
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair

2023 - 2024 Regular

Bill No: SB 268 **Hearing Date:** April 18, 2023
Author: Alvarado-Gil
Version: April 10, 2023
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Crimes: serious and violent felonies*

HISTORY

Source: Author

Prior Legislation: AB 2823 (Nazarian), held Sen. Appropriations, 2018
SB 976 (Bates), failed Sen. Public Safety, 2018
SB 770 (Glazer), held in Sen. Public Safety, 2018
SB 75 (Bates), failed Sen. Public Safety, 2017
AB 27 (Melendez), 2017, held in Assembly Appropriations
AB 67 (Rodriguez), 2017, held in Assembly Appropriations
AB 197 (Kiley), 2017, failed Assembly Public Safety
SB 1269 (Galgiani), 2015, failed Senate Public Safety
AB 1188 (Pan), 2012, failed Assembly Public Safety

Support: Arcadia Police Officers' Association; Association of Regional Center Agencies; Burbank Police Officers Association; California Association of Highway Patrolmen; California District Attorneys Association; California State Sheriffs Association; Claremont Police Officers Association; Concerned Women for America; Corona Police Officers Association; Culver Police Officers Association; Deputy Sheriffs Association of Monterey; Fullerton Police Officers' Association; Healthy Alternatives to Violent Environments; Live Violence Free; Murrieta Police Officers Association; Newport Beach Police Officers Association; Orange County District Attorney; Palos Verdes Police Officer Association; Peace Officers Research Association of California; Placer County Deputy Sheriffs Association; Pomona Police Officers Association; Riverside Police Officers Association; San Diegans Against Crime; San Diego Deputy District Attorneys Association; Santa Ana Police Officers Association; Upland Police Officers Association

Opposition: California Public Defenders Association; Ella Baker Center for Human Rights; Initiate Justice; San Francisco Public Defender's Office

PURPOSE

The purpose of this bill is to add specified rape offenses to the violent felony list.

Existing law includes the following offenses within the definition of “violent felony”:

- Murder or voluntary manslaughter;
- Mayhem;
- Rape or spousal rape accomplished by means of force or threats of retaliation;
- Sodomy by force or fear of immediate bodily injury on the victim or another person;
- Oral copulation by force or fear of immediate bodily injury on the victim or another person;
- Lewd acts on a child under the age of 14 years, as defined;
- Any felony punishable by death or imprisonment in the state prison for life;
- Any felony in which the defendant inflicts great bodily injury on any person other than an accomplice, or any felony in which the defendant has used a firearm, as specified;
- Any robbery;
- Arson of a structure, forest land, or property that causes great bodily injury;
- Arson that causes an inhabited structure or property to burn;
- Sexual penetration accomplished against the victim's will by means of force, menace or fear of immediate bodily injury on the victim or another person;
- Attempted murder;
- Explosion or attempted explosion of a destructive device with the intent to commit murder;
- Explosion or ignition of any destructive device or any explosive which causes bodily injury to any person;
- Explosion of a destructive device which causes death or great bodily injury;
- Kidnapping;
- Assault with intent to commit mayhem, rape, sodomy or oral copulation;
- Continuous sexual abuse of a child;
- Carjacking, as defined;
- Forcible rape or penetration of genital or anal openings by a foreign object;
- Felony extortion;
- Threats to victims or witnesses, as specified;
- First degree burglary, as defined, where it is proved that another person other than an accomplice, was present in the residence during the burglary;
- Use of a firearm during the commission of specified crimes; and,
- Possession, development, production, and transfers of weapons of mass destruction. (Pen. Code, § 667.5, subd. (c).)

Existing law imposes a three-year sentence enhancement for each prior separate prison term served by the defendant if the prior offense was a violent felony and the new offense is a violent felony. (Pen. Code § 667.5, subd. (a).)

