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# SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

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**Bill No:** SB 338                      **Hearing Date:** April 28, 2015  
**Author:** Morrell  
**Version:** February 23, 2015  
**Urgency:** No                                      **Fiscal:** Yes  
**Consultant:** MK

**Subject:** *Elder Abuse*

## HISTORY

**Source:** Placer County District Attorney

**Prior Legislation:** AB 332 (Butler) - Chapter 366, Stats. 2011  
SB 18 (Oropeza) - Chapter 25, 2009  
AB 1424 (Davis) - Ch. 152, Stats. 2008  
SB 1018 (Simitian) - Ch.140, Stats. 2005  
AB 484 (Benoit) - 2005, held Assembly Appropriations  
AB 916 (Canciamilla) - 2005, held Senate Appropriations  
AB 2611 (Simitian) - Ch. 886, Stats. 2004  
AB 2474 (Wolk) - 2004, not heard in the Senate Judiciary Committee  
AB 1131 (Jackson) - Ch. 543, Stats. 2003  
AB 255 (Zettel) - Ch. 54, Stats. 2002  
AB 2140 (Simitian) - Ch. 369, Stats. 2002  
AB 2735 (Chan) - Ch. 552, Stats. 2002  
AB 109 (Alquist) - 2001, held Senate Appropriations  
AB 559 (Nakano) - Ch. 214, Stats. 2000  
AB 2253 (Jackson) - 2000, died Assembly Inactive File  
SB 2199 (Lockyer) - Ch. 946, Stats. 1998  
AB 880 (Hertzberg) - Ch. 934, Stats. 1998  
AB 3988 (Papan) - Ch. 769, Stats. 1986  
SB 248 (Carpenter) - Ch. 968, Stats. 1983

**Support:** California Association of Area Agencies on Aging; California Advocates for Nursing Home Reform; California Commission on Aging; California Association of Area Agencies on Aging; California District Attorneys Association; California Retired Teachers Association; California State Sheriffs' Association

**Opposition:** California Association of Health Facilities; ACLU; California Public Defenders Association

## PURPOSE

*The purpose of this bill is to create a wobbler for causing substantial mental suffering in an elder or dependent adult.*

*Existing law* defines “dependent adult” is any person who is between the ages of 18 and 64, who has physical or mental limitations which restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age. (Penal Code § 368(h).)

*Existing law* defines “elder” as any person who is 65 years of age or older. (Penal Code § 368(g).)

*Existing law* establishes fines and other punishment for theft, embezzlement, forgery, or fraud, and identity theft and identity crimes against an elder or dependent adult, as follows:

- A person who is not a caretaker, and who knows or reasonably should know that the victim is an elder or a dependent adult, and the value of the labor, goods, services, funds, or real and/or personal property taken does not exceed \$950 may be punished by a fine not exceeding \$1,000 and/or by imprisonment in a county jail not exceeding one year. (Penal Code § 368 (d).)
- A person who is not a caretaker, and who knows or reasonably should know that the victim is an elder or a dependent adult, and the value of the labor, goods, services, funds, or real and/or personal property taken exceeds \$950 may be punished by up to one year in a county jail or 2, 3 or 4 years in state prison. (Penal Code § 368 (d).)
- A person who is a caretaker, and the value of the labor, goods, services, funds, or real and/or personal property taken does not exceed \$950 may be punished by a fine not exceeding \$1,000 and/or by imprisonment in a county jail not exceeding one year. (Penal Code § 368 (e).)
- A person who is a caretaker, and the value of the labor, goods, services, funds, or real and/or personal property taken exceeds \$950 may be punished by up to one year in a county jail or 2, 3 or 4 years in state prison. (Penal Code § 368(e).)

*Existing law* provides that a person who knows or reasonably should know that a person is an elder or dependent adult, and who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any elder or dependent adult, willfully causes or permits the person or health of the elder or dependent adult to be injured, or willfully causes or permits the elder or dependent adult to be placed in a situation in which his or her person or health is endangered, is punishable by imprisonment in the county jail not exceeding one year, or by a fine not to exceed \$6,000 or by both that fine and imprisonment or by imprisonment in the state prison for two, three or four years. If actual bodily injury occurs, there is an enhancement of 3 years if the victim is under 70 years of age and 5 years if the victim is over 70 years of age. If the offense is the proximate

cause of the death of the victim there is an enhancement of 5 years if the victim was under 70 years of age and 7 years if the victim is over 70 years of age. (Penal Code § 361(b)(1)(2))

*Existing law* provides that any person who knows or reasonably should know that a person is an elder or dependent adult and who , under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits an elder or dependent adult to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of an elder or dependent adult, willfully causes or permits the person or health of the elder or dependent adult to be injured or willfully causes or permits the elder or dependent adult to be placed in a situation in which his or her person or health may be endangered is guilty of a misdemeanor, punishable by up to 6 months in the county jail, a fine of up to \$1,000 or both jail and fine. A second or subsequent violation is punishable by up to one year in county jail, a fine of up to \$2,000 or both jail and fine. (Penal Code § 361(c))

*This bill* provides that a person who knows or reasonably should know that a person is an elder or dependent adult and who under circumstances or conditions likely to produce significant or substantial mental suffering, willfully causes or permits an elder or dependent adult to suffer, or inflicts thereon unjustifiable mental suffering, is punishable by imprisonment in the county jail not exceeding one year, or by a fine not to exceed \$6,000 or by both that fine and imprisonment or by imprisonment in the state prison for two, three or four years.

