
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: SB 164 **Hearing Date:** March 24, 2015
Author: Beall
Version: February 4, 2015
Urgency: No **Fiscal:** No
Consultant: JM

Subject: Serial Sexual Predators

HISTORY

Source: California District Attorneys Association

Prior Legislation: AB 1844 (Fletcher) – Ch. 219, Stats 2010
Proposition 83, November 2006 General Election
SB 1128 (Alquist) – Ch. 337, Stats. 2006
SB 448 (Poochigian) – 2005, held in Senate Appropriations
SB 1780 (Hollingsworth) – 2004, failed in this Committee
SB 881 (Hollingsworth) – 2003, failed in this Committee
SB 884 (Poochigan) – 2003, held in Senate Appropriations
SBx1 26 (Bergeson) – Ch. 14, Stats. 1994

Support: American Federation of State, County and Municipal Employees; California College and University Police Chiefs Association; California Communities United Institute; California Peace Officers Association; California Police Chiefs Association; California State Sheriffs' Association; Crime Victims United of California; Peace Officers Research Association of California; California Protective Parents Association; Incest Survivors' Speakers Bureau

Opposition: California Public Defenders Association

PURPOSE

The purpose of this bill is to provide that where a defendant has been convicted of a One-Strike qualifying crime in two separate cases, he or she is subject to a life term under the law regardless of the order of the convictions.

Existing law includes the One Strike law.¹ The One Strike scheme applies to rape, oral copulation, sodomy, and sexual penetration committed by force, duress or threats; lewd conduct with a child under the age of 14 and continuous sexual abuse of a child. Depending on the number and kinds of aggravating factors attendant to the crime, the court must impose a term of 15 or 25-years-to-life, or life without parole for specified crimes against a minor. (Pen. Code § 667.61.)

¹ The law includes numerous other special sex crime sentencing schemes under which a defendant is subject to a life sentence.

- The factors requiring imposition of a 25-years-to-life sentence where one factor is proved include the following:
 - The crime was committed during the commission of kidnapping in which the victim was exposed to an elevated risk of harm;
 - The crime was committed during the commission of a residential burglary;
 - The victim or another person was subjected to torture or mayhem;
 - The victim suffered great bodily injury;
 - A victim under the age of 14 suffered bodily harm;
 - The crime was committed by multiple perpetrators, one of whom kidnapped the victim causing an elevated risk of harm, inflicted torture or mayhem, or committed a residential burglary; or,
 - The defendant was previously convicted of a qualifying One-Strike crime. (Pen. Code § 667.61, subd. (d).)

- The factors requiring a sentence of 15-years-to-life for a single factor and 25-years-to-life for two or more factors are the following:
 - The crime involved a non-residential burglary;
 - The defendant kidnapped the victim without elevated risk of harm;
 - The defendant used a firearm or weapon;
 - The crime involved multiple victims;
 - Infliction of a specified kinds of injury;
 - The victim was bound or tied;
 - The defendant administered a controlled substance to the victim; or,
 - The crime was committed by multiple perpetrators, one of whom kidnapped the victim without elevated risk, committed a non-residential burglary, used a weapon, bound or tied the victim, inflicted great bodily harm or administered a controlled substance. (Pen. Code § 667.61, subd. (e).)

Existing law requires the following life terms under the One-Strike law where the victim is a minor:

- Life without the possibility of parole for an adult perpetrator, or 25-years-to-life if the perpetrator is a minor, if the perpetrator is convicted of a standard One Strike qualifying offense (Pen. Code § 667.61, subd. (c)) if the victim is under 14 years under the following circumstances:
 - One or more of the most serious aggravating factors described in Penal Code Section 667.61, subdivision. (d) apply; or,
 - The defendant inflicted “bodily harm.”
 - Two or more of the aggravating factors described in Penal Code Section 667.61, subdivision (e) apply).
 - These special penalties do not apply to a lewd conduct offense not involving force or duress. The usual One-Strike penalties apply in such cases.

- 25-years-to-life for any person convicted of an eligible offense under one of the factors set out in Penal Code section 667.6, subdivision (e) against a child under 14 years of age. (Pen. Code § 667.61, subd. (j).)

