
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2019 - 2020 Regular

Bill No: SB 459 **Hearing Date:** April 23, 2019
Author: Galgiani
Version: March 26, 2019
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: Crimes: Rape: Great Bodily Injury

HISTORY

Source: Author

Prior Legislation: AB 1844 (Fletcher), Ch. 219, Stats. 2010
SB 186 (Solis), Ch. 109, Stats. 1997
AB 105 (Wayne), Ch. 936, Stats. 1997
SB 26 X (Bergeson), Ch. 14, Stats. 1994
SB 59 (McCorquodale), Ch. 1188, Stats. 1994
Ch. 944, Stats. 1979
Ch. 1139, Stats. 1976

Support: California District Attorneys Association; Peace Officers Research Association of California

Opposition: ACLU of California; California Public Defenders Association

PURPOSE

The purpose of this bill is to require a five-year enhancement for great bodily injury during the commission of rape and spousal rape.

Existing law provides that the punishment for rape and spousal rape is imprisonment in the state prison for three, six or eight years. (Pen. Code, § 264.)

Existing law, known as the One-Strike Sex Law, provides sentences of 15-years-to-life, 25-years-to-life, or life without the possibility of parole for certain sex crimes if specified circumstances are found to be true. (Pen. Code, § 667.61.)

Existing law includes within the qualifying offenses under the One-Strike Sex Law rape and spousal rape accomplished by force, duress, menace, or fear of immediate and unlawful bodily injury and rape and spousal rape accomplished by threat of retaliation. (Pen. Code, § 667.61, subd. (c).)

Existing law, enacted by, states that it is the intent of the Legislature that district attorneys prosecute violent sex crimes under statutes that provide sentencing under a “one strike,” “three

strikes” or habitual sex offender statute instead of engaging in plea bargaining over those offense. (Pen. Code, § 1192.7.)

Existing law states that any person who inflicts great bodily injury on a victim during the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years. (Pen. Code, § 12022.7.)

Existing law provides that any person who inflicts great bodily injury on a victim during the commission of a specified sex offense shall receive a five-year enhancement. (Pen. Code, § 12022.8.)

This bill instead requires a five-year sentence enhancement for great bodily injury inflicted during the commission of all forms of rape or spousal rape.

Existing law defines “great bodily injury” means a significant or substantial physical injury. (Pen. Code, §12022.7, subd. (f).)

This bill amends the definition of “great bodily injury” to include impregnation as a result of sexual intercourse that violates any law.

COMMENTS

1. Need for This Bill

According to the author of this bill:

California’s Penal Code defines rape in two different sections:

Section 261 provides seven circumstances of rape when the victim is not the spouse of the perpetrator. These include:

- 1) when the victim is incapable of giving legal consent
- 2) when it is accomplished by means of force, violence, duress, menace, or fear of bodily injury
- 3) when the victim is intoxicated or under an anesthetic substance or controlled substance
- 4) when the victim is unconscious, asleep, or not cognizant
- 5) when the victim believes the perpetrator is someone else
- 6) when the victim or someone else is threatened with retaliation
- 7) when the perpetrator is a public official and threatens official authority over the victim.

Section 262 provides five circumstances of rape when the victim is the spouse of the perpetrator. These include:

- 1) when it is accomplished by means of force, violence, duress, menace, or fear of bodily injury
- 2) when the victim is intoxicated or under an anesthetic substance or controlled substance

- 3) when the victim is unconscious, asleep, or not cognizant
- 4) when the victim or someone else is threatened with retaliation
- 5) when the perpetrator is a public official and threatens official authority over the victim.

The Penal Code also defines great bodily injury as, “significant or substantial physical injury.” Case law has qualified impregnation as a result of a rape to be great bodily injury. However, this has been done on a case-by-case basis. SB 459 seeks to codify this definition.

Under current law, a person convicted of rape is given a five-year sentence enhancement when the survivor has suffered “great bodily injury” due to circumstances outlined in Section 261 (2) force/violence/duress/menace, (3) intoxicated or under anesthetic or controlled substances, and (6) under threat or retaliation.

Similarly, a person convicted of rape is given the same five-year enhancement when the survivor has suffered great bodily injury due to circumstances outlined in Section 262 (1) force, violence, duress, or menace and (4) under threat or retaliation.

This bill would fix the inconsistency and add the five-year enhancement for the infliction of great bodily injury to all forms of rape. It should not matter whether the victim is the spouse or not. It should not matter whether the perpetrator is a public official or not – rape is rape. If a survivor suffers great bodily injury during the attack, the existing enhancement should be applied.

2. Current Penalties

The punishment for rape, including spousal rape, is imprisonment in the state prison for three, six or eight years. (Pen. Code, § 264, subd. (a).) Rape by force against a minor 14 years of age or older is punishable by imprisonment in state prison for 7, 9 or 11 years. (Pen. Code, § 264, subd. (c)(2).) Rape by force against a minor under the age of 14 is punishable by imprisonment in state prison for 9, 11 or 13 years. (Pen. Code, § 264, subd. (c)(1).)

Certain sex offenses, including rape and spousal rape, are subject to the One-Strike Sex Law which imposes a sentence of 15-years-to-life, 25-years-to-life in state prison or life without the possibility of parole for qualifying offenses when certain circumstances are present. (Pen. Code, § 667.61.) Infliction of great bodily injury during the commission of rape or spousal rape is one of the specified circumstances that will trigger a 25-years-to-life sentence enhancement under the One-Strike Sex Law. (Pen. Code, § 667.61, subd. (a) & (d)(6).) The forms of rape and spousal rape that qualify for the enhanced sentences under the One-Strike Sex Law are when the act is accomplished by force, violence, duress, menace, or fear of immediate and unlawful bodily injury and when the act is accomplished by threat of retaliation. (Pen. Code, § 667.61, subd. (c).)

