
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: SB 1269 **Hearing Date:** April 19, 2016
Author: Galgiani
Version: March 28, 2016
Urgency: No **Fiscal:** Yes
Consultant: JM

Subject: *Violent Felonies*

HISTORY

Source: Author

Prior Legislation: Proposition 35 – passed by the voters in November 2012
AB 22 (Lieber) – Ch. 240, Stats. 2005

Support: California District Attorneys Association

Opposition: None known

PURPOSE

The purpose of this bill is to include human trafficking in the list of violent felonies, for which Three Strike sentencing, sentencing credit limits, enhancements for prior violent felony prison terms and other consequences apply.

Existing law provides that any person who deprives or violates the personal liberty of another with the intent to obtain forced labor or services, is guilty of human trafficking and shall be punished by imprisonment in the state prison for 5, 8, or 12 years and a fine of not more than five hundred thousand dollars (\$500,000). (Penal Code Section 236.1(a).)

Existing law states that any person who deprives or violates the personal liberty of another with the intent to affect or maintain a violation of specified sex crimes is guilty of human trafficking and shall be punished by imprisonment in the state prison for 8, 14, or 20 years and a fine of not more than five hundred thousand dollars (\$500,000). (Penal Code § 236.1(b).)

Existing law states that any person who causes, induces, or persuades, or attempts to cause, induce, or persuade, a person who is a minor at the time of commission of the offense to engage in a commercial sex act, with the intent to affect or maintain a violation of specified sex crimes is guilty of human trafficking. A violation of this subdivision is punishable by imprisonment in the state prison for 5, 8, or 12 years and a fine of not more than five hundred thousand dollars (\$500,000) or fifteen years to life and a fine of not more than five hundred thousand dollars (\$500,000) when the offense involves force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person. (Penal Code Section 236.1(c).)

Existing law provides that in determining whether a minor was caused, induced, or persuaded to engage in a commercial sex act, the totality of the circumstances, including the age of the victim, his or her relationship to the trafficker or agents of the trafficker, and any handicap or disability of the victim, shall be considered. (Penal Code § 236.1(d).)

Existing law includes a list of “violent felonies” that are qualifying convictions under the Three Strikes law, limit sentencing credits to 15% of the total term, and authorize a three-year sentence enhancement for each prior prison term for a violent felony and have a myriad of other consequences. (Pen. Code § 667.5, subd. (c).) Violent felonies include:

- Murder, attempted murder or voluntary manslaughter;
- Mayhem, as specified;
- Rape;
- Sodomy by force, violence, duress, menace, or fear of bodily injury;
- Oral copulation or sexual penetration by force, violence, duress, menace or fear of bodily injury;
- Lewd act with child under fourteen years of age and continuous sexual abuse of a child;
- Any felony punishable by death or life imprisonment;
- Any felony in which defendant inflicts great bodily injury or personally uses a firearm;
- Assault with intent to commit a sex crime, robbery or mayhem;
- Arson of an inhabited structure;
- Explosion causing great bodily injury or mayhem;
- Explosion with intent to murder;
- Crimes involving weapons of mass destruction;
- Burglary if another person other than an accomplice is present;
- Robbery, bank robbery or carjacking;
- Kidnapping;
- Any felony where defendant personally uses a firearm;
- Sale or furnishing heroin, cocaine, PCP, or methamphetamine to a minor;
- Any violation of 10-20-life firearm use and discharge enhancement law; and
- Any gang-related felony that involves extortion or witness intimidation.

This bill additionally would define human trafficking as a violent felony in this section.

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.

This bill defines any conviction for human trafficking – a category of separate crimes that each include an element of deprivation of the victim’s liberty for the benefit of the perpetrator – as a violent felony, as defined by Penal Code Section 667.5, subdivision (b), a designation that subjects a convicted defendant to Three Strikes sentencing, sentencing credit limitations and other consequences, unless a greater punishment is applicable under another provision of law.