Existing law requires the following life terms under the One-Strike law where the victim is a minor who is at least 14 years old and the defendant is convicted of rape, sodomy or oral copulation by force or duress, or the defendant is convicted of rape, sodomy or oral copulation in concert (with multiple perpetrators):

- Life without the possibility of parole for an adult perpetrator, or 25-years-to-life if the perpetrator is a minor, under the following circumstances:
 - One or more of the most serious aggravating factors described in Penal Code Section 667.61, subdivision. (d) apply; or,
 - Two or more of the aggravating factors described in Penal Code Section 667.61, subdivision (e) apply).
- 25-years-to-life if any one of the factors set out in Penal Code section 667.6, subdivision (e), apply. (Pen. Code § 667.61, subds. (l)-(m).)

This bill provides that where the defendant has been convicted of separate qualifying One Strike offenses, he² shall be subject to a One Strike sentence of 25-years-to-life, regardless of the order of the convictions.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past eight 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 its most recent status report to the court (February 2015), the administration reported that as “of February 11, 2015, 112,993 inmates were housed in the State’s 34 adult institutions, which amounts to 136.6% of design bed capacity, and 8,828 inmates were housed in out-of-state facilities. This current population is now below the court-ordered reduction to 137.5% of design bed capacity.”(Defendants’ February 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).

² The vast majority of sex offenders are men.

While significant gains have been made in reducing the prison population, the state now 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. Need for This Bill

According to the author:

California’s “One Strike Law”, enacted in 1994, is designed to punish serial sexual predators who commit multiple offenses and target multiple victims. The Law is designed to keep the most dangerous people in society behind bars and improve public safety.

Unfortunately, the statutory language has created a loophole where serial sexual predators can escape punishment under the One Strike Law simply because their crimes were uncovered late, such as when a child molestation victim comes forward later or when DNA technology solves a violent rape via a “cold hit” in the DNA database.

If such crimes were prosecuted simultaneously to another qualifying sexual offense, then the One Strike Law would be applicable. However, because the crimes were uncovered after the prosecution for another qualifying offense, the One Strike Law does not apply. Neither the multiple victim nor prior conviction triggering circumstances is applicable in such situations. Furthermore, the “prior conviction” triggering circumstance requires the conviction of the qualifying offense to occur before the commission of the currently charged offense. This loophole allows a sexual predator to escape the appropriate punishment under the One Strike Law based on the timing of the conviction rather than the crime itself.

SB 164 will close the loophole allowing sexual predators to escape punishment under the One Strike Law. This bill simply proposes to remove the word

“previously” from statute and explicitly state that the timing of the conviction is not a factor in whether the One Strike Law applies.

Simply put, this bill will ensure two convictions of specified violent sex crimes will result in punishment under the One Strike Law.

SB 164 is designed to keep repeat offenders of the most heinous, violent crimes off the streets. As Proposition 47 is implemented and non-violent offenders are released from prison, California must focus on reserving space in our corrections facilities for violent criminals—especially repeat offenders. SB 164 is step in this direction.

2. The Decision Prompting Introduction of This Bill

This bill seeks to essentially obviate or overrule the decision of the court in *People v. Huynh* (2014) 227 Cal.App.4th 1210.³ The opinion succinctly described the issue in the case:

The issue in this case is simply, what does “previously convicted” in Penal Code section 667.61, subdivision (d)(1), mean (all further statutory references are to the Penal Code)? The Orange County District Attorney argues “previously convicted” means a defendant was convicted of a qualifying offense but it is immaterial whether the qualifying offense occurred *before* or *after* the currently charged offense and the trial court erred in dismissing the section 667.61, subdivision (d)(1), allegation. Randy Thanh Huynh responds “previously convicted” means a defendant was convicted of a qualifying offense *before* the commission of the currently charged offense and the court properly dismissed the section 667.61, subdivision (d)(1), allegation. We agree with Huynh and affirm the trial court's order dismissing the section 667.61, subdivision (d)(1), allegation. (*Id.*, at p 1212.)

This bill essentially makes the position of the Orange County District Attorney the law. That is, the bill provides that a defendant is subject to a life term under the One Strike law if he has been convicted of qualifying crimes in separate prosecutions.

