the receiver of the property would should have known that the property commemorated a veteran, peace officer, firefighter or first responder?

The lack of a malice element and the lack of a requirement that the defendant acted with wrongful intent or guilty knowledge would essentially make the vandalism crimes defined by this bill strict liability offenses. Negligent or accidental damage would be covered by the bill. The lack of a requirement that a defendant received stolen property related to a veteran's memorial or gravesite adds a measure of strict liability to this new offense. Strict liability crimes concern matters of widespread harm or danger to public health and welfare, not individual fault and harm. (*People v. Chevron Chemical* (1983) 143 Cal.App.3d 50, 53-54.) They carry relatively "light penalties and no moral obloquy or damage to reputation." (*People v. Vogel* (1956) 46 Cal.2d 798, 801, fn. 2; see *Morissette v. United States* (1952) 342 U.S. 246, 26.) Imposing substantial penalties and assigning serious culpability through strict liability principles is disfavored and contrary to prevailing trends in the law. (*In re Jennings* (2004) 34 Cal.4th 254, 267.)

4. Tracking Vandalism and Receiving Stolen Property Related to Veterans' Memorials and Gravesites.

The author's statement indicates that one of the purposes of this bill is to track the extent of vandalism of memorials and related structures or items honoring veterans and public safety personnel. Law enforcement agencies report crimes by arrest. It is not known if law enforcement would actually arrest defendants under these new crimes, rather than under existing law. The fact that vandalized or stolen property had any connection to a veteran or public safety officer might not be known until well after arrest. Further, it is unclear whether convictions data for these offenses will be collected and organized. It appears that there is no systematic collection of conviction data in California.

It is thus unclear whether these new crimes will be accurately reported and tracked. Limited reporting would undercount the incidence of these offenses, frustrating the author's intent.

5. Drafting and other Technical Issues

Subdivision (b) of the new crime statute defined by this bill - Penal Code Section 594.38 - describes new or separate forms of vandalism of the gravesite of a veteran, peace officer, firefighter and "other first responder." The provision is unclear and confusing to read. It is not entirely clear which forms of vandalism apply to the gravesites of the specified decedents. However, it does appear that the vandalism of a commemorative flag holder at the grave of a peace officer, firefighter or first responder would have to occur at the gravesite of a person who served in both the police and fire departments, not either the police department or the fire department. This provision specifically refers to a "police" department, so it would apparently exclude someone who served in a sheriff's department/

This new vandalism crime refers to items at the gravesite of a first responder. The term "first responder" is not defined, perhaps leading to a constitutional vagueness challenge. Without

6. Possible Free Speech Claims

Any law that concerns the destruction of or damage to a flag or military symbol will likely bring to mind cases concerning free speech and flag burning or other activities. A claim that destruction of damage to a flag, memorial or symbol is protected by the First Amendment when offered as a defense to the crime defined by this bill would almost certainly be unavailing. The United States Supreme Court, in a landmark decision upholding a criminal law prohibiting destruction or damage to a draft card held:

We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that, when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. (*United State v. O'Brien* (1968) 391 U.S. 367, 375.)

The United States Supreme Court has clearly held that burning of an American flag as an act of political protest is expressive conduct protected by the First Amendment. (*United States v. Eichman* (1990) 496 U.S. 310.) Protection for expressive conduct does not extend to a defendant's taking or damaging of a flag or other emblem that is the property of another, regardless of whether the flag was displayed as a symbol of some government action that the defendant was protesting. In *Texas v. Johnson* (1989) 491 U.S. 397, a case in which the court reversed a Texas flag burning conviction the court stated: "There was no evidence that Johnson himself stole the flag he burned... nor did the prosecution or the arguments urged in support of it depend on the theory that the flag was stolen. [O]ur analysis does not rely on the way in which the flag was acquired, and nothing in our opinion should be taken to suggest that one is free to steal a flag so long as one later uses it to communicate an idea. We also emphasize that Johnson was prosecuted *only* for flag desecration -- not for trespass, disorderly conduct, or arson. (*Id.*, at p. 412, fn8.)

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