COMMENTS

1. Need for This Bill

Human trafficking is the world’s fastest growing criminal enterprise and is estimated to be a \$32 billion-per-year industry. California is considered one of the top four destinations in the United States for human trafficking and contains three of the FBI’s thirteen highest child sex trafficking areas in the nation.

The problem of human trafficking is growing in the state. Human trafficking victims are subjected to a multitude of heinous circumstances from working in sweatshops to being pushed into the sex trade. Trafficking victims have few economic or legal options and they are often controlled by violence, threats of violence, threats of being left destitute or of immigration consequences. Prosecutors need the authority to bring harsher charges against people who participate at any stage of trafficking schemes, including financing the operation, arranging the transportation of victims and recruiting the victims.

The inclusion of human trafficking under the definitions of serious and violent felonies will ensure that perpetrators are prosecuted according to the seriousness of their crimes, providing victims with a greater sense of justice that their victimization is taken seriously and prosecuted to the fullest extent of the law.

2. Human Trafficking is a Comprehensive Class of Crimes Involving Deprivation of Liberty, with a Comprehensive Penalty Structure, Including Determinate and Life Sentences, Various Enhancements, Fines up to \$1 Million and Asset Forfeiture

While the offenses that constitute human trafficking were crimes prior to enactment of the human trafficking statute in 2005, the statute organized these offenses into a single structure. Human trafficking is a largely a special punishment structure for a number of crimes with a common core element – the deprivation of the victim’s liberty in order to obtain labor and commercial sex services for the benefit of the perpetrator. A number of the crimes included in the human trafficking are violent or serious felonies when prosecuted separately, including kidnapping and sex crimes. California criminal law includes numerous special sentencing schemes that apply where a defendant is convicted of a specified crime or the crime involved specified aggravating. Examples of special sentencing schemes include the Three Strikes law, One Strike sex crime law and gang-related life terms.

The drafters of the initiative that greatly expanded and increased penalties for human trafficking could have defined any or all human trafficking offenses as serious and violent felonies. Arguably, the drafters determined that the self-contained and severe penalties in the human trafficking statutes accurately reflected the culpability of a defendant convicted under that law. Committee staff is not aware of any arguments that defendants who have actually been convicted under the human trafficking laws have not been subject to adequate punishment.

Human trafficking to obtain labor from the victim draws a sentence of 5, 8 or 12 years. Human trafficking that involves a minor in any form of sex trafficking or child pornography faces a sentence of 15 years to life where the crime involved any kind of force, fear or deceit. Other forms of sex trafficking of minors is punished by a term of 5, 8 or 12 years, although it is very unlikely that human trafficking of a minor for sexual purposes would ever not involve at least some form deceit or coercion. Perhaps the determinate term sentences would be used in plea bargaining where the prosecution is unsure of its case or the defendant has no prior criminal history. Human traffickers who cause great bodily injury receive an enhancement of 10 years. Each prior trafficking conviction is punished by five-year enhancement, the same penalty that applies in repeated serious felony convictions. If this bill is enacted, it is likely that the three-year enhancement imposed under the violent felony statute (Pen. Code §667.5 (a) and (c)) would not be imposed, as a defendant generally can only be punished once for the same conduct. The greater penalty in the human trafficking law would likely be imposed, not the violent felony enhancement.

DOES THE HUMAN TRAFFICKING LAW INCLUDE A COMPREHENSIVE PENALTY STRUCTURE, SUCH THAT ADDITIONAL SANCTIONS IMPOSED FOR VIOLENT FELONIES ARE NOT NECESSARY OR WOULD BE BARRED BY PROHIBITIONS ON MULTIPLE PUNISHMENTS FOR THE SAME CRIMINAL ACT?

3. Special Sentencing Schemes other than Human Trafficking that Create Complex Sentencing Issues for Courts and Practitioners

The basic California Determinate Sentencing Law (DSL) involves the imposition of a lower, middle or upper term, depending on whether the crime is average, mitigated or aggravated in comparison with other cases involving the same crime. Soon after the DSL was enacted, judges complained of the extraordinary complexity of the law. One appellate justice wrote: “[I]n some ways [the DSL] resembles the best offerings of those who author bureaucratic memoranda, income tax forms, insurance policies or instructions for the assembly of packaged toys.” (*Community Release Bd. v. Superior Court* (1979) 91 Cal.App.3d 814, 815, fn. 1.) Sentencing complexity has increased exponentially since that time.