Existing law includes the following offenses within the definition of “serious felonies”:

- Murder or voluntary manslaughter;
- Mayhem;

- Rape;
- Sodomy by force, violence, duress, menace, or threat or fear of bodily injury;
- Oral copulation by force, violence, duress, menace or threat or fear of bodily injury;
- Lewd act with child under fourteen years of age;
- Any felony punishable by death or life imprisonment;
- Any felony in which defendant personally inflicts great bodily injury on any person other than an accomplice or personally uses a firearm;
- Attempted murder;
- Assault with intent to commit rape or robbery;
- Assault with a deadly weapon or instrument on a peace officer;
- Assault by a life prisoner on a non-inmate;
- Assault with a deadly weapon by an inmate;
- Arson;
- Exploding a destructive device or any explosive with intent to injure;
- Exploding a destructive device or any explosive causing bodily injury, great bodily injury, or mayhem;
- Exploding a destructive device or any explosive with intent to murder;
- Burglary of an inhabited dwelling;
- Robbery or bank robbery;
- Kidnapping;
- Holding a hostage by an inmate;
- Attempt to commit a crime punishable by life imprisonment or death;
- Any felony where defendant personally used a dangerous or deadly weapon;
- Sale or furnishing heroin, cocaine, PCP, or methamphetamine to a minor;
- Forcible penetration with a foreign object;
- Grand theft involving a firearm;
- Any gang-related felony;
- Assault with the intent to commit mayhem or specified sex offenses;
- Maliciously throwing acid or flammable substances;
- Witness intimidation;
- Assault with a deadly weapon or firearm or assault on a peace officer or firefighter;
- Assault with a deadly weapon on a public transit employee;
- Criminal threats;
- Discharge of a firearm at an inhabited dwelling, vehicle, or aircraft;
- Commission of rape or sexual penetration in concert;
- Continuous sexual abuse of a child;
- Shooting from a vehicle;
- Any attempt to commit a “serious” felony other than assault;
- Any violation of the 10 years, 20 years, 25 years to life gun law;
- Possession or use of any weapon of mass destruction; and,
- Any conspiracy to commit a “serious” felony. (Pen. Code, §§ 1192.7, subd. (c).)

Existing law additionally defines the following as a “serious felony” when the offenses involve the personal infliction of great bodily injury on any person other than an accomplice, or the personal use of a dangerous or deadly weapon:

- Gross vehicular manslaughter while intoxicated and vehicular manslaughter while intoxicated;
- Driving under the influence and causing injury;
- Evading a pursuing peace officer causing serious bodily injury or death; or
- Reckless driving causing great bodily injury when the person previously has been convicted of specified driving offenses. (Pen. Code, § 1192.8.)

Existing law prohibits plea bargaining in any case in which the indictment or information charges a “serious” felony unless there is insufficient evidence to prove the charge, the testimony of a material witness cannot be obtained, or a reduction or dismissal would not result in a substantial change in sentence. (Pen. Code, § 1192.7, subd. (a)(2).)

Existing law provides that any person convicted of a “serious” felony who has previously been convicted of a “serious” felony receives, in addition to the sentence imposed by the court, an additional and consecutive five-year enhancement for each such prior conviction. (Pen. Code, § 667, subd. (a)(1).)

Existing law defines a "strike" prior as any “serious felony” listed in Penal Code sections 1192.7, subdivision (c) and 1192.8, and any “violent felony” listed in Penal Code section 667.5(c). (Pen. Code, §§ 667, subd. (d)(1) and 1170.12, subd. (b)(1).)

Existing law provides that where a defendant is convicted of any felony with a prior conviction for a single serious or violent felony, the sentence imposed must be twice the term otherwise provided as punishment. (Pen. Code §§ 667, subd. (d)(1) and 1170.12, subd. (c)(1).)

Existing law provides that a defendant, who is convicted of any current felony, with prior convictions of two or more "violent" or "serious" felonies, must receive a life sentence with a minimum term of 25 years. (Pen. Code § 667, subs. (a) and (d)(2)(i); Pen. Code § 1170.12, subd. (c)(2)(A).)

Existing law requires a defendant affected by a prior strike to be committed to state prison, and disallows diversion or probation. (Pen. Code, §§ 667, subd. (c) and 1170.12, subd. (a).)

Existing law requires consecutive rather than concurrent sentencing for multiple offenses committed by a defendant affected by a prior strike, unless the current felony convictions arise out of the same set of operative facts. (Pen. Code, §§ 667, subd. (c)(6) and 1170.12, subd. (a)(6).)