#### 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 February of this year 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).

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 The Bill

According to the author:

As currently constructed, the Penal Code 368 (b)(1) requires any and all alleged felony conduct occur under "circumstances or conditions likely to produce great bodily harm or death". The language of the code intends that "unjustifiable physical pain or mental suffering" be prosecuted as a felony. However, the applicable jury instruction for this code section (CALCRIM 830) requires that for whichever theory the prosecution is proceeding on (pain, mental suffering, permitting the elder to suffer etc.) that the act must be done under circumstances or conditions likely to cause "great bodily injury". Later in the jury instruction, CALCRIM 830 goes on to define "great bodily injury" as "significant or substantial *physical injury*. It is an injury that is greater than minor or moderate harm."

Therefore, in order to prove a felony mental abuse or painful suffering, a prosecutor would have to show significant or substantial *physical injury*. The construction of the CALCRIM and code section allows for loopholes when prosecuting. What about cases where pain medication is withheld causing significant pain but no lasting injury? A recent Placer County case involved an elderly nursing home patient who was deprived of her pain medication for shingles by the supervising nurse. She suffered excruciating pain, but no "injury" as defined in statute. Under the current jury instruction a district attorney would have to show a physical mark or injury. With pain, or mental suffering, such physical signs of abuse are absent. The woman charged with depriving the elder of the pain medication plead no contest, however, if the case had gone to trial, the district attorneys would have had a difficult time prosecuting based on the current statute and jury instruction.

Certain cases that involve significant pain and mental suffering without permanent or even noticeable physical injury do in fact merit felony charges. But based on the current statute construction and accompanying CALCRIM, these

cases would not obtain a holding order at preliminary examination, let alone a guilty verdict.

## 2. Author's Amendment

The author intends to amend this bill by inserting the words "pain or" in front of mental suffering on page 2 line 28.

## 3. New Wobbler for Significant or Substantial Mental Suffering

Existing law makes it a wobbler for any person under conditions likely to produce great bodily harm or death willfully causes or permits an elder or dependent adult to suffer, or inflict unjustifiable physical pain or having car or custody of the elder or dependent adult causes or permits the person or health of that elder or dependent adult to be injured or willfully places them in a situation in which his or her health is endangered. The penalty is either one year in county jail or 2, 3, or 4 years in prison and/or a fine of \$6,000 (with penalty assessments the fine would be more than \$24,000).

The background from the author indicates this bill is necessary because you often can't prove actual great bodily injury when there is mental suffering. However, showing actual physical injury is not necessary, a prosecutor just needs to show that it *could* have caused great bodily injury or death, not that it actually did. The bench notes to CALCRIM 380, the jury instruction for this section, make it clear that this section does not require actual injury it just requires that the harm be likely to cause great bodily injury:

If there is a question whether an elder or dependent adult suffered great bodily harm, give on request the bracketed paragraph stating that a person "does not need to actually suffer great bodily harm." (See *People v. Cortes* (1999) 71 Cal.App.4th 62, 80 [83 Cal.Rptr.2d 519]; *People v. Jaramillo* (1979) 98 Cal.App.3d 830, 835 [159 Cal.Rptr. 771] [in context of parallel child abuse statute].) (CALCRIM 830, Bench Notes

This bill deletes mental suffering from the existing section about causing mental suffering or unjustifiable pain that is likely to cause great bodily injury or death. This bill also creates a new wobbler with the same penalty for under circumstances or conditions likely to produce significant or substantial pain or mental suffering, willfully causing or permitting an elder or dependent adult to suffer or inflicting thereon unjustifiable mental suffering.

### a. Is this new section necessary?

If under the existing law, you do not need to show actual great bodily injury or death is this section necessary? The example in the author's background is withholding of pain medication for shingles. Could withholding pain medication a condition that could lead to great bodily injury or death? If not is it a crime that should be a felony?

### b. Same penalty for conditions likely to lead to GBI and no GBI?

This bill adopts the penalty that exists for mental suffering under conditions likely to produce great bodily injury or death but only requires "significant or substantial mental suffering." Is

a potential 2, 3 or 4 year prison term and \$6,000 fine (\$24,000 with penalty assessments) appropriate for a crime where the harm is less severe?

c. Significant or substantial.

Significant and substantial do not have clear meaning in criminal law, thus it is unclear how much injury this would require for the felony penalty to be imposed. Should these be defined?

#### **4. Proposed Amendment from CAHF**

The California Association of Health Facilities opposes this bill because they have concerns about the unintended consequences of this bill. They are especially concerned because these elder abuse Penal Code sections are often used as the basis for civil actions against them, so even if an accusation would not meet the standard for prosecution a broad Penal Code section could be used to commence a civil action. They would like to see the bill amended as follows:

For any elder and dependent adult residing in a long-term care facility, as defined in Section 15610.47, that has been previously diagnosed with a mental illness or dementia, the nature and seriousness of the mental illness or dementia shall be taken into account in determining whether the circumstances or conditions were likely to produce significant or substantial mental suffering and whether the elder or dependent adult suffered unjustifiable mental suffering, given the previously diagnosed condition.

The amendment suggested is to address issues where mental suffering may be caused for the good of the elder or dependent adult, for example they are moved out of their home and placed in a facility because it is no longer safe to be at home. If this is the example, should any amendment taken be broader than those living in a facility? Family members are often the caregivers and elders will often call law enforcement on their family members who they think are doing them harm even if the reality is much different.

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