Many defendants are subject to sentencing under special sentencing schemes that were enacted after and apart from the DSL, although aspects of the DSL are sometimes used to calculate a special punishment. The most prominent special sentencing schemes are the Three Strikes law, the One Strike sex crime law and the gang penalties. Often, special sentencing schemes overlap with sentence enhancements, for which the sentencing court must follow specified and extremely complex rules. For example, a defendant who has previously been convicted of two or more serious or violent felonies (all violent felonies are serious) who is convicted of a serious felony in the current case must be sentenced to a term of at least 25-years-to-life under the terms of the Three Strikes law. The court must also impose a five-year enhancement for each prior serious felony. The court has no discretion to not impose the five-year enhancements, although the court can dismiss a prior serious felony for purposes of avoiding the full consequences of the Three Strikes law. Courts must impose consecutive¹ terms in most Three Strikes cases, but not all. Prior serious felony convictions are also alleged as the bases of enhancements for prior prison terms.

The fact that a defendant served a prison term for a violent nature of a prior conviction would not actually affect a sentence in which the court imposes enhancements for a prior serious felony – despite the three-year enhancement for a prior prison term for a violent conviction described in Section 667.5, subdivision (a). The conviction underlying an enhancement for a violent felony prison term would also be the basis for a mandatory five-year enhancement for a prior serious felony and two enhancements cannot be imposed for that same conviction. Only the greater enhancement for the prior serious felony enhancement can be imposed. (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1652; *People v. Jones* (1993) 5 Cal.4th 1142, 1147-1153.) Thus, the three-year enhancement for each prior prison term served for a violent felony is seldom, if ever, imposed. As prior serious felony convictions are strikes, the imposition of Three Strikes penalties based on the prior serious felony convictions makes the sentence calculation even more complex. Adding even further complexities, Section 667.5 – the statute that defines violent felonies – also includes a one-year enhancement for prior prison terms for convictions of offenses that were neither serious nor violent.

¹ Consecutive sentences are served back-to-back. Concurrent sentences are served at the same time.

As noted above, it appears that all violent felonies are serious felonies – i.e., violent felonies are a subset of the serious felonies list. This bill would create an exception to the rule. Contrary to the description of the bill in the author’s statement, this bill defines any variation of human trafficking as a violent felony, but not a serious felony. The three-year enhancement for a prior violent felony prison term could perhaps be imposed for repeated convictions of human trafficking. However, the human trafficking law currently includes a specific five-year enhancement for prior human trafficking convictions. As the enhancement to be imposed for a prior violent felony prison term would be based on the same conviction as supports the existing five-year human trafficking enhancement, it is likely² that the defendant could not be punished for the same prior conviction twice. He or she would receive the greater of the two enhancements the specific enhancement for a prior human trafficking conviction. (Pen. Code § 654; *People v. Jones, supra*, 5 Cal.4th at pp. 1147-1153.)

A court imposing sentence on a defendant convicted of human trafficking in the current case would need to determine how to impose sentencing using at least two sentencing schemes and at least one enhancement provision. Arguably, the human trafficking sentence structure should not be augmented by additional sentencing provisions unless it can be shown that the existing penalties are insufficient.

WOULD ADDING HUMAN TRAFFICKING TO THE VIOLENT FELONY LIST INCREASE THE COMPLEXITY OF SENTENCING LAW WITHOUT RESULTING IN SUBSTANTIALLY DIFFERENT SENTENCES FOR OFFENDERS?