This bill adds the following serious felony offenses to the violent felony list:

- Rape of a person who is incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act;
- Rape of a person who is prevented from resisting by an intoxicating or anesthetic substance, or a controlled substance, and this condition was known, or reasonably should have been known by the accused;
- Rape of a person who is at the time unconscious of the nature of the act, and this is known to the accused;

- Rape when a person submits under the belief that the person committing the act is someone known to the victim other than the accused, and this belief is induced by artifice, pretense, or concealment practiced by the accused, with intent to induce the belief;
- Rape when the act is accomplished against the victim's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official.
- Former provision prohibiting spousal rape of a person who is prevented from resisting by an intoxicating or anesthetic substance, or a controlled substance, and this condition was known, or reasonably should have been known by the accused
- Former provision prohibiting spousal rape of a person who is at the time unconscious of the nature of the act, and this is known to the accused; and,
- Former provision prohibiting spousal rape when the act is accomplished against the victim's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official.

COMMENTS

1. Need for This Bill

According to the author of this bill:

Senate Bill 268 brings parity to victims of sexual assault. Over the last several years, California has gotten tougher on prioritizing the rights of rape victims over their perpetrators by increasing sentence enhancements for those who rape their spouses and by eliminating the code section defining spousal rape altogether. It is now time to declare that all forms of rape are a violent felony – even if the victim is unconscious or unable to give consent.

2. Three Strikes Law

In 1994, California voters passed Proposition 184, known as the “Three Strikes and You’re Out” law that defined qualifying “strikes” as those felonies listed as "serious" or "violent" on June 30, 1993. That same year, the California Legislature passed similar legislation that was signed into law. (AB 971 (Jones), Chapter 12, Statutes of 1994.) Collectively, Proposition 184 and AB 971 became known as California's Three Strikes Law which imposes longer prison sentences for certain repeat offenders. Proposition 21 of the March 2000 primary election added to the lists of serious and violent felonies and defined qualifying prior strikes as a felony listed as serious or violent felonies as of March 8, 2000 – the date that the Proposition 21 took effect.

The list of violent felonies is found in Penal Code section 667.5 and the list of serious felonies is found Penal Code sections 1192.7 and 1192.8. All violent felonies are encompassed in the serious felony list. (Pen. Code §§ 667.5, subd. (c), 1192.7, subd. (c).) The serious felony list is more expansive than the violent felony list because some of the crimes on the serious felony list are not inherently violent. An example of a serious felony that is not a violent felony is the sale

or furnishing of heroin, cocaine, PCP, or methamphetamine to a minor. (Pen. Code § 1192.7, subd. (c)(24).) Sometimes a crime can be either serious or violent depending on the circumstances. A residential burglary is a serious felony (Pen. Code, § 1192.7, subd. (c)(18), but can be a violent felony if someone other than an accomplice is present. (Pen. Code 667.5, subd. (c)(21).)

The Three Strikes Law requires a person who is convicted of a felony and who previously has been convicted of one or more violent or serious felonies, known as prior “strikes,” to be subject to enhanced penalties. Specifically, if the person has one prior strike, the sentence on any new felony conviction must be double what is specified by statute. If the person has two prior strikes, the sentence on any new felony conviction was 25 years to life, although this provision was amended by Proposition 36, approved by voters in 2012, to require that the third strike must be a serious or violent felony in order to impose the life term.

In addition to sentencing under the Three Strikes law, a person convicted of a serious or violent felony is subject to specified enhancements that add years to the underlying sentence, prohibited from receiving probation, limited from earning custody credits, and limited from plea bargaining, among other consequences.

This bill takes rape offenses already listed in the serious felony list, meaning they already qualify as strikes for Three Strikes sentencing, and includes them on the violent felony list. The current penalty for rape is a felony punishable by up to 8 years in prison with higher specified prison penalties if the victim is a minor, not including any enhancements or alternative sentencing schemes. (Pen. Code, § 264.)