3. Policy Issue Raised by this Bill

Proponents assert that this bill closes a “loophole” that allows defendants to avoid the intended purpose of the One Strike law. However, as noted by the court in *Huynh*, the provision amended by this bill is a recidivist penalty, not a more general provision concerning defendants who committed more than one qualifying sex crime. A recidivist is punished severely not simply because he committed more than one offense, but because he received due process in the prior offense and faced formal judgment, with its attendant consequences of public rebuke and punishment. (*People v. Kilborn* (1996) 41 Cal.App.4th 1325, 1329.)

The essence of the One Strike law is inherent in its name. The defendant sentenced under the law can be imprisoned for life for one crime. The court in *Huynh* explained that the One Strike

³ *Huynh* was decided by the Court of Appeal of California, Fourth District, Division Three. The Fourth District has three Divisions. Division One: San Diego and Imperial Counties; Division Two, Inyo, Riverside and San Bernardino Counties; Division Three: Orange County.

law, with one notable exception, punishes defendants for the aggravated or heinous manner in which an offense was committed. (*People v. Huynh, supra*, 227 Cal.App.4th 1210, 1215.) The One Strike factors that show a single offense to be especially heinous are numerous. Examples include infliction of injury, kidnapping and multiple victims in the current offense.

In contrast to One Strike, the Three Strikes law is a true recidivist punishment scheme, under which defendants are subject to increasingly severe punishments with each successive conviction. The One Strike law does have a single recidivism provision, under which a defendant convicted in the current case of a qualifying One Strike offense is subject to a life term if he has a prior conviction for such an offense. Neither the prior offense nor the current offense must be shown to involve aggravating factors, such as the binding of the victim, kidnapping, infliction of great bodily injury and others.

This bill essentially provides that a defendant who has been convicted of more than one qualifying crime in separate cases is subject to a life term, regardless of the chronological order of the convictions or crimes. Clearly, a defendant who has been convicted of sex crimes in more than one case is more culpable than a person who has been convicted of a single crime, but a defendant is a recidivist only where he committed the second crimes after being convicted and subjected to judgment and sentencing.

4. Suggested Amendment

The purpose of this bill is to provide that a defendant who has been convicted in separate cases of One Strike qualifying crimes are subject to a sentence of 25-years-to-life, regardless of the order of conviction. Specifically, the bill provides that a One Strike sentence applies if the defendant has been “convicted of a separate violation” of a qualifying offense.

For the reasons set out below, the following amendment is suggested to realize the stated intent of the author and the sponsor, the California District Attorneys Association:

The defendant has been convicted of more than one offense listed in subdivision (c) on charges brought and tried separately.

Without this amendment a defendant could be subject to a life term because he was convicted of more than one violation - or "count of conviction" - against a single victim in a single case. Many, if not most, single-victim sex crime cases involve or result in a more than one count or violation. Typically, each prohibited act in a sex crime is a separate violation. For example, a rape is committed when the perpetrator penetrates the victim without her consent. Each separate penetration - regardless of the time between them - is a separate rape. (*People v. Harrison* (1989) 48 Cal.3d 321.) Equivalent rules apply to oral copulation and other offenses. Without the amendment, many, if not most, sex crimes would be subject to a life sentence under this bill, eliminating distinctions between particularly aggravated sex crimes and others.

Sex offenders who are not punished pursuant to One Strike or another special sentencing scheme are still subject to greater penalties under California law than other offenders. In most non-sex crimes, a defendant can only be punished a single time for multiple crimes committed pursuant to a single objective. (Pen. Code § 654.) However, in sex crimes, each separately defined sex crime is essentially deemed to have been committed pursuant to multiple objectives, and is thus

separately punishable. (*People v. Harrison, supra*, 48 Cal.3d 321, 335-337.) In most cases that do not involve sex crimes, where the defendant is convicted of multiple offenses, the court can only impose a full term in one count. The "subordinate" terms for other offenses must be imposed as 1/3 the middle term. (Pen. Code § 1170.1.) In sex crimes, the court has either must impose, or has discretion to impose, full-term consecutive sentences, depending on the facts of the case. Specifically, if the defendant had the opportunity to reflect on his actions between crimes, the court *must* impose full-term consecutive sentences. (*People v. Corona* (1986) 206 Cal.App.3d 13, 17-18; Pen. Code § 667.6, subds. (c)-(d).)

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