4. Human Trafficking Victims are Reluctant to Come Forward

There have been numerous concerns raised about the difficulty of prosecuting human trafficking cases. Problems with human trafficking cases appear to flow from the reluctance of victims to come forward. They often have been threatened by the traffickers not to report the crime, they may fear they will not be believed, they may be undocumented fear deportation, and they may fear that they will be prosecuted for crimes they were coerced into committing. (*The State of Human Trafficking in California*, 2012, Cal. DOJ p. 75-76.)³ Perversely, raising human trafficking penalties could increase the pressure human trafficking perpetrators place on victims to accept their fates, exacerbating the problem until victims feel safe.

A number of bills in this and prior sessions have sought to relieve human trafficking victims of the consequences of offenses they were coerced into committing and to provide funding for services trafficking victims. Essentially, it appears that human trafficking victims must feel they will be safe and able to live independently before they will come forward. Without services for victims it is unlikely that the state can substantially erode human trafficking. Comment #5 discusses the research finding that raising penalties for a particular crime largely have little deterrence value. This research reinforces a conclusion that the best way to combat human trafficking is by providing resource and support for victims.

IS HUMAN TRAFFICKING BEST ADDRESSED THROUGH SERVICES AND SUPPORT FOR VICTIMS, RATHER THAN INCREASING PENALTIES?

² Such a sentencing outcome is likely, not certain, as no sentencing issue can be considered settled prior to a definitive ruling by the California Supreme Court.

³ <https://oag.ca.gov/sites/all/files/agweb/pdfs/ht/human-trafficking-2012.pdf?>

5. Research on Specific Sentences as a Deterrent to Crime

Criminal justice experts and commentators have noted that, with regard to sentencing, “a key question for policy development regards whether enhanced sanctions or an enhanced possibility of being apprehended provide any additional deterrent benefits.

Research to date generally indicates that increases in the certainty of punishment, as opposed to the severity of punishment, are more likely to produce deterrent benefits.⁴

A comprehensive report published in 2014, entitled *The Growth of Incarceration in the United States*, discusses the effects on crime reduction through incapacitation and deterrence, and describes general deterrence compared to specific deterrence:

A large body of research has studied the effects of incarceration and other criminal penalties on crime. Much of this research is guided by the hypothesis that incarceration reduces crime through incapacitation and deterrence. Incapacitation refers to the crimes averted by the physical isolation of convicted offenders during the period of their incarceration. Theories of deterrence distinguish between general and specific behavioral responses. General deterrence refers to the crime prevention effects of the threat of punishment, while specific deterrence concerns the aftermath of the failure of general deterrence—that is, the effect on reoffending that might result from the experience of actually being punished. Most of this research studies the relationship between criminal sanctions and crimes other than drug offenses.

In regard to deterrence, the authors note that in “the classical theory of deterrence, crime is averted when the expected costs of punishment exceed the benefits of offending. Much of the empirical research on the deterrent power of criminal penalties has studied sentence enhancements and other shifts in penal policy. . . .

Deterrence theory is underpinned by a rationalistic view of crime. In this view, an individual considering commission of a crime weighs the benefits of offending against the costs of punishment. Much offending, however, departs from the strict decision calculus of the rationalistic model. Robinson and Darley (2004) review the limits of deterrence through harsh punishment. They report that offenders must have some knowledge of criminal penalties to be deterred from committing a crime, but in practice often do not.”⁵

Members may wish to discuss whether the “rationalistic view” of crime described above likely would apply to persons who commit human trafficking offense. That is, will defining human trafficking as a violent felony deter traffickers from engaging in these crimes.

WOULD DEFINING HUMAN TRAFFICKING AS A VIOLENT FELONY DISCOURAGE PERSONS FROM ENGAGING IN THE CRIMES INCLUDED IN THE HUMAN TRAFFICKING STATUTE?

⁴ Valerie Wright, Ph.D., *Deterrence in Criminal Justice Evaluating Certainty vs. Severity of Punishment* (November 2010), The Sentencing Project (<http://www.sentencingproject.org/doc/Deterrence%20Briefing%20.pdf>)

⁵ *Id.* at 132-133.

The authors of the 2014 report discussed above conclude that incapacitation of certain dangerous offenders can have “large crime prevention benefits,” but that incremental, lengthy prison sentences are ineffective for crime deterrence.

-- END --