3. Proposition 57 and Violent Felonies

On November 8, 2016, California voters approved Proposition 57. Proposition 57 was known as the "Parole for Non-Violent Criminals and Juvenile Court Trial Requirements Initiative." The purpose of Proposition 57 was to increase rehabilitation services and decrease the prison population (see Note 5 below). It requires juvenile court judges, rather than district attorneys, to decide whether a juvenile will be prosecuted as adult. The initiative also authorized parole consideration for nonviolent felons after the inmate has served the full base term of their primary offense, exclusive of enhancements or alternative sentences. It also authorizes sentence credits for rehabilitation, good behavior, and education. (Official Voter Information Guide, Proposition 57, California General Election, Nov. 8, 2016 < <http://vig.cdn.sos.ca.gov/2016/general/en/pdf/complete-vig.pdf> > [as of Apr. 10, 2023].)

As pertains to this bill, Proposition 57 provided:

- a) The following provisions are hereby added to enhance public safety, improve rehabilitation, and avoid the release of prisoners by federal court order, notwithstanding anything in this article or any other provision of law....
 - (1) Parole consideration: Any person convicted of a *non-violent felony offense* and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense....
 - (b) The Department of Corrections and Rehabilitation shall adopt regulations in furtherance of these provisions, and the Secretary of the Department of Corrections and Rehabilitation shall certify that these regulations protect and enhance public safety.” (Cal. Const., art. I, § 32, emphasis added.)

Proposition 57 requires the California Department of Corrections and Rehabilitation (CDCR) to draft regulations on how the parole process will be implemented. The initiative specifies that early parole may only be considered for persons who have committed nonviolent offenses. CDCR's regulations specify that a person who is convicted of a violent felony is not eligible for consideration for the nonviolent parole process.

This bill adds specified rape offenses to the violent felony list. As noted above, persons convicted of nonviolent offenses are eligible for parole consideration after serving the full term of their primary offense, which is generally the crime for which they receive the longest amount of time in prison. Full term refers to the sentence imposed by the court not including any conduct credits. Importantly, the initiative did not mandate early release for nonviolent offenders:

The Amendment does not require that all inmates convicted of nonviolent felonies are subject to immediate release from custody. Rather, those inmates are permitted only early consideration by the Board of Parole Hearings, which is charged with determining whether an inmate is suitable for parole. (See, e.g., *In re Perez* (2016) 7 Cal.App.5th 65, 84 [212 Cal. Rptr. 3d 441] [Board of Parole Hearings' core determination is whether a prisoner remains a current threat to public safety].)

(*Alliance for Constitutional Sex Offense Laws v. Department of Corrections & Rehabilitation* (2020) 45 Cal.App.5th 225, 235-236.) Thus, inmates considered for nonviolent parole will only be approved for release if they do not pose a current, unreasonable risk of violence or a current unreasonable risk of significant criminal activity. This determination is made by evaluating specific risk factors concerning the person's current conviction(s), prior criminal behavior, institutional behavior, work history, and rehabilitative programming.

Since July 1, 2017, CDCR has made 34,772 referrals to the Board of Parole Hearings (BPH) for this parole process. BPH has reviewed 31,076 referrals on the merits as of February 28, 2023, approving 4,646 incarcerated persons for release and denying 26,430 (roughly 15 percent). 3,331 referrals have been closed because BPH's jurisdictional review of the incarcerated persons' criminal history and central file revealed they were not eligible for parole consideration. (CDCR, Three-Judge-Court Update (March 15, 2023) < <https://www.cdcr.ca.gov/3-judge-court-update/> > [as of Apr. 10, 2023].)

4. Proposition 20, rejected by California voters in 2020

In the November 2020 election, almost 62% of voters rejected a broader effort to roll back recent criminal justice reforms including changes enacted by Proposition 57. Proposition 20, among other things, added crimes to the violent felony list, including the rape offenses in this bill, in order to exclude those crimes from the nonviolent parole process. Californians voters overwhelmingly rejected Proposition 20, by almost 62 percent. (Ballotpedia, *California Proposition 20, Criminal Sentencing, Parole, and DNA Collection Initiative (2020)* [https://ballotpedia.org/California_Proposition_20,_Criminal_Sentencing,_Parole,_and_DNA_Collection_Initiative_\(2020\)](https://ballotpedia.org/California_Proposition_20,_Criminal_Sentencing,_Parole,_and_DNA_Collection_Initiative_(2020)) [as of Apr. 10, 2023].)