Separately, there is an enhancement for the infliction of great bodily injury during the commission of a felony which adds three years to a sentence (Pen. Code, § 12022.7) and a different enhancement for infliction of great bodily injury during the commission of specified sex offenses which adds five years to a sentence (Pen. Code, § 12022.8). The forms of rape that

are subject to the enhancement for great bodily injury inflicted during a sex offense are 1) where the act is accomplished by force, violence, duress, menace, or fear of immediate and unlawful bodily injury; 2) where the act is accomplished by threatening to retaliate in the future; and 3) where a person is prevented from resisting by any intoxicating or controlled substance. (Pen. Code, § 12022.8.) The forms of spousal rape that are subject to the enhancement for infliction of great bodily injury during the commission of specified sex offenses are 1) where the act is accomplished by force, violence, duress, menace, or fear of immediate and unlawful bodily injury and 2) where the act is accomplished by threatening to retaliate in the future. (*Ibid.*) The general great bodily injury enhancement apply to the other forms of rape or spousal rape that are not included in Penal Code section 12022.8.

3. Sentencing Enhancements and Ongoing Concerns over Prison Overcrowding

In January 2010, a three-judge panel issued a ruling ordering the State of California to reduce its prison population to 137.5% of design capacity because overcrowding was the primary reason that the California Department of Corrections and Rehabilitation (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 CDCR’s 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.*)

The Governor's January proposed budget for 2019-2020 anticipates that "The average daily adult inmate population is now projected to be 128,334, an increase of 1.1 percent over spring projections. However, current projections show the adult inmate population is trending downward and is expected to decrease by approximately 1,360 offenders between 2018-19 and 2019-20. Proposition 57, the Public Safety and Rehabilitation Act of 2016, established a durable solution to end federal court oversight and create more incentives for inmates to participate in rehabilitative programs. Proposition 57 is currently estimated to reduce the average daily adult inmate population by approximately 6,300 in 2019-20, growing to an inmate reduction of approximately 10,500 in 2021-22. The estimated impact of Proposition 57 has been incorporated into the aforementioned total population projections." (<http://www.ebudget.ca.gov/2019-20/pdf/BudgetSummary/PublicSafety.pdf>.)

CDCR's February 2019 monthly report on the prison population notes that the in-state adult institution population is currently 113,656 inmates, which amounts to 133.6% of design capacity. Additionally, there are still 1,463 prisoners being housed out of state. (See CDCR, Office of Research, Weekly Report of Population (as of February 28, 2019) https://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/TP_OPIA/TPOPIAd1902.pdf.)

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).

This bill increases existing sentencing enhancements for rape and spousal rape when great bodily injury is inflicted. Existing law contains a variety of enhancements that can be used to increase the amount of time a defendant will serve. Enhancements can range from adding a specified number of years to a person's sentence, or doubling a person's sentence or even converting a determinate sentence into a life sentence such as the One-Strike Sex Law. Multiple enhancements can be imposed in a single case to significantly increase the person's sentence.

Creating new enhancements, or expanding upon existing ones, will increase the length of time that an inmate must serve in prison and reverse the progress made in reducing the state prison population. This is inconsistent with the court's order for a durable solution to prison overcrowding.

4. Argument in Support

According to the Peace Officers Research Association of California:

SB 459 adds consistency to the Penal Code by applying all forms of rape convictions to be given a five-year sentence enhancement when the attack inflicts great bodily injury to the survivor. This bill also adds impregnation as a result of any unlawful intercourse to the definition of "great bodily injury."

5. Argument in Opposition

According to the California Public Defenders Association:

Regarding effect (1), great bodily and impregnation, the California Supreme Court found that a pregnancy that resulted in a case of child molestation constituted great bodily injury, but did not state a flat rule, leaving future decisions to be made on a case by case basis. CPDA believes this should be left for juries to decide on a case by case basis. In certain cases, such as consensual sexual intercourse between an 18-year-old male and a 17-year old female, unlawful only because a statute (Penal Code section 261.5) says so, the victim may not believe that great bodily injury has been inflicted. Instances such as this, and other examples where a great bodily injury is not in furtherance of justice are surely common enough that this should continue to be decided on a case-by-case basis.

Regarding effect (2), under current law, when great bodily injury is inflicted in cases of rape in violation of Penal Code section 261, subdivisions (a)(2), (a)(3), and d(a)(6), an enhancement of five years is imposed; while in cases of rape in violation of the other subdivisions of Penal Code section 261, namely subdivisions (a)(1), (a)(4), (a)(5), and (a)(7), the enhancement is three years. Likewise, in cases of spousal rape in violation of Penal Code section 262, subdivisions (a)(1) and (a)(4), an enhancement of five years is imposed, while in cases of spousal rape in violation of the other subdivisions of Penal Code section 262, namely subdivisions (a)(2), (a)(3), and (a)(4), the enhancement is three years.

Perhaps there is value to making the enhancement uniform for all subdivisions of Penal Codes sections 261 and 262, but, if so, CPDA believes that value is best achieved by lowering the existing five year penalties of four subdivisions (two in section 262 and two in section 262) of those two statutes to be uniform the existing three-year penalties in the other seven subdivisions (four in section 261 and three in section 262).

-- END --