5. Prison Overcrowding

In January 2010, a three-judge panel issued a ruling ordering California to reduce its prison population to 137.5% of design capacity because overcrowding was the primary reason that CDCR was unable to provide inmates with constitutionally adequate healthcare. (*Coleman/Plata vs. Schwarzenegger* (2010) No. Civ S-90-0520 LKK JFM P/NO. C01-1351 THE.) The United State Supreme Court upheld the decision, declaring that “without a reduction in overcrowding, there will be no efficacious remedy for the unconstitutional care of the sick and mentally ill” inmates in California’s prisons. (*Brown v. Plata* (2011) 131 S.Ct. 1910, 1939; 179 L.Ed.2d 969, 999.)

After continued litigation, 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.

The court also ordered California to implement the following population reduction measures in its prisons:

- Increase prospective credit earnings for non-violent second-strike inmates as well as minimum custody inmates.
- Allow non-violent second-strike inmates who have reached 50 percent of their total sentence to be referred to the Board of Parole Hearings (BPH) for parole consideration.
- Release inmates who have been granted parole by BPH but have future parole dates.
- Expand the California Department of Corrections and Rehabilitation’s (CDCR) medical parole program.
- Allow inmates age 60 and over who have served at least 25 years of incarceration to be considered for parole.
- Increase its use of reentry services and alternative custody programs.

(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).) Following the implementation of these measures along with the passage of Proposition 47 (approved by California voters in November 2014), California met the federal court’s population cap in December 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*.)

CDCR’s March 2023 report on the prison population notes that as of March 8, 2023, the State’s adult prison population is 90,934, or 110.9 percent of design capacity (Three-Judge Court Quarterly Update, CDCR, (March 15, 2023) <https://www.cdcr.ca.gov/3-judge-court-update/> [as of Apr. 10, 2023].)

While CDCR is currently in compliance with the three-judge panel’s order on the prison population, the state needs to maintain a “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).)

Proposition 57, approved by California voters on November 8, 2016, enacted many of the court-ordered reforms, expanded credit-earning opportunities, and created a parole consideration process for nonviolent incarcerated persons who have served the full term of their primary offense in state prison, providing the durable solution to prison overcrowding required by the court. Adding crimes to the violent felony list disqualifies the defendant from additional credit earning and CDCR's nonviolent parole process which will result in longer terms of incarceration thereby reversing the progress made in reducing prison overcrowding.

6. Argument in Support

According to California District Attorneys Association:

Under current law, a perpetrator at a college party who chooses to forcibly rape a conscious victim will be defined as a "violent" felony for purposes of sentencing. 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 is defined as "non-violent" for custody credits and for future crimes. Whether penetration is accomplished through physical aggression [force] or predatory behavior is a distinction without a difference. Both perpetrators seek prey that are 2 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. Both sexual predators should be treated identically under the law.

7. Argument in Opposition

According to Ella Baker Center on Human Rights:

Three Strikes and other sentencing enhancements led to the prison overcrowding crisis and the tragic rate of preventable deaths from medical malpractice and neglect that led to a federal takeover of our prison medical system.

The voters modestly reformed the sentencing system by passing Proposition 36 in 2012, requiring that a so-called "Third Strike" that would trigger a sentence of 25-to-life would have to be a third serious or violent felony, not just any felony. But the doubling effect of a single prior strike remains in effect. The voters also overwhelmingly supported Prop 57 in 2016, providing that a person would be eligible for parole after serving the base term of their sentence if the current offense were non-serious or non-violent offense, as defined. However, the regulation of Prop 57 has stated that persons with a prior serious offense, found in Penal Code 667.5, in the previous 15 years shall be considered an aggravating factor in determining risk, weighing against a parole opportunity for a current nonviolent conviction. This bill expands the number of offenses in 667.5, contributing therefore to longer sentences, worsened prison overcrowding, and wasteful spending.